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NOMINAL INDEX

*Abdul Haq v. Usman Khan 167
Abdul Subhan v. Abdul Ravoof 707
Ademma v. Subbamma 714
*Advocate General, Madras v. Sri Ramanatha Goenka (SB) 711(1)
Ahmed Kasim Sahib v. Land Acquisition Officer, Ramnad 665
Ahmed Khan v. Venkatachelamayya 511
Ahmed Mohideen v. Yusuf Ali Syed 81(1)
Alagappa Mudaliar v. Veerappan Chettiar 116
Albuquerque F. P. S. v. Catholic Bank Ltd., Mangalore 737(1)
**Amirthammal v. Vallimayil Ammal (FB) 693
Ammu Pujary, In re 295
Anjaneya Sastri v. Rajagopala Chettiar 699
Annamalai Chettiar v. Ganganna 398(2)
Annika Lakshmudu, In re 237
Anthonimuthu Pillai v. Naganatha Ayyar 311
Appalakonda, In re 740
Appalaswamy, In re 664(2)
*Appalaswamy, In re 735
Appanna Sastri v. Raja Sobhanadri Appa Rao 84
Arunachalam Chettiar v. Govindaswami Goundan 519
Arunachala Reddy v. Sellamuthu Goundan 594
Arunagiri Chettiar v. Kuppuswami Chettiar 655
Arunagiri Mudaliar v. Radhakrishna Ayyar 44
Atchutarama Rao v. Bapanayya 748
Athiappa Chettiar v. Ibramsa Rulavar 151
*Athinarayana Konar v. Subramania Ayyar 67
Ayyavar Thevar v. Secretary of State 528

Balakrishna Naidu v. Mrs. B. Sakuntala Bai 666
*Balakrishna Odayar, In re 586
*Balasubramaniam Chetty v. Kothandaramaswami Nayanim Varu (FB) 688
*Baron Von Dincklage, In re 182
Behara Viyyamma v. Suryaprakasa Rao 379
Bellemkonda Kanakayya, In re 609
Berumull Sowcar v. Velu Gramany 369
*Bhimaji Motiji Firm, Bombay v. Official Receiver, Bellary 425
*Bhuvaraha Iyengar, In re 221(2)
Boya Chinna Papanna, In re 49

**Cannanore Bank Ltd. v. Pattarkandy Arayanveettil Madhavi (FB) 41
Chakrapany Chettiar & Sons, In re 724(2)
Chandanmal v. Ramakrishnayya 173
Chellappa Chettiar, In re 715
*Chellathammal v. Kalitheertha Pillai 606
Chelliah Pillai v. Ramiah Thevar 77
Chengiah Chetty, In re 745(2)
Chetti Venkataraju v. Ramabhaddirraju 403
Chidambara Mudaliar v. Ranganatham 512
Chillara Seshamma, In re 293
China Ana Muthuvayyangar v. Thiruvangadammal 395
China Kondayya v. Ramalinga Reddi 271
China Ramamurti v. Pala Nukayya 30
Chinnapareddi v. Venkataramanappa 209
Chinnaswami v. Ramaswami 471
Chinnaswami Chetty v. Parvathiah Chetty 757
Chinnavadu, In re 726(1)
Chockalingam Chettiar v. Chockalingam-Chettiar 445(1)
Chockalingam Chettiar v. Government of Madras 704
Chockalinga Thevar Firm v. Sankarappa Naikar 421
*Chokklinga Mudali v. Manickka Mudali 273

Commissioner of Income-tax, Madras v. Firm N. V. Abdulla Sahib (SB) 177
——— v. G. D. Naidu Industrial Educational Trust (SB) 625
——— v. Maharaja of Pithapuram (SB) 191
——— v. Papammal (SB) 556
Curtis P. D., In re 27

Dabbala Koricha Nagadu, In re 33
Dashinamurthi, In re 603
*Dhanalakshmi Weaving Works, Kakkat v. Mohammad Abdul Azeez 179
Dharmayya v. Yanadi Reddi 731
Dindigul Municipality v. Rajamani Iyer 279(2)
Duraiswamy Mudali, In re 521

Egappa Chettiar v. Ramanathan Chettiar 384
Ekambareswaraswami and Dhandayudhapaniswami Temples v. Arunachala Goundar 92(2)

Embaru T. K. v. Vedavalli Ammal 595
Enayatullah Saheb v. Jeelanee Saheb 136
Errama Reddi v. Karnam Soorappa 418
Essappa Chettiar, In re 756
Ethiraja Mudaliar v. Murugesa Mudaliar 282
Ethirajulu Naidu v. Ranganatham Chetty 156

Gaddennaidu v. Chinna Ramanna 389
Ganapathi Sa, In re 354
Ganapatisubramanya Iyer, In re 417
Gangaraju v. Lakshminarayanamurti 644
Gangayya v. Lakshmi Devi 93
Gopala Maller v. Velloth Krishnan 134
*Gopalaswami Mudaliar v. Subramanya Pillai 397
Gopal Naicker v. Alagirisami Naicker 581
Goverdhandoss Takersey v. Abdul Rahiman 634
Govindan Thimma Chetty, In re 669
Govindaswami v. Kandaswami 742(1)
Gunda Narasimham, In re 744
Guravaiah v. V. Rangiah 415(1)
Gurucharan Kaur v. Province of Madras 539
*Guruswami G., In re 427

Hanumantharow v. Seetharamayya 343
Hindu Religious Endowments Board, Madras v. Ramiah 722
Indian Hume Pipe Co. Ltd. v. Travancore National and Quilon Bank Ltd. 646
Ismail Rowther v. Gomakkani Rowther 679

Jagannathachar C. P., *In re 326
Janaki, Mt. v. Kanaru Ambalavasi 583

Kailasa Ayyar v. Sundaram Pattar 205
*Kalitheertha Pillai v. Chellathammal 300
Kallalagar Devasthanam, Madura v. Baskaram Pillai 741
Kalyanarama Ayyar, In re 199
Kamaraju Pantulu v. Balla Saramma 604
Kameswara Rao v. National Movietone Co. Ltd., Kilpauk 659
Kanagavelu Nadar v. Sooravali Subbier 438
Kanakayya Garu v. Venkata Ranga 649
Kandasami Solagar, In re 213
*Kandaswami Mudaliar v. Palaniswami Goundar 460
Kandaswamy Pillai v. Municipal Prosecutor, Palghat 601
Karathammathintakath Kunhamad, In re 70
Karichiappa Goundan, In re 285
Karuppa Goundan v. T. R. Narayanaswami & Co. [illegible]
Karuppayya Thevar, In re [illegible]27
Kasi Visvanadan Chettiar v. Devakottai Municipal Council 661

Kasturi Chand v. Vaikuntam 426
*Kathersa Rowther v. Abdul Rahim 580
Kayambu Pillai v. Court of Wards 170
Kesavalu Naidu v. Venkatarama Chettiar 35
Kesava Menon v. Achuthan Nair 482
Khaja Moideen Saheb v. Abdul Gaffoor 247
Kikishru Nadershaw v. Nargesh Kikishru 159
Konda Boyan v. Palaniswami Goundan 114
Kotrabasavva v. Veerabhadrappa 313
Krishnamachariar v. Lakshmi Ammal 76
Krishna Menon v. Kurungara Kunhu 36
Krishnamurthi v. Jagannadhapadhi Khadanga: 598
Krishnamurthi Ayyar, In re (SB) 690
*Krishnan Chettiar v. Ammalu Amma 90
Krishnan Chettiar v. Nachimuthu Goundar 453
Krishna Rao v. Official Receiver, East Godavari 254
*Krishnaswami, In re (SB) 455
*Krishnaswamy Reddiar v. Venugopala Reddiar: 614
Krishna Warriar v. Malayalee Bank Ltd. 449
Krishnayya Rao v. Maharajah of Pittapuram 487
Kumaraswamy Kalinga Rayar, In re 221(1)
Kunhabdulla v. Abubacker 320
Kunholan v. Krishnan 652
Kuppala Krishtappa v. Premaleelamani 705
Kuppuswami Mudaliar v. Pannalal Sowcar 303
Kuttia Pillai M., In re 445(2)

Lakshmappa v. Venkata Reddi 305
Linga Reddi v. Subbarami Reddi 202
**Lingayya v. Punnayya (FB) 183

Madhava Rao v. Administrator-General of Madras 17
Madhava Rao, P. N. v. Vaikunta Kamath 468
Madura Mills Co., Ltd. v. Minakshi Sundareswaral Devasthanam 578
Madura Municipal Council v. Madura etc., Devasthanams 658
Mahaboob Sheik, In re 532(1)
Mahadeva Royal Y. B. v. Veerabasava Chikka Royal 368
*Mahanandi Reddi v. Panikalapati Venkatappa 21
Maharaja of Cochin v. Madhava Menon 413(2)
Mahomed Ghouse v. Muhammad Ghouse 742(2)
Mahomed Hussain Faroki v. Syed Abdul Huq 485
Mahomed Ibrahim v. Commissioner of Income-tax, Madras (SB) 266
Mahomed Jamaluddeen & Bros., Pettah, Colombo v. Commissioner of Income-tax, Madras 736(2)
Malabar District Board, Calicut v. United Motor (Coimbatore) Ltd. 319(2)
Mallayya v. Jagannadhamma 103(1)
Mallikarjanarao v. Official Receiver, Kistna 423
Manakkal Kumaran, In re 446
Manal Krishna Nayak and Sons v. South Indian Railway Co., Ltd. 627
Manickam v. District Board, Trichinopoly 321
Manicka Mudaliar v. Ammakannu 129
Manickavasaga Nadar v. Krishnaswami Iyer 113
Manikkam Chettiar v. Krishnappa Chettiar 382
*Manikyam v. Manikyamma 4
*Mariasoosai v. Arokkiam 465
Mattapalii Raju v. Mahalakshmamma 597
Meer Shafi v. Abdul Kharim 608
*Minakshi Ayyar v. Janaki R. Achalier 592
Moopil Nair v. Gopalan Nair 441
Muniappa Mudaliar v. Kuppuswami Mudaliar 419(2)
Municipal Council, Nellore v. Mohamed Sabash Khan 481
Munuswami Chetti v. Venkataswami Chetti 610
Murali Mohan Reddi v. Chinta Brahmayya 327
Murthuza Sahib, In re 269
Murugayya Pillai v. Rajagopal Pillai 381
Muthal Achi v. Doraisami Pillai 662(2)
Muthandi, In re 444
Muthukaruppan Chettiar v. Subbiah Chettiar 34
Muthukumaru Maniakarar v. Pethia Maniakarar 154
Muthusamia Pillai v. Sankara Ayyar 297
Muthusami Goundan, In re 420
Muthuswami Chettiar v. Ramaswami Samiyar: 751
Muthuveeran Chettiar v. Mottayan Chettiar 283
*Muthyalu v. Chinnayya 149

Nachiappa Chettiar v. Marappa Goundan 412
Nachiappa Chettiar v. Ramachandra Reddiar 527
Nadimpalli Bangaruraju, In re 58
Nagaportharow v. Subbarow 360
Nagappa Prabhu v. Chandrashekara 648
Nagarajan v. Krishna Aiyar 296
Nagayya v. Venkatayya 82
Nageswara Ayyar v. Ganesa Ayyar 675(2)
Nagi Reddy v. Sanjeeva Reddy 532(2)
Nagore Durga v. Kannu Pillai 79
Naha Haji v. Veeran 364
Nainamalai Goundan v. Ramaswami Goundan 20
*Nalamunni v. Dakshayani Amma 456
Nallamuthu Pillai v. Thirumalai Ayyangar 258
Nallappa Goundan v. Chinnammal 19
Nalliya Goundan v. Marappa Goundan 745 (1)
Namberumal Chetty v. Ramayya Naidu 602
Namberumal Naidu v. Muthukalathi Mudali 241
Nanjunda Reddi v. Venkatappa 758
Narappa Naidu v. Asethu Reddi 396
Narasayya v. Subbayya 728
Narasimhalu Chetty v. China Ramayya Naidu 502
Narasimhappadu, In re 275 (1)
Narayana Bhat v. Rama 551
Narayana Gajapati v. Narasimhulu 746
Narayana Gajapati Raju v. Ramunaidu 419 (1)
Narayanamma v. Venkatachalam 143
Narayana Murti, In re 654
*Narayanan Chetti v. Nallammal (FB) 685
Narayanan Chettiar v. Veeru Goundar 133
Narayanan Nambiar, In re 223
Narayanan Nambudiri v. Chathukutti Nayar 307
Narayanan Nambudiripad v. Achuthan Nayar 120
Narayana Reddiar, In re 316
*Narayana Sooru v. Rama Rao 680
Narayanaswami v. Narayya 240
*Narayanaswami Ayyar v. Sevadappa Goundar 226
*Narayana Venkatachalamiah v. Putika Venkatiah 24
Narikkal Chathan of Muthuvennacha Amsom and desom v. Kesavan Namboodiri Karnavan 242 (2)
*Nataraja Dikshithar v. Mahaganapathi Dikshithar 517
Nataraja Pillai v. Rangaswami Karamundar 119
Natesa Mudaliar v. Rajamanicka Chettiar 729
Navaneetha Krishna Yachendra Bahadur v. Ramanujulu Chetty 56
Niladri Rao Garu v. Venkatarama Iyer 505
*Official Receiver, Ramnad v. Sivasuriya Narayanaswami 216
Oomayan, In re 452 (2)
Oushadeeswara Swami Temple v. Samiappa Mudaliar 317
*P., a First Grade Pleader, Markapur (SB) 630
Pachai Ammal v. Corporation of Madras 346
Packirisami Pillai, In re 288 (2)
*Padmanabha Nayar v. Appu 288 (1)
Palamalai Chettiar v. Ramanathan Chettiar 442
*Palaniandi Muthirian v. Ramaswami Reddi: 724(1)
*Palania Pillai v. Amjath Ibrahim Rowther (FB) 622

*Palaniappa Mudaliar v. Official Liquidator, Pasupathi Bank Ltd., Coimbatore 470
*Palani Mudaliar v. Natarajan 503
Palanisami Gounder v. Bagavati Gounder 675 (1)
Panchapakesa Iyer, In re 103 (2)
Panchayat Board, Mangalagiri v. Bommala Kotayya 279 (1)
Pandalai v. South Indian General Assurance Co. Ltd. 95
*Panikar S. K. v. Travancore National and Quilon Bank Ltd. 351
Panthanam v. Mohd. Abdul Rahiman Marakayar 73
Papiah v. Ramapunniah 12
Papayya Sastri v. Appa Rao 677
Pappammal v. Ramaswami Chettiar 726 (2)
*Paramanand Doss Chota Doss & Sons, Firm v. Nannulal Kanji 232
Paramarth G. S., In re 439
Paramasivam T. R. v. Parvathareddy Chenchurami Reddy 345
Parameswara Menon v. Narayana Menon 204 (1)
Parasuram Byas v. Sub-Collector, Rajahmundry 596
*Parvathi Ammal v. Dasi Angamuthu 730
Patnam Lakshminarayana Chetti Firm v. Grandhe Seshmma 709 (1)
Pattabirama Ayyar, In re 736 (1)
Pattabhiramayya, In re 668
Peeram Chenna Reddi, In re 23
Peria Chelliah Nadar, In re 450
Peria Nagamam Sri Lakshmi Vilasa Draviya Sagaya Nidhi Ltd. v. Varalakshmi Ammal 386
Perianna Mudali, In re 31
Perumalla Venkayya v. Batchu Pullayya 466
Pethuraju Kone v. Muthuswami Ayyar 128
Pichumani Ayyar, In re 281 (1)
**Pleader, Rayadrug (Bellary District), In re (SB) 701
*Ponnuchami Goundar v. Muthusami Goundar 252
Pottiswami v. Sait Sulaiman 501 (2)
Prabhulal Madhavlal v. Messrs. Jeshing Bhai Bala Bhai & Sons 86
*Premji Tulsidas v. Sethuramaswami Iyer 373
Province of Madras v. Lady of Dolours Convent, Trichinopoly 719
Province of Madras v. Ramaswami Ayyar 599
Public Prosecutor v. B. V. A. Lury Co. 75
——— v. Chinnalatchumana Naidu 531
——— v. Gopalakrishnan Pillai 347 (2)
——— v. Karuppana Kone 356
*——— v. K. B. Kalkura 404
——— v. Kola Sahib 530 (2)
——— v. Krishnaswami 196
——— v. Linga Balija Devamma 513
——— v. Madathi 415 (2)
——— v. Papanna 347 (1)
——— v. Poongavana Goundan 530 (1)
——— v. Rajam Ammal 674

Raghava Dass Jee v. Sarju Bayamma 413 (1)
Rajabapayya v. Basavayya 713
**Rajagopala Ayyangar, In re (SB) 553
Rajagopala Iyer v. Ramachandra Iyer 628
Rajagopala Iyer v. South Indian Rubber Works, Ltd., Co. 656
Rajakumari T. R. v. Motion Picture Producers Combine Ltd. 349
Rajaram Das v. Duvvada Ramanna 534 (1)
Raji Bai Ammal, Mrs. v. Mohamed Nathar Sahib 251
Ramachandran, In re 276 (2)
Ramachandra Rao v. Chinnayya Goundan: 664 (1)
Rama Goundan, In re 275 (2)
Ramakrishna Iyear v. Official Liquidator, South Indian General Assurance Co., Ltd. 210
*Rama Kurup v. Kunhipathumma 657 (2)
Ramalingayya, In re 723
Rama Naidu v. Gangi Reddi 483
Rama Naidu P., In re 92 (1)
Ramanathan Chettiar, In re 390
Ramanathan Chettiar v. Muthuraman Naidu 161
*Ramanathan Chettiar v. Unnamalai Achi 632
Ramanatha Sastrigal v. Krishna Menon 70
Rama Rao v. National Assurance Co. Ltd., Vizianagaram 405(2)
Ramasami Konar, In re 48
**Ramasastrulu v. Balakrishna Rao (FB) 682
*Ramasubbayya v. Thimmiah 5
Ramaswami Ayyangar v. Arunachalam Chettiar 478(2)
Ramaswami Mudaliar v. K. L. Dargan 463
Ramaswami Naicker v. Sokkayya Naicker 428
Ramaswami Udayar v. Ramanathan Chettiar 357(1)
Ramaya v. Peda Kotayya 102
Ramayya v. Anjayya 146
Rameswara Sarma, In re 287
Ramier K. A. v. Ramaswami Pandia Thalavanar 315
Rangai Goundan, In re 702
Ranganatham Chettiar v. Mariappa Mudali 334
Ranganayakulu v. Gopayamma 323
Rangaswami Ayyar v. Jainabu Bibi Ammal 507
Rangaswami Goundar v. Official Receiver, Coimbatore 535
Rangaswami Gounden v. Kandaswami Goundan 732
Rangaswami Nadar v. Pitchaimani Nadar 29
*Rangaswami Naicker v. Raju Naicker 276(1)
Rangaswami Pillai v. Vasu Ammal 388
Ratnavelu Pillai v. Varadaraja Pillai 585
Rayalamma v. Butchiramayya Garu 429
Reddi Mallayya v. Pedda Mallayya 280
Reddy, D. K. In re 181
Rego J. P. v. Ananthamathi 472
Sadasiva Goundar, In re 69
Sahasralingeshwara Devara Bhandaram v. Nagappa 89
Sambanda Chetty v. Muthu Chettiar 398(1)
Sambasiva Ayyar v. Official Receiver, West Tanjore 88
Samuel Nadar v. Thangayya Nadar 104
*Sankaralingam Pillai v. Veluchami Pillai 338
Sankaranarayana Iyer v. Paramasivam Pillai 101
Sankaran Nayar v. Govindan Nayar 534(2)
Sankara Rao v. Bala Venkatappa 734
Saradambal v. Subbarama Ayyar 212
Saradambal Ammal v. Kuppusami Sastrigal 663
Sarangapani v. Venkata Ratnam 733
Sasala Raminaidu v. Secretary of State 127
Sathappa Chetti v. Thayyanayaki Ammal 698
Satyanarayanamurthi v. Sathiraju 525
Satyanarayanamurthy v. Kanakaraju 673
Secretary of State v. Jodaraj Dhupajee 244
*Sepulchre Brothers v. Khushal Das Jagjivan Das 13
Seshayya v. Swamireddi 204(2)
Seshayya v. Venkataramayya 278
Sha. Moolchand Kesarimull v. Associated Agencies, Firm of Merchants 139
Shanmuga Kone, In re 700
Sharma V. S. v. Dharma Rao 124
Shenbagavadivammal v. Mupidathi Ammal 720
Sheshamma Shedthi v. Vasudeva Bhatta 711
Shroff Bodanna, In re 319(1)
Shunmugam Chettiar v. N. M. Rayaloo Ayyar Nagaswami Ayyar and Co. 97

Siddappa Chettiar, In re 738
Sinnaswami Pillai v. Commissioner of Income-tax, Madras (SB) 268
Sitaramayya v. Venkanna 166
Somayajulu Venkatanarasimham v. Govindu Suryanarayana 708
Soundararaja Ayyangar, In re 38
Soundararajalu v. Shanmugham 324
*Sowdra Bai v. Saraswathi Ammal 590
Sreekakulam Seshamma v. Debt Conciliation Board, Nandyal 405(1)
Sreekanta Goundan v. M. Javani 406(1)
*Sreeramulu Chetti v. Subbarami Reddi (FB) 554
Sri Ekambareswaraswami and Dhandayudapani Swami Temples, Chettikulam v. Veerappa Gounder 198
Srinivasalu Reddiar, In re 242 (1)
*Srinivasa Rao v. Annadhanam Seshacharlu 106
Stanumurthiayya v. Ramappa 277
Subba Nayakkar v. Akkammal 392
Subbaramiah v. Gurumma 385
Subbaramiah P., In re 451
Subba Rao v. Tata Reddi 478(1)
Subba Rao v. Venkatapuram Panchayat Board: 111
Subbaraya Chettiar v. Debt Conciliation Board, Cuddalore, South Arcot District 26
Subbarayudu v. Venkatasubbamma 375(1)
Subbarow T. v. Sitarama Lakshmi Narasimham 600
Subbayya v. Machayya 365
Subbiah v. Venkata Subbamma 672
Subbiah Thevan, In re 501(1)
Subbier K. K. v. Lakshmana Iyer 452(1)
Sub-Collector, Rajahmundry v. Parthasarathi Naidu 739
Subramania Ayyar v. Annavi Pillai 522
Subramania Ayyar v. Province of Madras 660
Subramania Ayyar v. Thandavamurthi Chetty: 670
Subramania Iyer v. India Equitable Insurance Co. Ltd. 105
*Subramaniam v. Govinda Petar Satyanadham 391
*Subramanian Chettiar v. Chinnamuthu Batcha Rowther 145
Subramanian Chettiar v. Official Receiver, West Tanjore 294
Subramania Pattar v. Porathana Andi 709(2)
Sudalamada Kudumban, In re 281(2)
*Sundarabalakadiresa Thevar v. Avudai Ammal 495
Sundaram v. Subba Rao 402
Sundaramurthi Nainar v. Chotti Bibi 641
Sundara Rao Naidu v. Commissioner, Corporation of Madras 348
Suryanarayana Raju v. Viswanadharaju 249
*Surya Rao Bahadur v. Secretary of State 406(2)
Surya Rao Bahadur Garu v. Mangamma 148
Swaminatha Ayyar, In re 290
Swaminatha Pillai v. Krishna Padayachi 28
*Swarupchand Rayanji v. Janakiramayya 330
Swayamprabhai Ammal v. Muthukrishna Padayachi 362
*Thangathammal v. Veerama Reddiar 260
Thayyanayaki Ammal v. Sundarappa 200
Thekke Mannengath Ittichiri v. Appu Menon: 122
Thimmakka, In re 552(2)
Thiruvengadam Pillai v. Koolai 230
Tirumalai Tirupati Devasthanams Committee v. Tirupati Municipal Council 256
Travancore National and Quilon Bank Ltd., In re 377
Travancore National Bank Subsidiary Co., Ltd. v. Venkataraman 337
Ukkali v. Kelu Nayar 399
V, An Advocate, Madras, In re (SB) 267
Vaidyanatha Ayyar v. Srinivasa Ayyar 375(2)
Vaithinatha Swami Devasthanam, Srivilluputhur v. Anantharama Ayyar 747
*Vallabhaneni Venkayya v. Apparao Savai Aswarao Bahadur 352
Vallabhareddi Ramireddy, In re 25
Valliappa Chettiar v. Arandi 706
Varadarajulu Chetty, In re 494
Varadarajulu Chetty v. Janakirama Chetty: 552(1)
Varadaramanujalu Naidu v. Kaunanoor Naidu 737(2)
Varadia Chetty v. Province of Madras 121
Vasudevan Nambudiri v. Unnimaya Anterjanam 298
Vedaranyaswami Devasthanam, In re 464
Veerabadhrayya v. Subbarayudu 650
*Veeranna, In re 440
Veerappa Chettiar v. Sivagami Achi 291
*Veera Raghava Rao v. Gopalarao 125
Velayudha Mudali v. Chengama Naidu 727
Velayutha Pandaram v. Suryamurthi Pillai 219
Vellayappa Chettiar v. Alagappa Chettiar 289
Vemanna v. Sanjeeva Reddi 474
Venkadari Somappa v. Nagi Reddy 62
Venkatachalam Chetty, In re 100
Venkatachariar, C. S., In re (SB) 691
Venkata Charlu v. Rajah of Vizianagaram 725
*Venkata Chelamiah Sastri v. Annapoornamma (FB) 353
*Venkatakrishnayya v. Malakondayya 306
Venkatalingama v. Parthasarathy Rayanimgar 558
Venkatalingama v. Rajagopala Venkata Narasimha 509
Venkatappa v. Latchanna 653
Venkatappaya v. Mallayya 410
Venkata Rajagopala Krishna Yachendra Bahadur Varu v. Venkata Seshacharlu 78
Venkatarama Chetti, In re 178
Venkata Ramanayya v. Mallikharjanadu 533
Venkataramayya v. Baba Sahib 401
*Venkataratnam Chetti v. Venkatayya of Kadiri 172
Venkatasubba Bagavathar v. Manager L. F. Chatram, Tirukkurungudu 462
Venkata Subbadu, In re 81(2)
Venkatasubbamma v. Subbiah 716
*Venkatasubba Rao v. Chandanmal 662(1)
Venkatasubba Row v. Dr. Taylor Stanley Philip 16
Venkata Subbayya, In re 550
Venkata Subbaya v. Venkayya 612
Venkatasubbiah v. Venkatasubbiah 371
*Venkateswara Rao v. Venkatanarayana 422
Venkatramayya v. Pundareekakshudu 523
Venkatramayya v. Seshayya 193
*Venkayya v. Raghavamma 1
Venkataswami Naicken, In re 657(1)
Venugopala Naidu v. Valambal Ammal 588
Vinaitheerthal Achi, In re 152
Visalakshi Amma v. Madhava Menon 514
Visalakshi Ammal v. Coimbatore Janopakara Nidhi Ltd. 299
Visweswara Gajapathi Raj v. Pushavati Viziaram Gajapathi 743
Vittal, S. N., In re 357(2)
Vittal, S. N., In re 437
Vyagreswarudu v. Bhadramma 721
Vydialinga Swamigal v. Karuppanna Goundan 718

SUBJECT INDEX

Administration — Suit for—Court is not bound to make order for administration of estate when question between parties can properly be determined without such order — Creditor obtaining money decree against heir at law to extent of assets of deceased in his hands and filing suit for administration of estate of deceased — Administration order held should be refused as plaintiff could obtain all reliefs under S. 52 (2), Civil P. C., by application in execution of his decree 588*a*

*__Advancement__—Doctrine of — Applicability—It does not apply to Indian Christians 503

Adverse possession—Finding that defendant had not openly asserted title is of fact — Whether admitted facts constitute assertion of title is question of law 725*a*

——Title to property in issue in suit — Assertion of title in suit is open 725*b*

——Inamdar claiming title not against Government but zamindar — Twelve years rule for perfecting title applies — Question of Government's rights to resume inam has no bearing 725*c*

——Trustee and another by enjoyment in adverse possession for statutory period — Another can acquire title to extent of his enjoyment — Such persons are members of joint family is immaterial 699

——Person in adverse possession of property inheriting same within 12 years from date of his adverse possession — Vesting of property by inheritance puts an end to adverse possession 106*a*

Alluvion and Diluvion — Accretion by—Accretion due to abnormal floods in single year is not gradual 660*b*

Appeal — Letters Patent — Finding that person was insane cannot be challenged 606*c*

——New point—Point requiring investigation into facts cannot be raised 97*b*

Banker and customer—Firm with *A* and *B* as partners formed in Madras carrying on business at Laithieu in French Cochin China — Plaintiff depositing certain amount with firm and suing to recover same in British India—*B* pleading his adjudication by Court of Saigon in French Indo China in bar—*A* pleading payment by him of $1,10,525 representing total liabilities of firm under French law including amount in suit to Official Assignee of Saigon — Contract in respect of deposit held governed by French law as deposit was made in Saigon in dollars and was repayable there in dollars—*B's* adjudication held took away plaintiff's right to sue him—Payment by *A* to Official Assignee of Saigon operated to discharge liability in respect of deposit — Decision of Court of appeal in Saigon holding *A* liable for interest only up to date of *B's* adjudication held must be accepted—Trial Court's order while (erroneously) decreeing plaintiff's suit directing *A* to pay plaintiff court-fee on plaint and half pleader's fee and also directing defendants to bear their own costs held proper in circumstances of case 478(2)

——Customer of Bombay branch of bank on 16th June 1938 delivering two cheques drawn in his favour on Madras branch of bank to be credited in current account at Bombay—Cheques despatched to Madras on same day and amount of first cheque realised on 18th June 1938 and of second cheque on 20th June 1938 — Customer under rules of bank not entitled to draw on cheques until it was ascertained that proceeds thereof were realised by bank — Relationship of debtor and creditor held did not arise when cheques were delivered — Realisation of cheques by Madras branch held realisation by Bombay branch—Proceeds of first cheque held must be deemed to have been ascertained within rules of bank but not of second cheque — Customer held entitled to rank as preferential creditor in respect of second cheque and as ordinary creditor in respect of first 377

*——Deposit by Hindu husband in name of himself and his wife — Deposit payable to either or survivor — Deposit must be presumed to belong to husband in absence of contrary contract — Deposit can be set off against amount due to bank from husband 351

——Practice of bank when making claims against customer to allow credit for amount due by itself is no bar to suit by bank on its claim — Transferee of bank of pronote by customer is not bound to allow set off of amount due from bank in absence of rule or agreement between parties 30

*__Bar Councils Act__ *(38 of 1926)*—Madras High Court Rules, Rr. 1 (i) and (ii) and 16 Proviso—Advocate holding law degree of Rangoon University enrolled as advocate of Rangoon High Court before separation of Burma and practising there for 17 years — On invasion of Burma by Japanese, advocate coming to Madras and applying for enrol-

Bar Councils Act
ment as advocate of Madras High Court — Bar Council recommending advocate for exemption under R. 16, Proviso — Advocate held should be enrolled — Case held fit for granting exemption under R. 16, Proviso — Payment of further fee held not necessary as advocate came within exemption under Art. 30, Stamp Act **(SB)** 455*a*
——*S. 8 (1)*—Since separation of Burma, Act no longer applies to Rangoon High Court **(SB)** 455*b*
——*S. 12 (1)* — Rules under, framed by Madras High Court, R. 7 — Direction that members of tribunal shall sign their finding is mandatory — Member of tribunal dying before completion of report—Tribunal ceases to be properly constituted — New tribunal should investigate de novo **(SB)** 267
Benami—Benami and nominal — There is considerable difference between them 558*s*
Certiorari — Writ of — It can be granted only when no other remedy is open 348*b*
Charge — Enforceability — Partition between Hindu brothers *A* and *N* — Charge created in favour of *A* on properties allotted to *N's* share for meeting expenses of certain religious ceremonies, mahalaya and sradhas of maternal grandfather and grandmother of *A* and *N* — Step brothers of *A* and *N* purchasing property allotted to *A*—Vendees of *A* held could enforce charge against purchaser of *B's* properties — *A's* vendees held could perform mahalaya and sradhas 711(2)
Civil Procedure Code *(5 of 1908), S. 2 (17)* — Scope — Adhikari receiving money towards arrears of revenue comes within the definition of a "public officer" 288(1)*a*
——*S. 2 (17)* — Scope — Person who has ceased to be in Government employ is not public officer 288 (1)*c*
——*S. 11* — Land and crops on that land are different subject-matters — Decision on claim as to latter is not res judicata as to former 128*a*
——*S. 11 and O. 21, R. 63*—Decree-holder in claim suit is not representative of judgment-debtor 128*b*
——*Ss. 16, 17 and 20* — Plea that Court has jurisdiction — How and where cause of action arose not alleged — Plea held technically defective 614*a*
*——*Ss. 16, 17 and 20* — Civil Procedure Code is not confined to procedure—Jurisdiction does not come under processual law — Statute affecting procedure or substantive right — Whether retrospective — Right to institute suit or file appeal is substantive

Civil P. C.
right—Section 46 (2), Government of India Act, affects that right and Court's jurisdiction and hence is not retrospective and does not apply to actions pending on 1st April 1937—Effect of various enactments held to preserve to Courts jurisdiction which they held before 1st April 1937 in regard to actions then properly before them 614*g*
——*S. 20 (c)* — Contract of hiring is not complete until article hired is in hands of person to whom it is to be hired — Suit for infringement of copyright against hirer—Part of cause of action arises in place where hiring is completed and Court therein has jurisdiction 659
*——*S. 20 (c)*—Contract—Offer made and accepted through post—Part of cause of action arises where letter accepting offer is posted and part where it is delivered 13
——*Ss. 34 and 47* — Sale confirmed — Decree-holder claiming interest during period between date of receipt of money into Court and actual payment of same to him—Aforesaid interest can be claimed only if action on judgment-debtor's part prevents or postpones payment—Decree-holder held not entitled to interest as claimed as no blame could be attached to judgment-debtor 442*b*
——*S. 35* — Trial Court has full discretion in matter of costs—Mere reference to circumstances of case with no further detail is not sufficient compliance with S. 35 (2)—Defendant succeeding on plea of limitation and suit dismissed—Defendant is entitled to costs 713*b*
——*S. 42 and O. 21, Rr. 50 (2) and 10*—Original Court and not transferee Court can decide alleged partner's liability under Rule 50 (2) 501 (2)
——*S. 47* — Executing Court can go into contention that recital in decree was not enough to make it executable 748*b*
——*Ss. 47 and 11* — Objection to executability of decree—Objector not party to order passed by Court's predecessor deciding objection — Court cannot refuse to go into question on ground of predecessor's order: 748*c*
——*S. 47* — Pre-decree agreement that decree when obtained should not be executed can be pleaded in bar of execution 734
——*S. 47*—Decree against father alone — Sons not parties to suit actually or even constructively — Subsequent adjudication of father as insolvent — Question of discharge of father's debts by sons under pious obligation doctrine is for insolvency Court 732*c*
——*S. 47*—'Representative' is not confined to legal representative 714*b*

Civil P. C.

——*S. 47* — Order definitely allowing or disallowing plea in execution proceedings is appealable notwithstanding that execution petition is not terminated thereby—Executing Court holding claim to execute decree to be barred under S. 47 and adjourning proceeding to enable claimant to obtain succession certificate which would entitle him to execute decree — Order amounts to disallowance of claim and is appealable (Per *Division Bench in Order of Reference*) **(FB)** 688*a*

——*S. 47*—Creditor obtaining money decree against heir at law to extent of assets of deceased in his hands—Suit by creditor for administration of deceased's estate whether barred by S. 47 *(Quære)* 588*b*

——*S. 47 and O. 21, R. 90* — Sale void—Application to set aside is under S. 47 : 509*c*

——*S. 47*—Execution sale—Application by judgment-debtor for payment of surplus proceeds lying in Court — Decree-holder claiming surplus in lieu of interest—Application falls under S. 47 — Appeal lies from its dismissal 442*a*

——*S. 47*—Question between decree-holder auction-purchaser and Official Receiver on insolvency of judgment-debtor falls within S. 47—Second appeal is competent: 415(1)*a*

——*Ss. 47, 96 and 2* — Dispute between judgment-debtor and stranger auction purchaser regarding delivery treated and decided as one under S. 47 — Appeal from order thereon lies 406(1)

——*S. 47*—Partition decree entitling defendant to be put in possession of property allotted to him on payment of necessary court-fee —Defendant is not obliged to pay court-fee and seek possession in execution of partition decree—He can file separate suit—S. 47 is no bar—When S. 47 may bar separate suit, stated 364

——*S. 47*—Hindu trading family—Decree against karta in his individual capacity and not as representing family business—Decree is inexecutable against other members or their properties 161*a*

——*S. 51*—Appointment of receiver in execution without prior attachment is not bad 396

——*S. 55 (4)*—Surety under, cannot claim to be released from obligation at his pleasure — Principle of S. 130, Contract Act, does not apply 101

*——*S. 60 (1) (b)*—"Tools of an artisan" —Artisan does not include musician 4

——*S. 60 (1) (c)*—"Agriculturist"—Meaning of—House used by person for carrying on his calling effectively as agriculturist is exempt 375(1)

*——*S. 60 (1) (i)*—Protection is based on public policy and cannot be waived—Agreement by person getting salary of Rs. 100 that creditor may take certain sum out of his salary is not enforceable in law 391

——*S. 60 (1) (m)*—Interest of coparcener in joint family property is not contingent interest 97*c*

——*S. 64*—*N* bringing *D's* property to sale in execution of his decree on 29th August 1934 — Other decree-holders including *S* applying for rateable distribution—Sale set aside on 31st October 1934 on application by *D* under O. 21, R. 89, Civil P. C. — On 20th September 1934 *D* selling property to *P* — On 29th September 1934 *S* attaching aforesaid property pursuant to his application of 29th August 1934 — Claim by *P* on basis of his sale deed from *D* dismissed — Suit by *D* in 1935 against *S* and *D* for declaration of his title — *S* held could not make any claim based upon S. 64 explanation or his action on 29th August 1934—*D* held had good title on 20th September 1934 when he conveyed property to *P* 522*a*

——*S. 64*—Scope explained 330*c*

——*S. 66* — Applicability — Decree for arrears of rent — Sale in execution of by revenue Court under Madras Estates Land Act—S. 66 does not apply 154

*——*Ss. 73, 47*—Creditor who had attachment before judgment obtaining decree and succeeding debtor as heir—Decree obtained by another creditor against such heir as representative of debtor and property in his hands sold in execution — Whether heir is entitled to claim rateable distribution in sale proceeds explained 260*b*

*——*S. 80*—Scope and object—Suit against person who was public officer at time of cause of action but ceasing to be so at time of suit —Notice is not necessary 288(1)*b*

——*Ss. 92 and 73* — Scheme decree under S. 92—Provision in, whether executable — Test—Direction in scheme decree in regard to realisation of trust properties including certain amount as belonging to trust held not money decree and not executable: 748*a*

——*S. 100* — Consideration is question of fact 730*a*

——*S. 100*—Finding of fact—Appreciation of evidence basis for finding—No interference in second appeal 730*b*

——*S. 100* — Question whether agreement to sell had merged in conveyance is one of intention of parties and being one of fact or

Civil P. C.
of mixed law and fact cannot be advanced in second appeal when not specifically raised in written statement 716*a*
——*S. 100*—Finding that person was guilty of fraud supported by evidence—It is conclusive in second appeal 632*a*
——*S. 100*—Some of cosharers mortgaging certain items of joint property — Suit by other cosharers for partition—Finding that mortgage property cannot be allotted to share of mortgagors without causing hardship to other sharers is one of fact—It cannot be interfered with in second appeal (Per *King J., in Order of Reference*): **(FB)** 622*a*
——*S. 100*—Finding as to nature of transaction is conclusive in second appeal: 483*b*
——*S. 100*—Knowledge of other trustees is finding of fact 468*a*
——*S. 100* — Defamation case — Findings that allegations were not true and were malicious are of fact 343*a*
——*S. 109 (a)*—"Order passed on appeal" —Application to excuse delay for filing application for re-hearing appeal by deducting time taken in other proceedings dismissed—No leave to be granted 357(1)
——*S. 110*—Value of subject-matter in appeal—Value is amount up to date of decree of lower Court—Subsequent interest cannot be added as it is within discretion of Court —What may or may not be awardable is not to be included in claim 535
——*S. 110*—High Court affirming decision but interfering with order as to costs of lower Court—Decree is still one of affirmance 368*a*
——*S. 110 and O. 45, R. 3* — That large stakes are involved in appeal is not by itself ground for granting leave 368*b*
——*S. 110*—Question of law — Value put upon statement by person is a question of fact and not of law 368*c*
——*S. 110*—Substantial question of law — Meaning of 'substantial' — Important documents held inadmissible and their inadmissibility affecting result of appeal—Question is substantial one 368*d*
——*S. 111A and O. 45, Rr. 17 and 7* — Certificate under S. 205, Government of India Act, given — No further certificate is necessary—Person aggrieved can go to Federal Court provided he deposits fund for printing record and transmitting it to Federal Court 70
——*Ss. 115 and 47* — Execution of decree —Objection by judgment-debtor to executability rejected on 25th March 1941 — On 30th June on judgment-debtor's application

Civil P. C.
Court declining to reconsider previous order —Revision against order of 30th June held could be treated as one to revise order of 25th March 757*a*
*——*Ss. 115, 141 and O. 7, R. 10*—Revision petition to High Court cannot be returned for presentation to subordinate Court in province as appeal or revision petition 657(2)
——*S. 115*—Suit in respect of immovable and moveable properties situate in Burma and British India properly filed in British Indian Court in 1932—Suit becoming ready for trial only in 1940 — After passing of Government of India Act (1935), defendant raising plea that Court ceased to have jurisdiction over Burma properties by reason of S. 46 (2) of that Act—Plea upheld — High Court held could entertain revision as it raised important question of jurisdiction though point could be taken on appeal: 614*h*
——*S. 115*—Decree amended—Appeal must be against amended decree—No revision lies 519*b*
——*S. 115*—Finding that property is valued at certain amount cannot be disturbed in revision 502*b*
——*S. 115*—Interference — View of lower Court, though not the only view, not unreasonable—No interference 413(2)*b*
——*S. 115*—High Court will not ordinarily entertain revision under S. 115 on mere preliminary finding in absence of special circumstances 362*a*
——*S. 115*—Question of jurisdiction arising at preliminary stage of suit — High Court can interfere in revision—Question of inconvenience and delay in trial of suit should be considered 247*b*
——*S. 144*—Person attaching decree is representative of original decree-holder — He is party within S. 144 and is liable to make restitution 472*a*
——*Ss. 144 and 151* — Power to order restitution is not confined to cases strictly falling within S. 144 — Court can order restitution under S. 151 — Power under S. 151 should be exercised on principle and not arbitrarily — Whether power under S. 151 should be invoked depends on facts of each case—*P* obtaining mortgage decree against *D* and in execution putting mortgaged property to sale and purchasing it himself — On deposit by *D* under O. 21, R. 89 sale set aside — *T* who held decree against *P* attaching portion of deposit and obtaining payment — Mortgage decree set aside on appeal by *D* — Court held could

Civil P. C.
order restitution by ordering *T* and *P* to refund amounts withdrawn by them from deposit by *D* 472*b*
——*S. 144* — Application for restitution is for debt within Succession Act 445(1)*b*
——*S. 144* — Decree by *A* against *R* — *R* appealing—No execution by *A* pending—*R* applying for stay—Stay granted on condition of his furnishing security — *R* depositing decretal amount instead—*R* successful and withdrawing amount — Application by *R* against *A* for interest—S. 144 held not applicable and *A* held not liable to pay interest : (1939) 2 M. L. J. 509=('40) 27 A. I. R. 1940 Mad. 15=187 I. C. 30, *REVERSED* 166
——*Ss. 149 and 115* — Order directing plaintiff to pay additional court-fee—Revision lies 585*a*
——*S. 151* — Mortgage decree — Pending appeal to High Court defendant 1 who was not contesting appeal applying to scale down decree under Madras Agriculturists' Relief Act — High Court modifying decree and making its decree subject to final decision of defendant 1's application so far as mortgage amount was concerned — Under misapprehension of High Court's order, defendant applying for withdrawal of his application for presentation to High Court—Pleaders on both sides labouring under same misapprehension and Court returning petition for presentation to proper Court — Petition not actually withdrawn but lying in trial Court's office — Subsquently defendant 1 obtaining copy of High Court's judgment and on discovering his mistake which was shared by pleaders on both sides and Court applying to trial Court to restore his application which was lying in trial Court's office—Trial Court under circumstances of case held had power to restore application 519*a*
——*S. 151* — Plaint rejected for non-payment of deficit court-fee — Plaintiff filing review application and tendering deficit court-fee along with it—Review application rejected—Plaintiff held entitled to refund of deficit court-fee — Court held could return same under S. 151—Ss. 13, 14 or 15, Court-fees Act held did not apply 316
——*O. 1, R. 3* — Applicability — Lease of temple land by trustees in favour of four brothers under separate muchilikas for one year — Even after expiry of lease, lessees continuing in possession as tenants from year to year and after them their descendants —Tenancies terminated by notice—Suit for

Civil P. C.
ejecting all tenants from possession held not bad for multifariousness 334*a*
——*O. 7, R. 10 and S. 35*—Court directing plaint to be presented to proper Court can order plaintiff to pay costs of other side—But it cannot make payment of costs condition precedent to filing of suit in proper Court—Court directing payment of costs of other side before suit was presented in proper Court — Without paying costs as directed, plaintiff presenting plaint in proper Court—Costs paid subsequently while suit was well within time — Suit must be deemed to be properly filed even if it be regarded as filed on date when costs were tendered 35
——*O. 7, R. 11* — Value of property found for court-fees—Court is not precluded to find subsequently whether it has jurisdiction 502*a*
——*O. 7, R. 11* — Teacher filing suit for damages for wrongful dismissal against President of managing committee of High School — President filing some extracts in support of his defence—Subsequent suit for defamation against President by teacher on ground that extracts filed in previous suit were defamatory — Secretary of managing committee and Head master also impleaded without allegation that they were concerned in publication of extracts — Plaint basing cause of action entirely on publication of extracts in Court by President in previous suit—Plaint held disclosed no cause of action against Secretary and Head master 343*b*
——*O. 8, R. 5* — Assertion in plaint not denied in written statement—Effect stated 413(1)*b*
*——*O. 8, R. 6 and O. 2, R. 2*—Defendant who pleads set off is bound by O. 2, R. 2 580
*——*O. 21, R. 2*—Pre-decree arrangement that decree-holder will not proceed against particular defendant till amount cannot be recovered from others is enforceable — Arrangement prior to suit or pending suit makes no difference—Merely serving notice on other defendants without proceeding further does not fulfil agreement 460
——*O. 21, R. 11*—Execution petitions are as important as suits themselves — Court must bestow proper amount of care and caution 495*a*
*——*O. 21, R. 16 and S. 47*—Decree held by one person as benamidar for another——Holder dying—True owner can apply for execution — Question of his title can be decided in execution proceedings (Per *Full Bench*) **(FB)** 688*c*

Civil P. C.

——*O. 21, R. 16* — Decree transferred in writing to benamidar—Benamidar living—Whether real owner can claim under O. 21, R. 16 to execute it *(Quære)* (Per *Full Bench*) **(FB)** 688*d*

——*O. 21, R. 16* — Transfer of decree to benamidar of one of judgment-debtors—Decree cannot be executed against other judgment-debtor 28*a*

*——*O. 21, R. 16 and S. 146* — Pending suits, transfer of entire amounts due under them for consideration — Decrees passed—Assignee is entitled to execute decrees not under O. 21, R. 16 but under S. 146—O. 21, R. 16 held did not prohibit execution under Section 146 21*b*

——*O. 21, Rr. 17 and 11 to 14*—Filing of sale papers with execution application is not necessary—Execution application complying with O. 21, Rr. 11 to 14 must be admitted, numbered and retained on file—It may then be dismissed for non-compliance of this or that requisition of Court — Order returning execution application complying with O. 21, Rr. 11 to 14 is illegal—Execution application must be treated as pending or as disposed of along with next application with which it was re-presented 495*b*

*——*O. 21, R. 17* — Application returned for amendment re-presented after inordinately long period without application to excuse delay — Execution application cannot be deemed to be pending or revived: 216*b*

——*O. 21, Rr. 18 and 19* — Cross-decrees — Fact that holder of lesser decree cannot execute it until greater decree is satisfied does not render amount decreed to him as amount not due — Until holder of greater decree actually executes and sets off amount due from him lesser decree can become effective if greater decree is satisfied in some other way — Suit for redemption of kanom — Decree not drawn up according to S. 6, Malabar Compensation for Tenants' Improvements Act—Decree taking form of two decrees one in favour of plaintiff for rent and other in favour of defendant for kanom amount and value of improvements—Decree becoming final — Arrears of rent in lesser decree in plaintiff's favour cannot be said to have been wiped out by greater decree in defendant's favour and hence are liable to be scaled down under S. 15 (4), Madras Agriculturists' Relief Act — Decree cannot be rectified or treated as one passed according to S. 6, Malabar Compensation for Tenants' Improvements Act in proceedings under Madras Agriculturists Relief Act 399

Civil P. C.

——*O. 21, R. 58* — Appeal — Claim by sons in execution of decree against father — Decision of lower Courts rejecting claim based on view that sons were represented in suit by father — Second appeal by sons is competent 732*a*

——*O. 21, Rr. 58, 63, 46* — Scope—Right of vendor to unpaid purchase money from vendee is attachable where vendee admits liability to pay but claims to defer such payment till vendor pays off other incumbrances 650*a*

——*O. 21, R. 58* — Whether judgment-debtor is bound by order on claim petition is question of fact — Decree-holder and judgment-debtor both made parties to claim petition — No notice served on judgment-debtor when order passed—Judgment-debtor is not bound by order 330*a*

*——*O. 21, Rr. 58 and 63* — Order under R. 58 becomes conclusive when it is passed and continues to be so unless decision in suit under R. 63 is different—Property attached in execution of decree released on objection of third party — Execution application not having asked for any other relief dismissed — Decree-holder's suit under O. 21, R. 63 eventually dismissed — Order dismissing execution petition becomes conclusive when it was passed — Execution petition cannot be said to remain pending until suit under R. 63 is instituted or between date of its institution and its final disposal — Second execution petition filed more than three years from date of dismissal of first execution petition is time-barred — Plaint in suit under O. 21, R. 63 cannot be treated as application in accordance with law within Art. 182 (5), Limitation Act — Nor can declaratory suit under O. 21, R. 63 be regarded as step-in-aid of execution within Art. 182 (5), Limitation Act 5

——*O. 21, R. 63*—"Party against whom an order is made" — R. 63 applies to all orders which are against claims preferred under R. 58 irrespective of whether they have been passed on merits or not — Order "Petition not pressed. It is dismissed" is adverse order : 48 M L J 616=('25) 12 AIR 1925 Mad 1113=87 I C 635; ('25) 12 AIR 1925 Mad 265 = 80 I C 233; 110 I C 511 (Mad) and (1940) 2 M L J 402 = ('41) 28 A I R 1941 Mad 77, *OVERRULED* **(FB) 41

——*O. 21, R. 66* — Want of specification of judgment-debtor's interest in joint family property does not invalidate sale proclamation 97*d*

Civil P. C.
——*O. 21, R. 89* — Property sold — Judgment-debtor applying under S. 19, Agriculturists' Relief Act, and depositing amount under O. 21, R. 89 — Sale set aside — On accounts being taken, decree found satisfied — Decree-holder held not entitled to claim amount deposited as deposit by judgment-debtor held not voluntary 453
——*O. 21, R. 90* — Question of accepting offer for further security held discretionary with execution Court and should not be interfered with 509*b*
——*O. 21, R. 90, Proviso* — Time granted to furnish security—Draft security tendered —Court subsequently without passing orders as to adequacy of security issuing notice to opposite side — On objection security tested and found insufficient — Court held not deprived of power to decide inadequacy of security and held entitled to dismiss application without considering application on merits 509*a*
——*O. 21, R. 93* — Interest — Executing Court has full discretion to order interest or refrain from doing so 423*b*
——*O. 21, R. 97* — Applicability — R. 97 applies only where property is sold by Court in execution proceedings and requirements of R. 95 are fulfilled 505
——*O. 22, R. 6 and O. 21, Rule 92*—Order confirming sale under O. 21, R. 92 is necessary corollary of order refusing to set it aside — Application by judgment-debtor to set aside sale under O. 21, R. 90 — After conclusion of hearing judgment-debtor dying — Subsequent order dismissing application and confirming sale is valid by reason of O. 22, R. 6 even though passed without impleading judgment-debtor's legal representatives 608
*——*O. 23, R. 1*—One of plaintiffs applying for unconditional withdrawal from suit — Sub-rule (4) does not apply and consent of other plaintiffs is not necessary — But Court can refuse such application if it will be prejudicial to other plaintiffs — Mere inconvenience to other plaintiffs having no relation to conduct of suit is not prejudice — It must amount to legal obstacle to continuation of suit 373
——*O. 33, R. 5*—Application in High Court to sue in forma pauperis — Cause of action arising outside jurisdiction — Defendant not having address nor residing within jurisdiction — Leave to sue not obtained — Application must be dismissed 16*a*
——*O. 34, R. 10* — Redemption suit — Mortgagee is entitled to costs unless his conduct disentitles him 592*a*
——*O. 41, R. 10* — Order directing security to be furnished in specified time — Security tendered within time — Order is complied with — Security tested after time fixed — It must be held to have been furnished in time unless it is found insufficient 29
——*O. 41, R. 22* — Limitation — Starting point — Service of notice on pleader's clerk is not correct starting point 403*b*
——*O. 41, R. 22*—Decree one of dismissal—Cross-objections cannot be preferred against mere findings — Respondent can sustain trial Court's decree even on grounds decided against him by that Court 334*e*
——*O. 41, R. 33 and S. 73* — Suit under S. 73 (2), for refund — Other creditors also impleaded as defendants—Suit dismissed — Appellate Court while decreeing suit cannot pass decrees in favour of defendant creditors when limitation for suit by them under S. 73 (2) had expired 748*e*
——*O. 41, R. 33*—Appellate Court—Powers of — New Act passed pending appeal — Appellate Court can pass decree in accordance with Act 291*c*
——*O. 41-A (Madras) and O. 3, R. 5* — O. 41-A is special provision and prevails over general provision—Service of notice of appeal by merely leaving in office of advocate is not service on party or his pleader 403*a*
——*O. 44, R. 1, Proviso* — Court is not bound but should hear party before rejecting application 478 (1)
——*O. 47, R. 7 and R. 4 (2), Proviso (b)* — Words "strict proof" in R. 4 (2), Proviso (b)—Meaning of—"Proof" and "evidence"—Distinction — Appellate Court in deciding whether R. 4 has been complied with or not can see whether evidence adduced before lower Court did or did not amount to "proof" 511*a*
——*O. 47, R. 7* — R. 7 does contemplate discussion of sufficiency of cause by appellate as well as trial Court 511*b*
Companies Act *(7 of 1913), S. 4 (5)* — Magistrate finding that he ought not to have taken cognizance of offence under S. 4 (5)—He can drop proceedings 283*a*
——*S. 4 (5)* — S. 4 (5) relates to S. 4 (1) and (2)—Company formed in contravention of S. 4 (2) before S. 4 (5) came into force—Members can be punished for continuing to be members after S. 4 (5) came into force 283*b*

Companies Act
——*S. 32 (5)* — Words "knowingly" and "wilfully" refer to company's officers and not to company itself — Company is always liable when return is not sent in—Its officers liable only when they knowingly or wilfully authorise or permit default 75
——*S. 86D* — Loans to directors of bank are part of its business 737 (1)*c*
——*S. 86D* — Loan sanctioned to one of directors—Directors held guilty under S. 86D —Registrar's duty explained — High Court refused to interfere at instance of private person 452 (1)*a*
——*Ss. 137, 138, 141 and 141A* — Construction—Offences under Act—Cognizance of, is governed by S. 190, Criminal P. C. — Private person can complain 283*c*
*——*S. 184*—Contributories — Application by father for shares as guardian of minor daughter—Shares issued in minor's name—Father cannot be placed in list of contributories 470
——*S. 191 and Company Rules, Rr. 83, 91* — Delay in filing proof of claim should be excused — Claimant may be paid dividend without disturbing previous dividends — Amendment of R. 91 suggested 349
——*S. 229* — Company having current account with Travancore Bank at Nagarcoil—Bank suspending business on 20th June 1938 and in process of liquidation under Court's order for its compulsory winding up—Company having no account with Bank's Bombay branch—On 14th June 1938, company instructing Bombay branch of Bank to collect amount of cheque in its favour on Indian Bank at Bombay and remit proceeds to Bank's Nagarcoil branch to credit of company's account — Bombay branch of Bank collecting amount next day but not remitting it to Nagarcoil — After Bank's liquidation amount remaining with Bombay branch — Bank's position held was of agent holding his principal's money for special purpose — Company held entitled to amount of cheque 646
——*Ss. 235, 103* — Person signing prospectus as director but resigning before declaration under S. 108 cannot be made liable for pecuniary loss sustained by company by misfeasance of directors 365*a*
——*S. 235* — Misfeasance — Becoming a Director by accepting a gift of shares without paying for them is a misfeasance: 365*b*
——*S. 235*—Section does not exclude nonfeasance—It applies to every act of commission or omission 365*c*

Companies Act
——*Ss. 236 and 282*—Company going into voluntary liquidation — Accused appointed liquidator — Accused as liquidator filing periodical returns during 1934 — In 1935 accused writing against debt of Rs. 33,600 due by him to company as many individual items of shares and debts as he could think of and writing off balance — Writing off of his own debt being false and dishonest accused held properly convicted under S. 236 —If other entries against his debt of rupees 33,600 were true accused held guilty also under S. 282 702*a*
——*Ss. 236 and 208A (2)* — Company going into voluntary liquidation — Director does not cease to be director when liquidator is appointed — Liquidator is officer of company—S. 236 held applied to liquidator whether as contributory, director or officer 702*b*
——*Ss. 280, 202* — Order dismissing petition for taking security given under S. 280 is not appealable 405 (2)
——*S. 282* — S. 282 applies to de facto liquidator 702*c*
Company — Bank — Article of Association declaring director's office to be ipso facto vacated if he resigned or became incapable of acting as director—Construction—Director's indebtedness to bank held not incapacity within article 737 (1)*a*
——Articles of Association — Removal of directors — Directors cannot under procedural article frame rule for removal of directors—Such rule is ultra vires 737 (1)*b*
——Prospectus changed in material particulars before allotment — Application for shares can be revoked 656
——Directors — Meeting of — Quorum — Validity—Director interested in resolution cannot vote—Company can agree that debt due to shareholder should be set off against future calls — Director and managing agent held in fiduciary relation to company and hence incompetent to decide whether resolution was for company's benefit 95
*__Contempt__ — Contempt of Court — There cannot be contempt more gross than allegation that once Magistrate knew that Government had instituted prosecution there was bound to be conviction **(SB)** 711 (1)
Contract — C. I. F. contract — Effects of stated—Breach—Cancellation of contract—Validity—Test—Contract partly typed and partly printed—*A* agreeing to purchase and *B* agreeing to sell 60 bottles of quicksilver to be imported from Italy, half quantity to be shipped in July 1939 and remaining half

Contract
in August 1939—Typed portion mentioning terms as "Document against sight payment" —Printed portion providing that on arrival of steamer by which goods were shipped indentor should take up documents which would be delivered against payment only— On receipt of bill of lading and other documents relating to first consignment *B* presenting same to *A* and on *A's* refusal to pay for same cancelling whole contract and refusing to give delivery of second consignment when received — Contract held lawfully cancelled by *B* — *A* held not entitled to delivery of second consignment 139*a*
——Construction — Contract partly typed and partly printed — If both portions can be read together, effect must be given to all provisions—Printed portion not reconcilable with typed one — Typed portion must prevail 139*b*
——Consideration — Validity — Decree against *A* alone—*A* and *B* executing pronote for decretal amount — Abandonment of decree by promisee against *A* is sufficient consideration for *B's* liability under pronote 134*c*
*——Maintenance and champerty — Suits on promissory note—Pending suits, plaintiff transferring entire amounts due in respect of suits for consideration to be paid within a few days of passing of decrees in suits— Decrees passed—Transaction held completed one and valid 21*a*
Contract Act *(9 of 1872), S. 23*—Undertaking not to prosecute part of consideration —Entire agreement is illegal 173*a*
——*S. 50*—Performance — Company conducting chit fund — Subscriber depositing money towards future instalments in bank as required by company — Performance is good even though such bank subsequently goes into liquidation 337
*——*S. 72* — Money paid by *R* under influence of mistake that *A* was first mortgagee and *R* second mortgagee of *M* who was represented by *G* as *M*—*R* held entitled to return of amount paid 590
——*S. 73* — Interest — Interest cannot be awarded under S. 73 to party not entitled to it 429*a*
——*S. 126*—Person in position of surety— In granting relief Court is not confined to contracts of guarantee within S. 126—Court can apply principles of equity unless case is governed by positive provision of law— Father mortgaging his separate property and having benefit of whole of mortgage loan— Son made party to mortgage deed not as mortgagor but as party of second part—Son not described as surety but brought in in case of need—Son's position held was that of surety — Son held entitled to benefit of security to extent to which he had contributed towards discharge of mortgage 628*a*
*——*Ss. 128, 134* — Discharge of principal debtor by operation of law does not discharge surety — Surety cannot take advantage of partial discharge which principal debtor gets by Madras Agriculturists' Relief Act 145
——*S. 132* — *A* and *B* executing pronote and making themselves jointly and severally liable—Mere knowledge by promisee that *B* was only surety for *A* cannot affect liability of promisors under pronote—Nor can *B* let in parole evidence to vary terms of pronote 134*d*
——*Ss. 148, 178A and 178 (as amended in 1930)*—Goods entrusted for safe custody —Pledge by depositee is invalid 299
Copyright Act *(3 of 1914), Ss. 7, 8* — Scope explained 124
Costs—Major portion of claim admitted— Costs on uncontested scale should be granted on such claim and on contested scale on portion contested 551*b*
——Appellant though successful not given costs 419 (2)*b*
Court-fees — Refund — High Court can under S. 107 and S. 151, Civil P. C., help party to get refund of excess court-fee erroneously paid 464
——Fixation of — Duty is of trial Court 445 (2)*a*
——Determination of — Hardship is no factor 205*d*
Court-fees Act *(7 of 1870), S. 7 (i)* — Applicability — Plaint in suit by mortgagee or person entitled to charge on immovable property to recover what is due to him falls to be stamped under S. 7 (i) 205*a*
——*S. 7 (v) (c)* — Words "net profits" in S. 7 (v) (c)—Meaning explained 585*b*
——*S. 7 (ix)*—Suit to enforce mortgage by sale does not fall under S. 7 (ix) 205*b*
——*S. 17* — Suit for possession on basis of sale deed and in alternative for recovery of consideration money—Suit valued at Rs. 955 —Same value placed on alternative relief— Alternative reliefs held did not constitute two distinct subject-matters within S. 17 — Single court-fee based on valuation of Rs. 955 held sufficient for both reliefs 744
——*Sch. 2, Art. 1 (d) (i) (as amended in Madras)*—"Suit or proceeding" — Meaning

Court-fees Act
of, explained — Suit includes execution proceedings and proceedings in appeal — Proceeding also bears same meaning 390
——*Sch. 2, Art. 17* — Suit for Rs. 18,000 and first charge on property — Suit decreed but charge refused — Appeal for having charge — Property valued at Rs. 9500 — Court-fee held payable on Rs. 9500, i.e., on value placed on property 152
——*Sch. 2, Art. 17B and S. 7 (iv) (f) (as amended in Madras)*—Administration suit not being suit for account falls under Sch. 2, Art. 17B — Market value of property determines jurisdiction 247*a*
——*Sch. 2, Art. 17B (as amended by Madras Act 5 of 1922)*—Partition suit by person in joint possession — Value for jurisdiction is market value of property claimed 103 (1)

Criminal Procedure Code *(5 of 1898), Ss. 54 and 56* — Applicability — S. 56 does not limit S. 54 in all cases 539*e*
——*Ss. 54 (1) (ix) and S. 56* — Word 'requisition' in S. 54 (1) (ix) is quite general and covers telephonic message — Order for arrest of person by telephonic message is legal provided S. 54 (1) is complied with — Officer ordering such arrest acts in discharge of his official duty within S. 270 (1), Government of India Act 539*d*
——*Ss. 87 and 88*—Condition precedent to issue of proclamation under S. 87 and attachment under S. 88 stated — Arrest warrant issued — Magistrate informed that accused had already left India — Issue of proclamation under S. 87 and attachment under S. 88 is without jurisdiction 289
——*Ss. 88 (6D) and 386*—Wife *A* obtaining maintenance order under S. 488 — Certain property attached and money deposited in Court — Claim by other wife *B* rejected —Suit by *B* under S. 88 (6D) — Fact that *B* asked for money decree and not for declaration held did not take suit out of S. 88 (6D) — Money in Court not being held by or at disposal of Government, Secretary of State held not necessary party 93*a*
——*S. 106* — Magistrate not giving reasons for passing order under S. 106 — Order is not illegal 501 (1)
——*S. 112*—Court can pass supplementary order 242 (1)
——*Ss. 140, 139 and 133* — Order under S. 133 not made absolute under S. 139 (1)— Further proceedings dropped under S. 139 (2)—S. 140 does not apply 113
——*S. 144* — Sub-Magistrate refusing to pass order under S. 144 for want of sufficient grounds — Sub-divisional Magistrate in appeal can pass order under S. 144 if he considers it necessary on material before him 20
——*S. 145*—Scope—Dispute between tenants and sub-tenants about land—Landlord is not party to dispute—But Magistrate can proceed under S. 145 even though his attention to dispute is drawn by landlord: 534(1)
——*S. 145* — Partition between *A* and *B* after harvest — *A* willingly accepting partition and saying that *B's* share was to be his — That amounts to giving over possession to *B*—*B's* repairing of bunds and cultivation of seed beds held sufficient to constitute possession 249*b*
——*Ss. 147, 145 and 146*—Right of easement in respect of certain lands—Magistrate unable to decide whether right exists — He cannot order attachment of lands under Section 146 77*a*
——*S. 147*—Evidence conflicting—Magistrate need not give definite finding 77*b*
——*S. 162* — Copies of witness's statement when granted, stated 451
——*S. 162* — Statement to police under S. 162 is not substantive evidence 288(2)*a*
——*Ss. 172 and 174*—Case diary — Use of —Absence of statement from diary is not in itself evidence that statement was not made — Proper way to prove omission stated 288(2)*b*
——*S. 192* — Scope — Charge sheet filed under S. 326, Penal Code — Complaint containing exaggeration of facts and offence being only one punishable under S. 325, Penal Code — Transfer of case from First Class Magistrate to Sub-Magistrate held proper 465*b*
——*S. 195* — Registrar of Small Cause Court Madras when Court within S. 195 — While taking security under O. 12, cl. (10), Madras High Court Rules of Practice, Registrar does not act as Court within S. 195, Criminal P. C. 737(2)
——*S. 195* — Complaint to village Magistrate is tantamount to information to police — Police finding complaint false, filing charge-sheet under S. 211, Penal Code, setting out all facts constituting offence — Complaint by police held valid complaint under S. 195 513
*——*S. 195* — Complaint of defamation based on evidence in Court — Complaint by Court or its sanction is not necessary—Complaint by defamed lies under Penal Code : (1939) 1 M.L J. 412=('39) 26 A.I.R. 1939 Mad. 368=181 I. C. 86 ; (1939) 1 M. L. J.

Criminal P. C.
614=('39) 26 A.I.R. 1939 Mad. 493=183 I. C. 179 and 1940 M. W. N. 867, *OVERRULED* 19
——*S. 195 (1) (b)*—Offence under S. 193, Penal Code—Filing of complaint by proper person is essential for taking cognizance — Court ordering return of costs to accused — Proceedings before Registrar—Accused filing false affidavit—Registrar held not Court but ministerial officer—Complaint by Registrar held incompetent 326*b*
——*S. 197* — Object — Complainant tying cow to tree—Municipal Health Officer coming to complainant, giving smack on neck and telling him that he had no business to tie his cow there—On protest by complainant, Health Officer losing temper and giving further blows on cheeks and head — Health Officer held was acting as public servant when he interfered with complainant and struck him 664(1)
——*S. 197*—Assistant Police Commissioner arresting accused for offence under Madras City Police Act — On his order given while purporting to act in discharge of his official duty, Police Sub-Inspectors beating accused —Assistant Police Commissioner not removable from his office except with Secretary of State's sanction—Court held could not take cognizance of his alleged offence without Governor's previous sanction 81(1)
——*Ss. 201, 528 (2), 526* — Case before Magistrate having no jurisdiction — Proper procedure is for Magistrate to return complaint to be presented to proper Court and not for District Magistrate or High Court to transfer it to Magistrate having jurisdiction 715
——*Ss. 202, 200, 192* — Case transferred under S. 192—Stage of inquiry under S. 202 already passed by Magistrate transferring case—Transferee Magistrate cannot proceed under S. 202 — Mere transfer is not sufficient to indicate whether stage has passed 426
——*Ss. 209, 28 and 438*—Joint Magistrate before whom accused was charged under S. 511 and S. 379, Penal Code, erroneously thinking S. 75, Penal Code, to be applicable and transferring case to Sub-Magistrate — Sub-Magistrate holding that prima facie case was made out and committing accused to Sessions — Committal held not illegal — Reference by Sessions Judge to High Court to have committal quashed held unnecessary — Proper procedure stated 440*b*
——*S. 225* — Charge sheet filed by police relating to offence on 18th May 1941 — Charge itself relating primarily to incident on 26th March 1941 — Sub-Inspector only witness in case referring to incidents other than that on 18th May 1941 one of them being that of 26th March 1941 — Accused questioned particularly with regard to incident of 26th March 1941—Accused pleading guilty—Accused held not prejudiced by difference in charge and charge sheet 417*b*
——*S. 247* — Allegations in complaint constituting warrant case—Magistrate can adopt summons procedure if he comes to conclusion that only minor offence has been committed — Magistrate without giving any reasons ordering complaint filed under S. 427, Penal Code, to be taken as under S. 426, Penal Code, and acquitting accused under S. 247, Criminal P. C., acts without jurisdiction 594*a*
——*Ss. 250 and 342*—Complainant showing cause under S. 250—Magistrate need not record actual words used by complainant — Proper procedure indicated 241
——*S. 256*—Summary trial of warrant case —Omission to give facilities for further cross-examination by accused is grave one 672*b*
——*Ss. 258 (1), 259* — Charge framed — Order of acquittal for complainant's absence under S. 258 (1) is illegal — Nor can order under S. 259 be passed 552(1)
——*S. 263* — Summary trial — Magistrate should give brief statement of reasons for convicting accused—That would necessitate short summary of prosecution evidence—If there be defence evidence Magistrate should also give reasons for preferring evidence of prosecution to that of defence 669*a*
——*S. 288*—Sessions Judge making up his mind that witness was not giving true evidence before him— He can admit under S. 288 evidence of witness before Committing Magistrate—Before acting under S. 288 Sessions Judge need not conduct enquiry to satisfy himself that evidence before him was false 700
——*S. 345*—Offence of cheating cannot be compounded without Court's leave even if no prosecution is launched — *A* executing pronote in consideration of payee not prosecuting *B* for cheating—Consideration for pronote is unlawful — Pronote cannot be enforced against *A* : (1941) 2 M. L. J. 827 = ('42) 29 A. I. R. 1942 Mad. 173 = 201 I. C. 91, *REVERSED* 662(1)
—— *S. 345* — Agreement compounding offence compoundable without Court's leave is lawful — Such agreement in case of non-compoundable offence is unlawful 173*b*

Criminal P. C.

——*S. 345 (2)*—Offences specified in S. 345 (2), Criminal P. C., can be lawfully compounded before they go to Court — Prosecution launched — Agreement to compound it without Court's leave is void under S. 23, Contract Act — Agreement compounding offence of cheating before launching prosecution by execution of pronote held valid 173*c*

——*S. 349 (2)* — Magistrate under S. 349 (2) must dispose of case himself—He has no power to remand it 281(2)

——*S. 350 (1), Proviso (a)* — Transfer of case to another Magistrate — Accused have no right to have witnesses re-called: 221(1)*b*

——*Ss. 366 and 367*—Pronouncement not in accord with signed judgment is not pronouncement of judgment and has no validity 668*b*

——*S. 370 (i)* — Magistrate merely saying that he believed prosecution witnesses without noting their evidence and without any reference to defence evidence—S. 370 (i) is not complied with — Magistrate should give brief statement of reasons for conviction which would necessitate reference to prosecution and defence evidence 603*a*

——*Ss. 370 (i), 441 and 439*—Magistrate not complying with S. 370 (i) by not giving reasons for conviction—High Court in revision sending for record of case—Magistrate can submit report under S. 441 and remedy defect in original order—In such case High Court will not interfere 603*b*

*——*Ss. 422 and 545* — On appeal by accused, notice sent to Public Prosecutor—Conviction and compensation order set aside after hearing Public Prosecutor—Absence of notice of appeal to complainant is not irregularity much less illegality 465*a*

——*S. 422* — Appeal from conviction allowed without notice to officer appointed by Provincial Government—Appellate order of acquittal cannot be sustained 356

——*Ss. 428 and 540* — Power of appellate Court to make enquiry to take additional evidence—In view of allegations in grounds of appeal appellate Court summoning trial Magistrate and recording evidence from him as to circumstances under which judgment was delivered — Magistrate's evidence held was not evidence contemplated by S. 428—But appellate Court held had power to enquire by report or otherwise what transpired in Magistrate's Court — Appellate Court's enquiry from Magistrate held not wrong 668*a*

Criminal P. C.

——*Ss. 435, 561A and 145 (7)* — Order under S. 145—After filing revision to High Court petitioner dying — High Court can bring legal representatives on record if ends of justice so require 249*a*

——*S. 436*—It is desirable that Magistrate passing orders in revision should give reasons for orders passed though mere absence of reasons is not indication that Magistrate has not given case full consideration 653

——*S. 439* — Concurrent findings that evidence of witness was not true must be accepted as correct in revision 668*c*

——*S. 439* — Order of acquittal without jurisdiction—Order to continue proceedings from point where illegal order was passed likely to unduly harass accused — Evidence against accused very little and entitling them to benefit of doubt—Order held should not be interfered with 657(1)*b*

——*S. 439*— Sentence of small fine — No interference on ground of error in conviction 532(2)*c*

——*S. 439*—Interference with sentence in revision—High Court is very reluctant but it will not allow very inappropriate order to stand 415(2)*c*

——*S. 439* — Acquittal — High Court will interfere only in very exceptional circumstances—Proper course is Crown appeal 279(1)*b*

——*S. 476*—Proceedings under—Judgment in civil proceedings how far admissible — Similarity of reasons in criminal Court and in civil Court does not mean that criminal Court was influenced by decision in civil Court 758*c*

——*Ss. 480, 486 (1) and 407 (2)* — Sentence under S. 480 by second class Magistrate—Appeal lies under S. 486 (1) only and to District Magistrate—S. 407 (2) does not apply—District Magistrate cannot transfer appeal to other Magistrate of first class 181

——*S. 488* — As long as child is with mother, she must be given sufficient to maintain child — If father has right to custody of child he can at any time institute proceedings for that purpose — It is improper for Court to refuse maintenance for child merely because it was of opinion that mother had no right to custody of child: 705

——*Ss. 488 and 439* — Finding that wife had proved cruelty against husband is of fact — When it is reasonable on evidence it will not be interfered with in revision: 666*a*

——*S. 488*—Maintenance petition by married woman against third person as mother

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Criminal P. C.
of minor child alleged to be born through illegal intimacy with him — Admissions of paternity are irrelevant if woman fails to prove non-access to her husband when child could have been begotten 251
——*S. 488 (8)* — Expression 'reside' — Meaning of — Husband and wife held last resided in Bangalore and not Trichinopoly 666*b*
——*S. 488 (8)* — Person can be taken to reside at place even if he lives in rented house 666*c*
——*S. 496* — Bailable offence — Condition not to enter disputed land is not authorized 740
——*S. 523*—Accused asserting property as not being his—Order returning property to accused is bad—Magistrate must inquire as to person entitled to possession 726(1)
——*Ss. 526, 476 and 476B* — Fact that District Judge who heard appeal from order directing complaint to be filed under S. 476 is to try case itself is good ground for transfer of case under S. 526 *(Obiter)* 753*b*
——*Ss. 526 and 203*—Cross-complaint by accused dismissed under S. 203—Accused's apprehension that his case had been prejudged held reasonable — Case held fit for transfer 69
——*Ss. 526 (8) and 344* — Intimation by party of his intention to move for transfer —Case adjourned—Party cannot be ordered to pay costs of the day 178
——*S. 528* — Notice — Transfer of case on application of one of accused to another Magistrate without notice to other accused is not illegal 221 (1)*a*
——*S. 530 (p)* — Magistrate trying person for offence less serious than actually committed—Effect of — High Court when will interfere—*B*, Deputy Tahsildar, finding that owner had no license for grazing goats in forest taking goats to cattle pound—On way *B* meeting *A* and *C* owners of goats and their friend *D* — *A*, *C* and *D* without disclosing fact of ownership volunteering to assist *B* in taking goats to pound and leading him not to pound but to their own pen—*B* duly driving goats into pen and on subsequently discovering that enclosure into which he had driven goats was not cattle pound but owners' private pen lodging complaint—*A*, *C* and *D* charged under S. 417, Penal Code—Offence held did not fall under S. 420, Penal Code—Magistrate held could not be said to have clutched at jurisdiction 31

Criminal P. C.
——*S. 531* — S. 531 applies only to inquiries in British India — It does not condone enquiry by British Indian Court when no British Indian Court would have jurisdiction — Bangalore Courts are foreign Courts 666*d*
——*S. 540* — Scope — Prosecution under S. 409, Penal Code—Court allowing stamp vendor to be called as prosecution witness to explain how name of person who had not purchased stamp could appear as vendee at back of stamp — Discretion under S. 540 held properly exercised 223*a*
——*S. 540* — Witness allowed to be examined under S. 540 at instance of party—Notice to other party is not necessary: 223*b*
——*Ss. 550 and 523*—Disposal cannot be postponed indefinitely 319(1)
——*Ss. 556, 476 and 476B* — Complaint by District Munsif under S. 476 — District Judge dismissing appeal holding that there was sufficient material to justify District Munsif in laying complaint — Same case coming before District Judge as Sessions Judge—District Judge is not precluded from dealing with case 753*a*
——*Ss. 562 and 380*—S. 562 applies only to convicted persons — Reference under S. 562 — Magistrate must proceed under S. 380 — S. 380 does not empower Magistrate to set aside conviction — Further enquiry under S. 380—Object stated: 657(1)*a*
——*S. 562* — Applicability — Accused already spending two periods in Borstal School —S. 562 does not apply 532(1)*a*
——*S. 562*—Applicability —Application of S. 562, Criminal P. C. is not illegal to offence punishable only under S. 304 (2), Penal Code; but that section is not ordinarily to be applied to such offences 415(2)*b*
——*S. 565*—Conviction only under S. 511, Penal Code—S. 565 does not permit of order as to notification of accused's residence: 521*e*
Criminal trial — Crown appeal against acquittal — Though appellate Court can go into facts it will not convict if facts were at all uncertain especially when lower Court's finding on evidence is not unreasonable 531*a*
——Evidence — Record of accused's statement attested by witnesses not filed — Witnesses stating what accused said—There is no check on accuracy 450*b*
——Evidence—Prosecution witnesses taking part in defending deceased — Their unwillingness to accept responsibility for long wound on back of accused is not sufficient for doubting prosecution story 446*a*

Criminal trial
——Evidence — Witnesses using defensive measures against rowdies and giving evidence freely regarding death of their companion — Witnesses cannot be described as interested 446*b*
——Evidence—Number of persons attacking without warning in crowded place—Number of minor discrepancies and inconsistencies in evidence given by prosecution witnesses —That is insufficient to throw real doubt on prosecution story 446*c*
——Evidence—Statements by expert medical witnesses as to nature of blows causing injuries — Court need not try to reconcile statements—Court should consider whether medical evidence precludes prosecution story 227*a*
——Evidence — Postal stamp — Probative value of, on a postcard is not very high: 227*b*
——Evidence — Disinterested witnesses not coming forward at earliest opportunity and informing police—Merely on this their evidence should not be rejected 49*d*
——Evidence—Head constable examined as prosecution witness producing general diary containing entry regarding occurrence in question as reported by complainant — In cross examination, omission of material and relevant facts and injuries sustained by complainant elicited—Accused's prayer to have aforesaid portion in diary marked as exhibit refused — At Magistrate's suggestion complainant applying for and getting expunged evidence of head constable from record — — Head constable's evidence held could not be expunged from record — Accused held entitled to prove through him documents admissible in evidence 38
——Experts—Footprint experts—Evidence of, how far relevant explained 452 (2)
——Injunction by civil Court on complainant not to further prosecute case — Magistrate can proceed with case and summon complainant to give evidence 756*c*
——Judgment — Validity — Three Bench Magistrates considering case—At later hearing fourth Magistrate joining — At final hearing, three Magistrates present two of whom had sat throughout—Order passed by Bench held illegal 240*a*
——Murder — Sentence — Mitigating circumstance — Primitive character of accused not using deadly weapon but joining in murder held justified transportation 237*c*
——Public Prosecutor — Duty of explained 227*d*
——Retracted confession—Conviction is not safe if confession is uncorroborated 450*d*

Criminal trial
——Review — Bench Court cannot correct errors in its judgment or review its illegal order—High Court alone has power 240*b*
——Sentence — Imprisonment till rising of Court — Validity—No alternative of fine — Imprisonment till rising of Court is objectionable—Law permitting alternative of fine — Sentence of imprisonment — Necessity of stated 723*c*
——Sentence—Public Prosecutor representing that more serious offence not committed —Policy of Crown is not to press 213*b*
——Summons case — Accused can be convicted of offence not specified in charge sheet laid by police provided he is not prejudiced by omission of charge 354*d*
——Witnesses not examined—Accused cannot be acquitted 452 (1)*b*
Criminal Tribes Act *(6 of 1924), S. 23 (1)* —Accused out of jail for 7 years after previous conviction — It is reason to contrary within S. 23 (1) 33
——*S. 23 (1) (b)*—Long interval (5 years) between accused coming out of prison after serving last sentence and commission of offence is "special reason to contrary" within S. 23 (1) (b) 81 (2)
Custom — Proof — Uncontested cases are very good proof of alleged custom 485*c*
——Irrigation rights — Lands irrigated by water from tank—Defendants lands remaining submerged for weeks during rains under water spread from tank — Defendant constructing bunds to prevent submersion — Erection of bunds interfering with customary supply of water to lands of plaintiff and other ryots in ayacut — Plaintiff held entitled to injunction — Principles of English common law held inapplicable 258
Decree — Assignment by decree-holder to defraud creditors—Creditor of decree-holder can attach decree and claim that assignment is not binding on him 714*a*
Deed—Construction — It must be read as a whole 558*q*
——Construction — Intention must be gathered from words used — Surrounding circumstances are not to be ignored 139*c*
Defence of India Act *(35 of 1939), S. 2* — Wild speech tending to endanger public safety and hinder defence of India — Act applies 494*a*
——*S. 2* — Applicability of Act — Speech in connexion with trade or industrial dispute — Speech not adversely affecting war effort or seriously embarrassing Government—Act should not be invoked—Sole object of speech to promote welfare of speaker and his fellow

Defence of India Act
workers in a particular employment — Act does not apply 427
——*S. 2, Rules under*—Literature of virulent nature—Possession simpliciter is liable to heavy punishment under rules 664 (2)*a*
——*S. 2, Rules under*—Sentence—Offence under rules—Accused member of communist party — Court cannot take into account changed attitude of party to Government and of Government towards party—It is matter for executive and not Court 664 (2)*b*
——*S. 2, Rules under R. 19* — Offence under—Absence of intention to injure state is no reason for not imposing punishment 723*d*
——*S. 2, Rules under, R. 19 (1)*—Article (letter) when may be regarded as sent within R. 19 (1) 723*a*
——*S. 2, Rules under, R. 19 (1) (a)*—Secret code—Meaning of, explained 723*b*
——*S. 2, Rules under, R. 34 (6) (d), (e), (j) and (k)* — Particular portion of speech can constitute "prejudicial act" — Portions of speech held prejudicial acts 199
——*S. 2, Rules under, R. 38 (1)* — Mill producing war material—President of labour union calling strike not with object of impeding war effort but to remedy grievance regarding dismissal of worker — President must be deemed to have acted with lawful excuse and is guilty of no offence 735
——*S. 2, Rules under, Rr. 38 (1) (a) and 34 (6) (e), (f) and (g)* — Objectionable remark in speech when constitutes prejudicial act—Accused can be convicted for same speech only once and not three times merely because speech offends against R. 34 (6) (e), (f) and (g) 494*b*
——*S. 2*—Rules under, R. 58 (1)—Accused held guilty under R. 58 (1) 439
——*S. 2, Rules under, R. 121* — Accused organizing meetings at which intending satyagrahis made anti-war speeches — Accused introducing satyagrahis to audiences and appreciating their speeches at end of meetings—Accused held guilty under R. 121 417*a*
——*S. 2, Rules under, R. 121* — Under R. 121 person cannot be punished for abetting in general — He must be charged with abetment of particular offence — Ordinary rule of joinder of charges applies—Misjoinder of charges held did not prejudice accused 417*c*
——*S. 2, Rules under, R. 130A (b)*—R. 130A is not ultra vires—Reasons stated 221 (2)*a*

Defence of India Act
——*S. 2, rules under, R. 130A (b)* — Bail—Provisions of Criminal Procedure Code do not apply 221 (2)*b*
Easement — Claim to both ownership and easement in regard to same plots though inconsistent may yet be put forward : 392*a*
——Right of easement over plot not matured—Assertion of ownership involves loss of right of easement 392*b*
——Finding that plaintiff had exercised right of way on plot for over statutory period before assertion of his ownership of that plot is of fact and binding in second appeal 392*c*
——Right maturing into easement — Subsequent assertion of ownership cannot destroy easement — Nor can subsequent allegation that right was enjoyed as public right or right in gross do so 392*d*
Easements Act *(5 of 1882), S. 15* — No license or agreement — Plaintiff using way over defendant's land openly, peaceably and as of right for over statutory period—Plaintiff must be held to have acquired easement—In absence of license or agreement during that period his user must be regarded as with animus of enjoying easement 392*e*
Estoppel—When arises stated 193*d*
Evidence Act *(1 of 1872), S. 24* — Mere administering of oath is not tantamount to threat — Confessional statement made on oath to assistant registrar is not inadmissible 654
——*S. 24* — Murder case — Statement by accused to police held came under S. 24 237*a*
——*Ss. 24, 21*—Confession is relevant without formal proof of voluntary nature by prosecution 49*a*
——*S. 24*—Person making confession of his guilt—There is no presumption that he had done so under pressure exerted on him (Per *Horwill J.*) 49*b*
——*S. 27*—Principle of S. 27 is guarantee of truth of information 450*c*
——*S. 27*—Portion admissible—Only such portions of confession as lead to discovery of some fact can be admitted 444*a*
——*S. 27*—Statements to police made while producing materials used by accused in committing offence are inadmissible 237*b*
——*S. 27* — S. 27 whether affected by S. 162, Criminal P. C., explained 49*c*
——*S. 30* — Confession of co-accused how far to be used, explained 444*b*
——*Ss. 32 and 35* — Statement of *C* to village Munsif recorded by him that *P* killed *C's* husband while she was with *P*—*C* com-

Evidence Act
mitted suicide same evening — In trial of *P* for murder of *C's* husband, statement of *C* held not admissible under S. 32 nor under S. 35 450*a*
——*S. 33*—Depositions of persons recorded in case to which defendant not party—Persons dead at time when copies tendered in evidence — Depositions do not fall within S. 33 and hence are inadmissible 528*a*
——*S. 33*—Evidence to be admissible must fall within one or other section of Act—If it does not, it must be rejected — Inadmissible evidence cannot be made admissible by consent of parties — Consent when may cure defect stated 528*b*
——*S. 33* — Deponents in prior proceedings themselves examined in subsequent suit — Fact that parties agreed to have depositions read in Court as evidence would not amount to admission of irrelevant evidence but only consenting to wrong procedure—Proper procedure indicated 528*c*
——*S. 33*—Witnesses whose depositions in prior proceedings were tendered in evidence alive — Their statements admitted in evidence—On consent by other side, application to summon those witnesses cancelled—Other side held estopped from objecting to statements being referred to in case 528*d*
——*S. 35* — Birth register — Entry in, is relevant to show date of birth—Legitimacy of child—Mother's name appearing in register but not of father — Evidentiary value stated 129*c*
——*Ss. 41 and 13*—Guardianship proceedings for custody of child—Father not made party—Parentage of child in issue in subsequent suit—Orders in guardianship proceedings are not admissible 129*d*
——*S. 74*—Copies of execution petition or of counter-affidavit are not public documents 558*r*
——*S. 112* — Child born in lawful wedlock — Onus to prove that parties to marriage had no access to each other is on person alleging illegitimacy—Method of proof — It is for him to show that strained feelings were not reconciled before child could have been begotten — That feelings continued to be strained cannot be presumed 129*b*
——*Ss. 114 and 35* — Receipt granted by Revenue Inspector reciting that delivery of property was effected in pursuance of revenue Court's order being report of officer in discharge of his duty must be presumed to be true 698*a*
——*S. 155 (3)* — Defence seeking to show that witness's statement in Court is contrary to what he told Police Officer—Proper way of contradicting witness stated — Only way to prove that statement in Court was not made to Police Officer is to ask Police Officer himself in witness box—Reference to police diary for that purpose is useless—Witness's statement in case diary — Use of diary to contradict witness how far permissible stated 58*a*

Execution — Application returned and retained by decree-holder is deemed not filed at all for purposes of limitation 679*a*
—— Instalment decree with exigibility clause — On default execution for whole decree—Application not coming to notice of judgment-debtor—Decree-holder can subsequently apply for instalments becoming due — Previous election does not affect as judgment-debtor has not been prejudiced: 679*b*
*——Execution application pending—Death of decree-holder — Court cannot dismiss application — It must be kept on file awaiting any legal representative to continue it: 495*c*
Factories Act *(25 of 1934), S. 2 (1), Proviso and S. 60* — Manager of factory is not managing agent within S. 2 (1) 347(1)*b*
——*Ss. 60 and 2 (1)* — Owner or occupier is not relieved of responsibility under Act by appointing manager — Owner or occupier when can escape liability — Fact that occupier is ignorant person may be reason for awarding him smaller punishment than manager but it is no ground for acquitting him 347(1)*a*
Fraud — Decree obtained by perjury or on forged document—Decree cannot be set aside —Plaintiff executing pronote in defendant's favour—Defendant forging another pronote similar to genuine one and obtaining decrees on both by playing trick upon Court, also on debtor and witnesses to prevent truth being discovered—Case held of fraud much wider than scope of matters decided in suit in which wrong decree was obtained — Decree on forged note held must be set aside 114
Gift—Real or benami—Things to be considered in determining, explained 558*o*
——Gift between husband and wife—Ordinarily presumption is transferee holds for benefit of transferor 558*p*
Government of India Act *(1935, 25 & 26 Geo. V, Ch. 42), S. 46 (2)* — Act affects its own territory and not foreign territory 614*f*
——*S. 270 (1)*—Applicability of S. 270(1) depends primarily on allegations in plaint 539*c*

Government of India Act
——*S. 270 (1)*—Word "duty" in S. 270(1) refers to actual duty and not what person thinks to be his duty 539*f*
——*S. 270 (1)*—Senior Police Officer issuing lawful order to subordinate officer to arrest particular person—Subordinate officer misunderstanding order and arresting some one else—Subordinate officer instead of acting in execution of his duty can only be said to be purporting to act in execution of his duty — Either of them is covered by S. 270 (1) — S. 53, Madras District Police Act, applies 539*h*
——*S. 270 (2)* — Onus to prove want of good faith in case of persons and acts referred to in S. 270 (2) is on plaintiff or complainant 539*j*
——*S. 292*—Effect of, stated 614*c*
Government of India (Adaptation of Indian Laws) Order, 1937, *Cl. 2 (2)*—Meaning of, explained 614*d*
——*Cl. 10* — Word "authority" in Cl. 10 includes Court 614*e*
Hindu law—Adoption—Widow not authorised by husband to adopt cannot do so unless she receives assent of nearest sapindas—Nearest reversioners improperly withholding assent—She can adopt with assent of remoter reversioners 606*a*
——Adoption — Widow — Sapinda improperly withholding assent—It may be ignored —Two out of six sapindas assenting — Rest improperly withholding assent — Adoption by widow is valid 606*b*
——Adoption—Widow — Motive for adoption is immaterial 606*d*
——Adoption—Widow—Whether spiritual point of view or property considerations are paramount *(Quære)* 606*e*
*——Adoption — Widow — Joint family—Only surviving coparcener insane — Widow can adopt with assent of nearest divided sapindas : (1942) 1 M. L. J. 28=('42) 29 A.I.R. 1942 Mad. 300, *REVERSED* : 606*f*
——Adoption—Boy given and taken during husband's lifetime — Widow can complete adoption by performing datta homam after husband's death 395*a*
——Adoption—Formal ceremony when boy is given and accepted is not necessary—Essentials of valid adoption stated 395*b*
——Adoption—Widow living in concubinage and in state of pregnancy — She is incompetent to adopt 379*a*
——Adoption — Validity — Unchastity—Widow must be shown unchaste at time of adoption—She cannot be regarded unchaste at time of adoption on account of her conduct many years before adoption 379*b*
——Adoption — Giving and accepting—Natural father and adoptive parent can appoint agent to give or take boy 379*c*
——Adoption — Adoption by widow of deceased coparcener after partition between remaining coparceners is valid 338*a*
*——Adoption — Rights of adopted son—Adoption by widow of deceased coparcener after partition between remaining coparceners —Adopted son is entitled to re-open partition and recover his share—Only limit to his right of succession explained 338*b*
——Adoption—Validity—Consent of majority of sapindas is not always necessary—Sapindas of equal grade — Two out of six consenting—Others' refusal actuated by improper motives—Adoption is valid 300*a*
*——Adoption—Joint family—Widow has no inherent power to adopt — Husband's authority not given — Widow must seek consent of sapindas within joint family—Sole male member minor or lunatic—Widow cannot adopt with consent of divided sapindas 300*b*
——Alienation—Necessity—Father—Mortgage by—Property purchased with mortgage money — Suit to enforce mortgage — Fact that son was in enjoyment of property cannot preclude him from challenging mortgage—Mortgage not found to bind son—Mortgagee cannot be given charge on property purchased to extent of son's share in family property 758*c*
——Alienation — Widow — Necessity—Alienees not attempting to satisfy themselves that money was necessary for family or estate —Alienations cannot bind adopted son 379*d*
——Alienation—Father — Son's liability—Sale in execution against father — Whether son's interest also passes 193*e*
*——Alienation—Daughter inheriting property from mother — Daughter can alienate property for marriage of her daughter's daughter as it is pious and meritorious purpose under Hindu law 106*c*
——Conversion — Hindu father and minor son becoming Christians — Reconversion to Hinduism does not ipso facto bring about coparcenary relationship 193*b*
——Debt — Antecedent debt — Manager—Debt incurred by manager in purchase of lands held not antecedent debt 758*a*
——Debt — Father — Mortgage by father found not binding on sons — Decree should be against father's share in mortgaged pro-

Hindu law
perty—It need not be against father's right, title and interest in mortgaged property at time of mortgage 758*b*
*——Debts—Creditor succeeding as heir to debtor — Effect — Principle of retainer applies whether heir is limited owner or absolute owner 260*a*
——Debt — Father — Son's liability — Pious obligation — Sale by father not for necessity—Sale set aside at instance of sons — Vendee can compel father to refund — This liability of father, which was contingent, becomes present one on happening of contingency — Liability comes within the doctrine of pious obligation — If sale is set aside during father's life time, liability can be enforced against him and if transaction is set aside after father's death, vendee has claim against estate in hands of sons—Whether son pays willingly or not is immaterial: (Remarks in conflict in 44 Mad. 801=('21) 8 A. I. R. 1921 Mad. 447=64 I. C. 698, *OVERRULED*) **(FB) 183*a*
——Debt — Father — Duties and functions of father or manager are similar to those of a trustee—Expressions "trust" and "breach of trust" do not properly describe their position (Per *Krishnaswami Ayyangar J.*) **(FB)** 183*b*
——Debt—Father—Son's liability—Pious obligation — Enforceability of doctrine justified (Per *Krishnaswami Ayyangar J.*) **(FB)** 183*c*
——Debts—Father — Decree against father —To make son liable, decree must relate to debt for which he is liable 161*b*
——Debts—Manager — Decree obtained in suit on promissory note executed by karta—Decree can be executed against entire family estate even though other members were not parties to suit provided decree-holder proves that debt was for family necessity and that it was incurred as karta — Decree-holder is not debarred from adducing evidence to prove these merely because he did not implead other members to suit 62
——Exclusion from inheritance — Congenital idiot is member of coparcenary in spite of exclusion from enjoyment **(FB) 698*a*
——Father — Father as manager can represent family in all transactions — Liability found to be family liability—Every item of joint family property is liable—Decree need not be against father as manager 161*d*
——Impartible estate—Holder—Position of — Person succeeding to ancestral impartible estate and also receiving legacy of monies due by estate — No merger takes place — Legacy is not extinguished 743
——Impartible estate — Impartible estate taken as self-acquired property by member of joint family—Other members have no right to be maintained in absence of custom 558*u*
——Inheritance — Daughter as heir of parents takes restricted interest similar to that of widow—Alienation for spiritual welfare of parents is for necessity 106*b*
——Joint family—Manager—Alienation by — Validity — Alienation for necessity and binding on estate—Renewal of, by successor is also valid 558*t*
*——Joint family—Rights of person acquiring member's undivided share — *A* and his brother *B* members of joint Hindu family executing pronote in favour of *C* for family necessity — C suing on pronote attaching family properties before judgment, and obtaining decree against *A* and *B* personally and their sons limited to their interest in family properties—*A* and *B* adjudicated insolvents on their own petition—Sons' interest alone sold in execution — Proceeds distributed among decree-holder and other creditors who had obtained decrees binding on family and applied for rateable distribution — Purchasers at execution sale suing for partition of sons' shares in family properties — Partition decree entitling purchasers to sons' shares subject to payment of other family debts — Condition imposed by decree held not sound in law—In unique circumstances of case, execution sale held conveyed good title to purchasers notwithstanding that other family debts were left unsatisfied **(FB)** 554
*——Joint family — Father—Adjudication of — Father's share alone vests in Official Receiver—Father's power to alienate son's share for his debts vests in Official Receiver and is subject to same qualifications as in father's hands—Son's share attached by his creditor in execution of decree — Share not sold — Father's power to alienate share is not destroyed—Hence Official Receiver can sell son's share — Sale binds son though it does not prevail against attaching creditor by reason of S. 64, Civil P. C.: ('31) 18 A. I. R. 1931 Mad. 118 = 130 I. C. 479; 42 M. L. W. 295 = ('35) 22 A. I. R. 1935 Mad. 427 = 156 I. C. 205 and 71 M. L. J. 294=('36) 23 A. I. R. 1936 Mad. 698=164 I. C. 853, *OVERRULED* 330*b*
——Joint family — Decree against father alone creates debt of contract—Suit against

Hindu law
son on decree after father's death is maintainable — This dictum how far applies in cases of division between father and son also where insolvency supervenes *(Quære)* 327*c*

——Joint family—Father — Debt contracted by father for family necessity or benefit — Partition between father and sons—Sons continue liable to pay debt out of property in their hands 327*d*

——Joint family—Father — Debt contracted by father for joint family business—Insolvency proceedings against father—Before adjudication, son filing partition suit against father — Creditor advancing debt for family business proving debt before Official Receiver and as no dividend was paid filing suit against son without impleading Official Receiver — Suit against son held competent — Official Receiver's failure to secure son's share for father's creditors in partition suit held did not prevent creditor from realising amount due to him from son's share: 327*e*

——Joint family — Manager incurring debt for family necessity and adjudicated insolvent after partition — Suit against divided member whether maintainable without impleading manager or Official Receiver *(Quære)* 327*f*

——Joint family — Ancestral business — Test — *M* carrying on business in medicine in partnership with *C* dying in 1926 leaving three minor sons—In 1929 eldest son attaining majority and starting business in medicine — Business carried by *M* with *C* not wound up till 1935—All assets of *M's* business continuing to remain with *C* till 1935 when by compromise eldest son obtaining Rs. 2500 in full satisfaction of his father's share — Business started by eldest son in 1929 held new and not ancestral 324

——Joint family — Alienation by father—Suit to set aside by sons — Suit instigated by father — Effect stated 232*a*

*——Joint family—Alienation — Mortgage by manager of property in Madras — Mortgagor can confer power of sale on mortgagee without recourse to Court—Reasons stated 232*b*

——Joint family—Manager—Powers of, to contract debts for family business—Coparceners are liable to extent of their interest in family property 161*c*

*——Joint family — Partition deed which ought to have been registered not registered and as such inadmissible—Person in possession of property allotted on such partition —Trespass into such land by another member of family — Ejectment suit on basis of possessory title does not lie 125*b*

——Joint family — Creditor can attach coparcener's interest in portion of joint family property *(Obiter)* 97*a*

——Maintenance — Illegitimate son — Father not possessing any joint family property 419 (2)*a*

——Maintenance — Widow — Widow's daughter and son-in-law when can be maintained stated 313*a*

——Maintenance—Widow—Widow is entitled to live in same state in which she lived during her husband's life-time — But maintenance should be fixed with regard to circumstances of family 313*b*

*——Maintenance — Wife obtaining decree for maintenance — Subsequent cohabitation with husband—Decree becomes ineffective and cannot be enforced 1

——Manager—Suit against—Whether other members of family are represented is question of fact depending upon nature of claim, plaint allegations, etc. — Remedy of decree-holder who has obtained decree against manager only but wanting to proceed against other members who have separated from manager subsequent to decree is by separate suit 732*b*

——Marriage—Idiot's marriage is lawful particularly when his father has arranged marriage and his wife has given birth to sons **(FB) 693*b*

*——Marriage—Second marriage of minor is not obligatory sanskara — Debt incurred for same is not binding on family 517

——Marriage—Byragis—Marriage between, is valid 413 (1)*a*

——Marriage—Brahma and Asura forms—Marriage must be presumed to be in Brahma form—Presumption can be rebutted 219

——Minor—Guardian—Father or mother is natural guardian—Brother cannot act for his minor divided brother unless he gets himself appointed as guardian under Guardians and Wards Act 282*b*

*——Partition—Suit for partition on behalf of two minors by their maternal grandfather for their share held did not constitute separation from each other 422

——Partition—Whether alienation, stated 338*c*

——Partition—Partition deed allotting properties to each member and each member to have full rights of enjoyment, alienation, etc., and pay Government taxes himself—Partition held final and required registration even though parties contemplated execution of

Hindu law
another more comprehensive partition later on 125*a*
——Reconversion—Sudras—Hindu convert to Christianity coming back to Hinduism — Expiatory ceremonies when necessary stated 193*a*
——Religious endowment — Agreement to perform ceremony of feeding Brahmins in temple executed in favour of temple represented by its trustee—Construction—Consideration — Certain property charged for performance of aforesaid ceremony—Failure of executants of agreement to perform ceremony—Trustee held could perform same out of temple funds and recover cost from executants and properties charged 39*a*
——Religious endowment—Feeding of devotees in temple is religious charity 39*b*
——Succession—Father dying before uncle who died without widow or other heirs—Nephew held entitled to apply as heir of uncle 445 (1)*a*
——Succession — Murderer cannot succeed as heir of person whom he murdered — No title can be claimed through murderer—Inheritance vests in those entitled to it if murderer was out of way—Test of disqualification is not relationship but whether title is traced through murderer 277
——Widow — Necessity — Widow handing over to creditor most of income realized on harvest in shape of grain and day after day taking sums from him for daily consumption —Whether particular amount taken binds reversion stated 313*c*
Hindu Women's Rights to Property Act *(18 of 1937), S. 3*—Applicability—The Act does not regulate succession to agricultural lands in the Governor's Provinces 212*a*
——*S. 3*—Construction—Property taken by widow is liable for her husband's debts — Fact that property was given to her under her husband's will for maintenance cannot exonerate her liability for those debts: 212*b*
Income-tax Act *(11 of 1922), S. 4 (3) (i)* — *N* creating Industrial Educational Trust and endowing shares held by him in six motor transport companies of which he had control and immovable property worth Rs. 1,10,000 —*N* constituting himself as managing trustee with full powers to deal with its assets—Objects of trust were to provide permanent facilities for improvement of motor, electrical and other industries and transport, to found institution for research, education and training in that connexion and to ensure permanence and efficiency of institution by placing at its disposal work-shops and motor transport concerns in which founder was interested — Institution not to be founded until companies had made sufficient money for the purpose — Trust held would have been charitable if assets were to be directly devoted to its objects — Since *N* had power to utilize assets for his own purpose or purposes of his companies trust could not be said to have been created wholly for charitable purposes — Idea that some day institution contemplated by deed might be founded was not sufficient compliance with S. 4 (3) (i) **(SB)** 625
——*S. 4A (b) (as amended by Act of 1939)* — Firm carrying on business in Colombo — Branch in British India managed by partner residing there—Firm is liable to be taxed under Act 736 (2)
——*S. 4B (as amended by Act 7 of 1939)*, —Words "British India" in S. 4B—Meaning of — Residence in Burma prior to 1st April 1937 amounts to residence in British India **(SB)** 556
——*S. 16 (1) (c) (as amended by Act 7 of 1939)* — Settlement in favour of daughter prior to amendment revocable — Income of 1938-39 can be deemed as income from revocable transfers within S. 16 (1) (c) **(SB)** 191
——*S. 16 (3) (a) (iii)*—Assets of married Hindu lady—There is no presumption that they are transferred to her by her husband out of love—Under S. 16 (3) (a) (iii) assessee husband must prove source of those assets—Assessee admitting that some of monies in his wife's account came from him—No proof that some of them came from other sources —Income-tax authorities held justified in including interest on monies in his income **(SB)** 268
——*Ss. 26 (2) and 23* — Profits earned before year of account cannot be included in assessment **(SB)** 266
——*S. 26A* — Individual shares of partners not clearly stated—S. 26A does not apply—Share of widow two annas and of children collectively four annas, recovered as six annas in the name of widow in application for registration under S. 26A—Application held rightly rejected as children as a body could not be taxable unit **(SB)** 177
*——*S. 54*—Account book of firm produced before Income-tax Officer in course of income-tax proceedings — Even partners are not entitled as of right to production or inspection of it from Income-tax Officer 276 (1)
Insolvency—Adjudication—Application — Date of admission of—What is stated : 88*a*

Interest — Prior to suit, when payable explained 429*b*

Interest Act *(32 of 1839), S. 1* — Date of payment — Court can find it out from construction of document 429*c*

——*S. 1* — Applicability of — Existence or non-existence of agreement to pay interest is irrelevant in applying provisions of Act 429*d*

——*S. 1* — "Certain time" — When it is payable at certain time — Test explained 429*e*

——*S. 1, Proviso* — Equitable jurisdiction of Courts to grant interest — Partition — Party liable to pay certain sum to another party on taking particular share — Enjoyment of such property by such party but failure to pay amount — Other party held may be awarded interest 429*f*

Interpretation of statutes — Court should adhere to grammatical and ordinary meaning of words used 558*b*

——Same word can be construed in different parts of same Act in different senses if sufficient reasons exist 495*d*

——Statutes concerning procedure apply to pending proceedings unless such operation is excluded — No litigant has vested right in procedure 474*d*

——Test for seeing whether rules are ultra vires or intra vires stated 466*a*

——Ejusdem generis rule—The rule should not be applied when context makes clear that it was intention of the Legislature that general words should be construed generally 462*b*

Jurisdiction—Want of—Test laid down — Debtor residing in Tanjore—False statement in affidavit and application as to residence in Madras—Madras High Court adjudicating debtor—Order held not nullity—Order held not vitiated by fraud 675 (2)

——Immovable property in foreign territory — British Court will not entertain suit affecting property — Nor will British Court recognize foreign judgment adjudicating title to immovable property within British jurisdiction 614*b*

Land Acquisition Act *(1 of 1894), Ss. 15 and 4 (1)* — Sale deed more than six years prior to notification under S. 4 (1) — Price of sites in locality increasing by reason of fresh amenities — Sale deed cannot furnish basis for fixing market value of land 739*a*

——*S. 15* — Property covered by sale deed situated about half mile from sight to be acquired — Sale deed is not proper criterion of value 739*b*

Land Acquisition Act

——*S. 15* — Capitalization — Net annual value of property should be considered: 739*c*

——*S. 15* — Valuation of property to be acquired — No evidence as to number of years purchase to be adopted—Twenty years' purchase should be adopted 739*d*

——*S. 15*—Market value of land — Ascertainment of — Definite material not forthcoming — Mode of fixing value indicated 739*e*

——*S. 15*—Sale deed executed shortly after notification for acquisition admitted with Government counsel's consent—Its admissibility cannot be questioned—Even otherwise, it is admissible and can be taken into consideration under S. 15 665

——*Ss. 15, 23 and 24*—Lessee of land from East India Company for 99 years—Acquisition of land by Government — Market price of lessee's interest in land is his lessee's interest plus added value of prospect of having land converted into ryotwari tenure at end of lease under Madras Government Order of 28th October 1898 under which lessee cannot as of right have leasehold converted into ryotwari tenure 596

* **Landlord and tenant** — Rights of landlord—Act of stranger resulting in permanent diminution of water supply to lands in possession of tenant—Landlord is entitled to sue 352*b*

** **Legal practitioner** — Professional misconduct — Tutoring of witness inside or outside Court amounts to professional misconduct — It is all the greater when done inside Court in spite of warnings **(SB)** 701

——Person appearing as counsel in case should not give evidence as witness in same case—If he wants to give evidence, he must retire from case as counsel **(SB)** 691*a*

——Professional misconduct—Misrepresentations made by counsel in open Court but Court knowing real facts not misled — No charge should be made **(SB)** 691*b*

——It is improper for pleader or advocate to advance money to his client at any time for purposes of action in which he is engaged —Since pleader had acted in good faith in financing his client's litigation no action held was called for **(SB) 553

Legal Practitioners Act *(18 of 1879), S. 13 (f)*—Malicious and defamatory allegations by pleader against Judge held amounted to professional misconduct and constituted "reasonable cause" within S. 13 (f) **(SB)** 630*b*

——*S. 14*—Pleader committing misconduct in course of his professional duty in subor-

Legal Practitioners Act
dinate Court—Such Court can frame charge and inquire into misconduct **(SB)** 691*c*
——*S. 14* — Finding that allegations were false and were result of animosity is of fact —It cannot be challenged in reference to High Court under S. 14 **(SB)** 630*a*
Lessor and lessee — Lessee to construct building on land leased — Lessor to pay market value of building at time of resuming possession—Method of valuation — Value of building must be taken to be constructional value — No special value can be placed by reason of building being cinema hall : 156*a*
Limitation Act *(9 of 1908)* — Article of Limitation Act under which suit is alleged to be barred must be specified in written statement—Practice of not disclosing Article in written statement deprecated 386*a*
——*S. 3*—Limitation—Exemption from — Court cannot invent new ground not recognized by statute — Rights of parties subjected to adjudication by Court—Limitation for other suits based on those rights cannot necessarily be computed from date of their final determination 487*c*
——*Ss. 4 and 12* — Construction — S. 12 assumes that time requisite for obtaining copy of decree must begin before prescribed period is over—S. 4 presupposes that prescribed period has expired and cannot extend period prescribed under Act — Application for copy of decree made under S. 4 on date on which Court reopened—Extension granted by S. 4 cannot be combined with extension sought under S. 12 604*a*
——*S. 5*—Order refusing to excuse delay under S. 5—No second appeal lies 604*b*
——*S. 5* — Court has discretion to excuse delay under S. 5 — Court holding that no sufficient grounds existed for excusing delay —Decision cannot be interfered with under S. 115, Civil P. C. 604*c*
——*S. 5* — Words "sufficient cause" must be liberally construed—Existence of circumstances mentioned in S. 14 constitutes "sufficient cause" within S. 5 170
——*S. 14*—Defendant executing pronote in plaintiff's favour in 1929—Plaintiff in 1932 filing petition to adjudicate defendant as insolvent on ground that alienation by defendant of greater portion of his property amounted to fraudulent preference and was intended to defeat interests of other creditors—Petition dismissed in 1939 as facts not proved — Suit on pronote in 1940 — S. 14 held did not save limitation 713*a*
——*S. 14*—Application by Official Receiver to set aside transfers by insolvent under

Limitation Act
Ss. 53 and 54, Provincial Insolvency Act, dismissed — On appeal by Official Receiver District Judge directing that proper remedy was suit by creditors under S. 53, T. P. Act, for declaration of transfers as void—Suit by *A*, one of creditors under S. 53, T. P. Act—*A* claiming to deduct time spent in prosecution of appeal before District Judge—S. 14, Limitation Act, held did not apply — Suit under S. 53, T. P. Act, held could have been filed during pendency of insolvency proceedings 483*c*
——*S. 14*—Insolvency proceedings whether outside S. 14 *(Quære)* 483*d*
*——*S. 19*—Father and son executing pronote—Statement of family liabilities including pronote prepared by son on behalf of himself and his father—Statement initialled by father on behalf of himself and as agent of son, as acknowledgment of its correctness —Pronote subsequently indorsed by payee to plaintiff — Suit on pronote by plaintiff against son after father's death—Statement held amounted to acknowledgment of liability within S. 19 — Initialling of statement by father held full compliance with S. 19—Statement held extended limitation against son as well—Plaintiff held entitled to recover amount due under pronote : 51 M. L. J. 414=('26) 13 A. I. R. 1926 Mad. 827=96 I. C. 700, *OVERRULED* 680
——*S. 19*—Mortgage—Preliminary instalment decree — Payment of instalment does not amount to acknowledgment 581*b*
*——*S. 19* — Acknowledgment — Test — Words used alone should be considered — Words at back of pronote "paid Rs. . . . towards this promissory note and endorsed the payment hereon" constitute acknowledgment **(FB)** 353*b*
——*S. 19* — Composition deed signed by insolvent filed in insolvency Court held amounted to acknowledgment 327*a*
*——*S. 19, Arts. 111 and 132* — Person having two separate and distinct remedies arising out of one and same transaction — Acknowledgment to save one of remedies will not save other also—Vendor taking promissory note from vendee for unpaid sale price — Acknowledgment of liability under promissory note cannot be treated as acknowledgment in respect of vendor's lien 167
——*Ss. 19 and 20*—Pronote—Endorsement on—Amount paid towards pronote—Endorsement not valid under S. 20 but sufficient acknowledgment under S. 19 146

Limitation Act
——*S. 20* — Payment by debtor without specification does not constitute acknowledgment of liability **(FB)** 353*a*
——*Ss. 20 and 19*—Distinction—Mortgage —Payment by mortgagee after he has parted with mortgaged property saves right of suit against purchaser of equity of redemption 200*a*
——*Ss. 21 (3) (b), 19*—Manager of Hindu joint family can acknowledge debt binding on family even after his insolvency 721
——*S. 21 (3) (b)* — Pronote by mother as guardian of her minor sons—One son attaining majority — Payment by mother subsequently does not bind even other minor son 663
——*Arts. 2, 36, 19 and 120 and S. 24* — Mere allegation that person acted or omitted to act in pursuance of enactment is not enough to attract Art. 2—Act found to have been done in pursuance of enactment—Art. 2 must apply—Suit by plaintiff against police officers for damages for wrongful confinement and wrongful restraint — Plaintiff found to have been wrongfully restrained—Defendants found to have acted under S. 54, Criminal P. C., and S. 21, Madras District Police Act—Art. 2 and not Art. 19 or Art. 36 held applied—Limitation held started when wrongful restraint took place and not when injury (illness) resulted therefrom — S. 24 held inapplicable 539*k*
——*Art. 49* — Plaintiff entrusting specific moveable property to defendant on understanding that it would be returned — Suit to recover property or value — Limitation starts on defendant's refusal to return property 303
——*Art. 62* — Applicability — Defendant receiving money on his own account and not on behalf of plaintiff—Art. 62 does not apply 386*c*
——*Art. 120* — Parties divided in status—One of them continuing in actual possession of property — Demand for division of that property — Person in possession not objecting—He is liable to account to other sharers for their shares of income of property—Suit for share of income — Art. 120 applies — Plaintiff is entitled to share in income not merely for six years prior to suit but from date of division in status 514
—— *Arts. 120, 89, 62, 145 and 48A* — Bank advancing loan to *A* — *A* executing pronote and lodging certain shares which he held in Bank as security for loan—After *A's* death Bank selling shares, adjusting amount due to them and keeping balance in suspense account — Notice of sale not given—Suit by *A's* wife against bank for accounts and for return of balance—Relation between *A* and bank held of pawnor and pawnee and not of principal and agent — Sale without notice held did not terminate relationship — Suit for accounts not being provided for by any other Article held governed by Art. 120 — If suit were to recover shares in specie from bank or from their transferee Art. 145 or Art. 48A held would have applied 386*b*
——*Art. 144* — *A* in possession of suit property as trespasser since 16th July 1918 — *B* going into possession on strength of his own title to property on 9th February 1930 — *A* suing under S. 9, Specific Relief Act, obtaining decree and restored to possession on 4th September 1931 — Title suit by *B* on 24th November 1931 — Period between 9th February 1930 and 4th September 1931 during which *B* had both title and possession held could not be ignored — Suit held within time — Decree under S. 9, Specific Relief Act, held different from erroneous decree for possession based on title 728
——*Art. 144* — Sale for arrears of rent — Auction purchaser obtaining receipt of delivery of property from Revenue Inspector without physically evicting tenant—Suit for possession within 12 years of delivery of receipt is in time 698*b*
*——*Art. 144* — Possession to be adverse must be adequate in continuity, publicity and extent to show that it is adverse to competitor — Property held by Mahomedan family — Some co-owners usufructuarily mortgaging specific items of property—Possession of mortgagee becomes adverse to other members of family from moment of his entry into possession and not from date of ouster to their knowledge—Suit by other members of family for possession of their share at end of 12 years of mortgagee's possession is barred by Art. 144 — Mortgagee acquires interest of usufructuary mortgagee and not full title : 27 M. L. J. 600=('15) 2 A. I. R. 1915 Mad. 447 = 25 I. C. 573 ; I.L.R. (1940) Mad. 245 = ('40) 27 A. I. R. 1940 Mad. 91 = 190 I. C. 42 ; 20 M. L. W. 122=('24) 11 A. I. R. 1924 Mad. 741=78 I. C. 37 ; 42 M. L. W. 798=('35) 22 A.I.R. 1935 Mad. 1059 = 159 I. C. 1021 and 52 M. L. J. 203 = ('27) 14 A. I. R. 1927 Mad. 111 = 99 I. C. 158, *OVERRULED*
(FB) 622*b*
——*Art. 147*—English mortgage—Suit for foreclosure or sale falls within Art. 147 628*b*

Limitation Act
——*Art. 180* — Previous petition dismissed for no fault of party — Subsequent petition must be treated as continuation of previous one 718
——*Art. 181*—Preliminary mortgage decree directing payment by instalments—Decree-holder on any default entitled at his option to sell mortgage property for instalments remaining unpaid — New cause of action accrues on every fresh default 581*a*
——*Art. 182* — Execution application returned for amendment — Application not represented within time fixed by Court — Order returning application held not wrong — Application held could not be deemed to be pending 307*b*
——*Art. 182 (5)* — Whether "final order" in Art. 182 (5) means last order or order putting end to execution application *(Quære)* 495*e*
——*Art. 182 (5)*—Final order — Meaning of explained — Order requiring applicant to do something so that Court may proceed with application is not final order 216*a*
Local Authorities Loans Act *(9 of 1914), S. 3* — Panchayat Board borrowing money from plaintiff for purpose falling under S. 3, Local Authorities Loans Act, without Local Government's sanction as required by rules framed under Act—Contract is void — But plaintiff is entitled to restoration of his money under S. 65, Contract Act—Plaintiff can amend his plaint so as to claim relief under S. 65, Contract Act — Purpose not falling under S. 3, Local Authorities Loans Act of 1914 — Plaintiff is not entitled to equitable relief under S. 65, Contract Act—Burden to show that S. 65, Contract Act, does not apply is on Panchayat Board : 111
Madras Agriculturists Relief Act *(4 of 1938)* — Rent — Interest due must be included in rent for purpose of the Act 419(1)*b*
——Provisions of Act are not invalid even though they may affect rights of parties under Negotiable Instruments Act 169*c*
——*S. 3* — Assignee of pronote is creditor within Act 169*b*
——*S. 3 (i)* — Marumakathayam family — Individual member himself constituting tavazhi has saleable interest in family property—Family property agricultural land—Member if not otherwise disqualified can claim benefits of Act — Groups of individual members each constituting sub-tavazhi female ancestor of which living—They have as individuals no saleable interest in family property 456*b*
Madras Agriculturists Relief Act
——*S. 3 (ii)* — Usufructuary mortgagee of agricultural land would prima facie be an agriculturist unless disqualified under one of the provisos to S. 3 (ii) 296*d*
——*S. 3 (ii)*—Person claiming benefits of Act must show himself to be agriculturist within S. 3 (ii) — Original debt incurred by agriculturist — Transferee is not necessarily entitled to benefits of Act 200*c*
——*S. 3 (ii), Proviso (A)* — Firm or association of persons assessed to income-tax — Individual member comes within S. 3 (ii), Proviso (A) 428*a*
——*S. 3 (ii), Proviso (B)*— Assessment to property tax under Madras Local Boards Act not challenged in appeal within time — Sch. 4 of aforesaid Act does not empower President or Panchayat to cancel assessment —Expunction of assessee's name from registers by Panchayat cannot affect assessee's legal position—Assessee must be deemed to be assessed within S. 3 (ii), Proviso (B), Madras Act 4 of 1938 — Under S. 3 (ii), Proviso (B), Madras Act 4 of 1938, Court cannot question legality of assessment 598
——*S. 3 (ii), Proviso (B)*—Police pensioner paying profession tax does so on income from profession other than agriculture: 449*a*
——*S. 3 (ii), Proviso (B)* — Applicability —Only income in respect of which agriculturist has actually been assessed to profession tax under District Municipalities Act should be considered — His share of income of firm separately assessed to profession tax should be excluded 382*a*
——*S. 3 (ii), Proviso (C)* — Property tax paid by receiver of mortgaged property is on behalf of mortgagor — Mortgagor cannot claim to be agriculturist — Position of receiver explained 602
——*S. 3 (ii), Proviso (C)* — Tax need not have been imposed throughout period of two years 533*a*
——*S. 3 (ii), Proviso (C)*—"Aggregate"—Meaning explained 533*b*
——*S. 3 (ii), Proviso (C)* — "Is" must be read as "was" 410*a*
——*S. 3 (ii), Proviso (C)* — Property in municipal register in third person's name—Tax held recovered from real owners 410*b*
——*S. 3 (ii), Proviso (D)* — Proposal to enfranchise inam falling through at time of Inam Commission — By subsequent agreement with zamindar mokhasadar paying certain amount annually to zamindar as cist—Payment is in nature of quit rent or kattubadi—Mokhasadar is landholder : 733*a*

Madras Agriculturists Relief Act
——*S. 3 (ii), Proviso (D)*— Partition suit —Payment of land revenue by receiver is payment by persons entitled to properties in respect of which it is paid 456*g*
——*S. 3 (ii), Proviso (D)* — For purposes of S. 3 (ii), Proviso (D), total payments of land revenue by jenmi must be taken into consideration 120
——*Ss. 3 (v), 8 Expl.* — Creditor does not include person beneficially entitled to amount lent 143*a*
——*S. 4 (c)* — "By way of loan or otherwise" explained — Sum payable to local authority as rent—Whether rent is contractual or under Estates Land Act — Sum is covered by Exemption in S. 4, cl. (c) : 462*a*
——*Ss. 4 (d), 8 and 9*—Mortgage debt on security of municipal house alone existing on 1st October 1937—Preliminary mortgage decree to enforce aforesaid debt also existing when Act came into force — Addition of security of agricultural lands after Act cannot create retrospectively debt contracted on security of property other than municipal house property so as to exclude S. 4 (d) : 34
——*S. 4 (f)* — Object — Scope — Surety guaranteeing due discharge of his duties by trustee—Trustee committing breach—Surety is entitled to have his liability scaled down under Act 202
——*S. 4 (g)* — Security bond in favour of Hindu widow's husband's family — Family assigning bond to widow in lieu of maintenance —Debtor's liability does not become one in respect of maintenance within S. 4 (g) 385
——*S. 4 (h)* — Female assignee from male assignor is entitled to exemption 662(2)
——*S. 6*—Scope explained 402
——*Ss. 7, 23, 19, 13 and 10*—Construction of S. 7—Debtor claiming relief during trial of suit—He is entitled to relief if he was agriculturist on 1st October 1937 and 22nd March 1938—He need not be agriculturist on date when relief was claimed 726(2)*b*
——*Ss. 7 and 12* — Money paid after Act appropriated towards interest—Money in excess of interest as scaled down — Excess cannot be recovered in absence of plea and proof of mistake 655
——*S. 7* — Mortgagor agriculturist — Properties purchased subject to mortgage by non-agriculturist are liable only to extent of scaled amount 527
——*S. 7* — Sale of part of mortgaged property to non-agriculturist with liability to pay off mortgage — Suit for redemption by mortgagor agriculturist—Whole debt including amount in respect of property in hands of purchaser held should be scaled down 525*a*
——*Ss. 8 and 9* — Suit note renewal of earlier note of 1927 for Rs. 2100 — Note of 1927 renewal of other four notes one of them being of 1917 for Rs. 700 which itself was renewal of note of 1906 for Rs. 250 — Mode of scaling down suit note stated: 456*a*
——*S. 8*—Bond charging lands executed in discharge of promissory notes — Lands purchased with liability to pay amount due under bond — Purchaser cannot scale down debt with reference to promissory notes: 412
——*S. 8*—Member of Hindu joint family joining with manager in renewal of note executed by manager alone is also entitled to scale down debt under S. 8 298
——*Ss. 8, 9*—Re-opening of settlements or re-appropriation of payments under S. 9 — When justified stated 297
——*Ss. 8, 19 and 23* —Mode of construing Act, stated 271*b*
——*S. 8*—Court dealing with actual proceedings in suit — Defences are open not merely under Act but also under general law 134*b*
——*S. 8*—Debt due by *A* to *B* cancelled and debt due by *A* to *C* substituted — *B's* separate obligation to *C* also discharged—*A's* debt to *C* is not renewal of debt to *B* within S. 8 12
——*S. 8 (1)*—"Outstanding" means "unpaid" — Interest unpaid as on 1st October 1937 is liable to be cancelled 551*a*
——*S. 8, Explanation* — Promissory notes executed by father—The debts allotted to son on partition and son executing fresh document —Son cannot claim to scale down debts 143*b*
——*S. 8, Explanation*—Debt due by *A* renewed by later debt due jointly and severally by *A* and *B*—*B's* liability is not renewal of antecedent debt though *A's* liability is 134*a*
——*S. 9*—Decree for costs—Scaling down of explained 729*b*
——*Ss. 9 and 8*—Suit by plaintiff for Rs. 232-11-0 being balance due under pronote dated 11th April 1937 for Rs. 415-7-3 and subsequent dealings—Indebtedness starting early in 1932—By 1st October 1932 Rupees 327-15-6 advanced — Between 1st October 1932 and commencement of Act further advances amounting to Rs. 792-14-3 made —Whole of sums advanced before 1st October 1932 held must be deemed to have been discharged before Act came into force—

Madras Agriculturists Relief Act
Court held was concerned only with debt starting on 11th April 1937 to be scaled down under S. 9 673
——*Ss. 9 and 8*—Family debt renewed in various documents by different coparceners —Any member of family liable for that debt can get it scaled down on basis of original liability by which he was bound throughout all renewals—Liability of executant coparcener can be traced back to earlier documents 482
——*Ss. 9 and 8*—*S* in 1931 executing note in favour of *P* undivided brother of *F*—Partition between *P* and *F* in 1932 — In 1933 *S* executing fresh note in favour of *F* in discharge of note of 1931—*F* assigning note of 1933 to *P* in 1937—Suit by *P* on note of 1933—Debt under suit note held could be scaled down under S. 9—Note of 1933 held not renewal of note of 1931, creditor not being same—Dismissal of suit on account of *P's* failure to produce note of 1931 held erroneous—Error held justified interference in revision 280
——*Ss. 9 and 8* — Construction — Under S. 9, principal of debt cannot be treated as different from principal of contract sued on —Nor does S. 9 warrant procedure analogous to that of S. 8 except for reducing debts originating before 1st October 1932 204(2)
——*S. 10 (2) (i)*—Mortgagee need not be in physical possession for purposes of S. 10 (2) (i)—Usufructuary mortgage—Lease back to mortgagor—Mortgagee must be deemed to be in possession 507*b*
——*Ss. 10 (2) (iii), 8 and 9*—Liability excluded from operation of Ss. 8 and 9 is present liability under which debtor is indebted at time of his application—Debt on which decree was passed carrying interest not more than 9 per cent—Fact that debts of which it was renewal carried interest over 9 per cent. cannot exclude it from operation of S. 10 (2) (iii) 105
——*Ss. 14 and 3 (1)*—Section 14 applies to Marumakathayam Hindu family 456*c*
——*Ss. 14 and 3 (1)*—Word "member" in S. 14 means individual or group of individuals entitled to share at partition—Group of individuals is person within S. 3 (1)—Hindu Marumakathayam family — Subtavazhi consisting of group of individuals is person within S. (8) (1) and when entitled to share in family property is "member" within S. 14 456*d*
——*S. 14*—Mode of application of S. 14 indicated—Procedure in applying S. 14 to

Madras Agriculturists Relief Act
Hindu Marumakathayam family stated 456*e*
——*S. 14* – Object—S. 14 is concerned only with liability of family property—It has nothing to do with personal liability or separate property of member of family: 456*f*
——*S. 14* — Words "debt" and "family debt" in S. 14—Meaning—*A* and *B* brothers members of joint Hindu family executing pronote for family debt—Partition—Liability under pronote assigned to *A*—Creditor obtaining decree against *A* and *B*—*B* agriculturist taking no steps to scale down debt —*A* non-agriculturist claiming that debt being family debt within S. 14 decree could be executed against his proportionate share of debt—Debt under decree held not "family debt"—*A* held entitled to no relief 375(2)
——*S. 15*—Landlord's interest undivided—Part of tenant's interest assigned—Assignee can get rent scaled down only on paying rent of entire holding—Division of landholder's interest corresponding with division of tenant's interest — Question whether tenant can get rent scaled down by payment only of rent due to person entitled thereto of items assigned to him explained: 534(2)*a*
——*S. 15*—Deposit made subsequent to 30th September 1939—Circumstances under which deposit may be treated as made on 30th September 1939 stated 534(2)*b*
——*Ss. 15 and 3 (ii), Proviso (D)*—Malabar tarwad paying sufficient land revenue to disqualify it under S. 3 (ii) proviso (D)—Partition suit—Receiver appointed—Properties not divided by metes and bounds—Application by receiver under orders of Court on behalf of all tenants-in-common for relief under S. 15 held competent 441
——*S. 15*—Procedure for amendment or discharge of rent decree is not execution proceeding and no appeal lies 413(2)*a*
——*S. 15*—Decree in suit by jenmi for redemption of kanom passed in 1937 before Act modified by High Court after Act by reducing amount decreed to defendants under S. 6 (2), Malabar Compensation for Tenants' Improvements Act after allowing full set off to plaintiff for arrears of rent—S. 15 not being retrospective held did not apply 307*f*
——*Ss. 15 and 3 (4)*—Scope of S. 15—Agraharam in Kalahasti zamindari—Zamindar must be regarded as "landholder" of agraharam—Fact of proprietor of agraharam also being regarded as landholder by virtue of amending Act 18 of 1936 does not affect zamindar's position as landholder of

Madras Agriculturists Relief Act
agraharam — Jodi payable by proprietor of agraharam to zamindar comes within purview of S. 15 56
——*S. 15 (4)*—Application under—Plea for reduction of rent, when can be entertained explained 649
——*S. 15 (4)*—Amount of rent already determined by decree of civil Court—Subsequent application under S. 15 (4) in revenue Court does not lie 78
——*S. 17*—Object—Scope — S. 17 applies to all suits against defaulting tenants whether agriculturist or not 79*a*
——*Ss. 19 and 15*—Decree passed for contractual rent which alone could be claimed when Court dealt with matter—Amendment of S. 3 (2) (d), Madras Estates Land Act, by Act 18 of 1936 cannot change character of rent or relations of parties at time of previous adjudication — Decree can be scaled down only as decree for debt and not rent—Mode of scaling down decree indicated : 746
——*Ss. 19 and 20* — Debtor's conduct obstructive—Still Court must grant stay—No conditions for stay can be imposed — Application under S. 19 can be made at last minute — Holding sale in disobedience of S. 20 is material irregularity 731
——*S. 19*—Payment by mortgagor pending suit by mortgagee appropriated by Court in mortgage decree dated 3rd October 1936 to interest due on mortgage — Parties not objecting—Appropriation is binding on parties and cannot be re-opened 729*a*
——*S. 19* — Relief sought during trial of suit itself—S. 19 does not apply 726 (2)*a*
——*S. 19* — Proceeding under S. 19 is not proceeding in execution of decree but one which gives new statutory remedy 610*a*
——*S. 19* — Proceedings under S. 19 when can be regarded as separate and not mere continuation of suit, stated 610*b*
——*S. 19*—Decree amended — Appeal lies but order refusing to amend is not appealable 610*c*
——*S. 19* — Proceedings under S. 19 after Court comes to conclusion that decree should be amended are proceedings in suit — Presidency Small Cause Court passing decree without contest — Court amending decree under S. 19 after contest—Judgment-debtor can file new trial application under S. 38, Presidency Small Cause Courts Act 610*d*
——*S. 19*— Decree — Application to scale down—Uncertified payments can be proved 597
——*Ss. 19, 20* — Preliminary decree in mortgage suit before Act—Final decree after

Madras Agriculturists Relief Act
Act — Failure to take plea in final decree proceedings is no bar to such plea being taken subsequently 418*b*
——*S. 19* — Appellate decree passed after Act cannot be scaled down under S. 19 291*a*
——*S. 19* — Appellate decree passed after Act affirming decree of trial Court passed before Act—Appellate Court's decree supersedes lower Court's decree — Decree to be executed is decree of appellate Court and not of Court below — Application under S. 19 should be made to appellate Court 291*b*
*——*Ss. 19, 9*—Agriculturist surety is entitled to benefit of procedure under S. 19 with reference to date on which his liability was incurred 149
——*Ss. 19, 8, 9* — Promissory note dated 4th January 1931 and letter of guarantee dated 7th August 1933—Decree against both executants — Remedy of each for scaling down explained 133*a*
——*S. 19* – Execution—Plea by surety that full amount due from judgment-debtor has been paid cannot be adjudicated 133*b*
——*S. 19*—Compromise decree can be scaled down with reference to original principal 133*c*
——*S. 19*—Decree-holder given leave to bid and set off but sale not confirmed — Decree is not satisfied and application under S. 19 can be filed 119
——*S. 19*—Applicability explained 79*b*
——*S. 19 Proviso*—Proviso relates only to costs originally decreed—Compromise decree not separately allocating payments towards costs—Court cannot reopen compromise and act under proviso 133*d*
——*Ss. 20 and 19*—Application under S. 19 — Notice under S. 20—Proceedings under O. 21, R. 90, Civil P. C., must be stayed : 727
——*S. 20* — No appeal from dismissal — From the dismissal of an application under S. 20, there is no right of appeal 418*a*
——*S. 20* — Judgment-debtor can make application at any stage—Court has no discretion to reject it on ground that judgment-debtor had ample opportunities earlier to do so 398 (1)*a*
——*S. 20*—Section does not permit passing of conditional order 398 (1)*b*
——*S. 20*—S. 20 does not apply to sales by Official Receiver 254*a*
——*Ss. 20 and 21*—Official Receiver about to sell insolvent's property subject to mortgages — Mortgages liable to be scaled down under Act—Application to Insolvency Court to direct Receiver to suspend sale till com-

Madras Agriculturists Relief Act
pletion of scaling down process can be made — Sale by receiver in disobedience of direction can be set aside under S. 68, Provincial Insolvency Act 254*d*
——*S 20, Proviso* — Applicability — Execution of decree stayed under S. 20—Application under S. 19 filed more than sixty days after stay and contested by decree-holder—Decree amended — Executing Court must execute decree as amended 757*b*
——*S. 21* — Applicability — Words "has been adjudicated" in S. 21 — Meaning of— In order to come under S. 21, applicant must be insolvent at time of his application : 523*a*
——*Ss. 21 and 20*—Debts due by insolvent — Scaling down — Procedure analogous to that for reduction of other debts should be followed — Debts not covered by decree or suits in other Courts—Insolvency Court can entertain application under S. 21 to scale down debts and direct receiver to revise schedule according to result or stay realisation of assets—Insolvent and Official Receiver both should be made parties to application under S. 21—But Court is not bound to stay administration of estate or sale of property subject to mortgage until debts are scaled down 254*b*
——*Ss. 21 and 20* — Sale of insolvent's property subject to mortgage advertised by Official Receiver — Application by insolvent under S. 21 to Insolvency Court without impleading Official Receiver to declare him agriculturist, scale down his debts and stay sale — Insolvent also applying to Official Receiver to stay sale under S. 20 and mentioning his application filed before Insolvency Court — Receiver refusing stay and holding sale on 27th September 1938 — Application by insolvent under S. 68, Provincial Insolvency Act, to set aside sale — Application to Insolvency Court without impleading receiver for scaling down all debts including mortgage debts held not maintainable—Application to receiver under S. 20 for stay of sale held incompetent — Sale by Receiver held valid 254*c*
——*S. 23* — S. 23 applies to sales in execution of decrees under Madras Estates Land Act 741*a*
——*S. 23* — Rent decree — Judgment-debtors' mortgagee applying under S. 23 and impleading one of judgment-debtors as counter petitioner — On objection being raised as to mortgagee's competency to file application Court allowing judgment-debtor to be transposed as petitioner—At time of transposition, application by judgment-debtor would have

Madras Agriculturists Relief Act
been time-barred — O. 1, R. 10, Civil P. C., held not applicable—Court held had no jurisdiction to order transposition 708
——*Ss. 23 and 4 (h)* — Decree-holder woman — Another mortgage debt in her name — It is open to her to adduce evidence that she is only benamidar 388
——*S. 23*—Property attached in execution of money decree—Property sold in disregard of attachment — Purchaser cannot be said to be liable to pay decree debt and is not judgment-debtor — He cannot apply under S. 23 even if he be agriculturist 323*a*
——*S. 23* — Words 'entitled to benefits of Act' in S. 23—Meaning of, explained : 323*b*
——*Ss. 23, 7 and 19* — In view of Ss. 7 and 19, S. 23 cannot apply to decree fully satisfied before 22nd March 1938 323*c*
——*S. 23* — No appeal lies from order on application under 296*a*
——*S. 23* — Properties sold in execution of mortgage decree — Mortgagor selling equity of redemption pending mortgage suit cannot be said to have interest in property within Section 23 296*b*
——*S. 23* — Agriculturist debtor must own interest at time of sale 296*c*
——*S. 23* — S. 23 applies to sales held between 1st October 1937 and 22nd March 1938 — It does not apply to sales held after Act 278
——*S. 23* — Sale in execution of decree set aside under S. 23 — Purchaser is entitled to profits of land between date of his obtaining possession and re-delivery of land on cancellation of sale 271*a*
——*S. 23* — Decree-holder purchasing property at sale in execution of his decree — Sale set aside under S. 23—Decree amended — Decree-holder seeking execution by resale of property — Claim by judgment-debtor that he was entitled to profits earned by decree-holder between date of his obtaining possession as purchaser and date of cancellation of sale is not claim arising out of execution — Claim held could be agitated only in separate proceeding 271*c*
——*Ss. 23 and 19*—Applicability—Decree passed by foreign Court — Sale in British India in execution of decree — Sale cannot be set aside under S. 23 204(1)
——*S. 23* — Words "property, in which agriculturist had interest has been sold" in S. 23 — Meaning explained 102
——*S. 28, Rules under, R. 9* — R. 9 is properly framed 466*b*
——*S. 28 (1) and (2) (b) and (c), Rules under, R. 9* — Invalidity of R. 9 cannot

Madras Agriculturists Relief Act
render whole body of rules invalid — Even without R. 9, procedure under rules would be subject to revisional control of High Court 362c

——*S. 28 (1) and (2) (b)and (c), Rules under, R. 2* — R. 2 is not ultra vires — It does not offend against provisions of O. 2, R. 2 or O. 34, Civil P. C. or S. 42, Specific Relief Act 362d

Madras Borstal Schools Act *(5 of 1926), S. 2* — Adolescent girls cannot be sent to a Borstal School 674a

Madras City Municipal Act *(4 of 1919), S. 54* — Elected person admitting vacancy by his non-attendance — Commissioner is not bound to take action under S. 54 and can proceed to take steps to fill vacancy 348a

——*S. 100* — Building owned by one and same person — Different portions of building cannot be assessed in different names because they are occupied by different persons 346

Madras City Police Act *(3 of 1888), S. 3 (as amended by Act 13 of 1929)*—Keeping of betting slips on horse races in house makes it common gaming house—Fact that at time of raid no betting was actually going on does not in itself show that house is not common gaming house 357(2)b

——*Ss. 37 and 45 (as amended by Act 13 of 1929)* — Betting organisation conducted by accused 1 having no particular abode — Accused 1 employing agents to offer and accept bets — On night of raid accused 1 and 5 with others found in house assisting accused 1 in making calculations with regard to bets laid on recent horse race — House taken on lease by accused 5 — Accused 5 shown to have taken bets — Accused 1 held guilty not of running common gaming house but under S. 37 (3) read with S. 109, Penal Code—Calculators held could not be said to assist accused 1 or 5 in running common gaming house and hence committed no offence 354b

——*S. 37 (2) and (3) and Ss. 45 and 46 (as amended by Act 13 of 1929)*—Persons found calculating in common gaming house are not guilty of any offence 357(2)c

——*Ss. 37 (2), 45 and 43 (as amended by Act 13 of 1929)* — Accused and number of persons found in house taken on lease by accused—Betting slips and money connected with gaming found—Accused shown to have taken bets—Accused held guilty under Ss. 37 (2) and 45 354a

Madras City Police Act
——*Ss. 37 (2) and (3) and 45 (as amended by Act 13 of 1929)* — Accused convicted under Ss. 37 (2) and 45 — He need not be further convicted under S. 37 (3) 354c

——*S. 37 (3) (as amended by Act 13 of 1929)*—Agents of betting business found to have received bets on horse races which were being or had been held at time of raid of common gaming house are guilty under S. 37 (3) notwithstanding that they were not present there at time of raid 357(2)a

——*Ss. 37 (3) and 46 (as amended by Act 13 of 1929)* — Persons in common gaming house connected with actual betting in some way or other are guilty under Ss. 37 (3) and 46 357(2)d

——*Ss. 37 (3) and 47 (as amended by Act 13 of 1929)*—Money in accused's possession obtained as result of offences committed under S. 37 (3) can be confiscated 354e

——*Ss. 45 and 37 (2) and (3) (as amended by Act 13 of 1929)*—Lessee of common gaming house organising and conducting betting on horse races is guilty under S. 45—If betting was done outside house by agents he would not be guilty under S. 37 (2) but under S. 37 (3) read with S. 109, Penal Code 357(2)e

——*S. 45*—Accused 2 owning betting club used as common gaming house and formerly managing business—Subsequently his brother-in-law accused 1 organising and conducting business and accused 2 paying visits from time to time—At time of raid accused 2 found in house discussing with his agent about some payment—Accused 2 held properly convicted under S. 45 357(2)f

——*S. 51* — Fraud must be during betting or gaming and not prior or subsequent to it 437

——*S. 75* — Disorderly conduct — One month's rigorous imprisonment and fine of Rs. 25 held very severe—Fact that accused was fined for similar offence four years ago held not sufficient for imposing heavy sentence — Eight days' imprisonment before release on bail held sufficient 603c

Madras City Tenants' Protection Act *(3 of 1922), S. 1 (2)* — Act is not confined to area comprised in City of Madras at time of its commencement — Expression "city of Madras" includes Thayagarayanagar 334b

——*S. 11*—S. 11 is mandatory—Absence of offer of compensation in notice is fatal to suit—Non-service of copies of notice on Commissioners may be disregarded as mere irregularity 334c

Madras City Tenants' Protection Act
——*S. 11* — Plaintiff in notice under S. 11 making no distinction of suit land as let for building purposes and for cultivation—Plaintiff in suit claiming whole block of land as single item of property — S. 11 must be applied to suit land as whole 334*d*
***Madras Co-operative Societies Act** *(6 of 1932), S. 51 (1) (b)*—Registrar or Arbitrator appointed by him is "Court" within S. 52, T. P. Act—Registrar's or arbitrator's decision is "order" within S. 52, T. P. Act — Reference to Registrar in respect of immovable property under S. 51 (1) (b) — Mortgage pending reference — S. 52, T. P. Act, applies 24
——*S. 52* — Shutting door on face of sales officer of society while trying to enter house to attach property is not offence under S. 52 but one under S. 186, Penal Code—Trial of such offence by Second Class Magistrate held proper 552(2)*a*
Madras Debt Conciliation Act *(11 of 1936), Ss. 4 and 25* — Application by creditor must be in regard to his own debt: 612*b*
——*Ss. 7 and 9* — Application dismissed otherwise than under S. 7 — Further application does not lie 612*a*
——*Ss. 7, 17* — Application in compliance with Ss. 5 and 6 — Board has no power to dismiss it under S. 7 — If no settlement has been reached within 12 months it must be dismissed under S. 17 26
——*S. 9 (a)*—Joint Hindu family—Application by member for settlement of his own debts dismissed under S. 9 (a)—Joint family is not precluded from applying for settlement of all family debts 405(1)*a*
——*Ss. 10 (2) and 4* — Scope of S. 10 (2) —Any debt not included in creditor's statement is discharged under S. 10 (2) 738
——*Ss. 17 and 4*—Petition under S. 4 returned as not in order — Date of petition must be deemed to be date of representation 405(1)*b*
——*S. 25* — S. 25 only necessitates stay of execution proceedings—It does not prohibit executing Court from passing order under O. 21, R. 40 (2), Civil P. C. 389
Madras District Municipalities Act *(5 of 1920), Rules under, R. 7*—Auction by municipality for collecting dues from market — Highest bidder at auction contrary to agreement refusing to enter into formal contract prescribed by rules of municipality—Municipality cancelling auction and holding fresh one—R. 7 does not apply 481*a*
——*S. 3 (3)* — Compound-wall more than eight feet high is building by itself within

Madras District Municipalities Act
S. 3 (3)—But compound-wall less than eight feet high is not — Detached wall (not compound-wall less than eight feet high) is building within S. 3 (3) 256*a*
——*S. 69 (1) Proviso (as amended by Act 15 of 1933)*—Contract by municipality falling within proviso — Signature of Commissioner is sufficient 481*b*
——*S. 82 (2) Proviso*—Compound wall is part of building—Cost of constructing compound wall must be considered in valuing building under S. 82 (2) Proviso 256*b*
——*S. 83* — Shops at Madura temple held assessable to property tax 658
——*S. 93 and Sch. 4, R. 16* — Assessment under S. 93—Determination of class into which assessee's income falls under Sch. 4, R. 16—Income to which assessee is entitled as member of firm separately assessed cannot be considered 382*b*
——*Ss. 180 and 181* — Word "encroachment" in S. 180 — Meaning of — S. 181 deals with windows, etc., which in normal open position project over road — Window when fastened back not projecting over road nor when it was shut — Only in process of opening and shutting its panels swinging six inches beyond road — Momentary swinging of panels over portion of road in opening and shutting window held was not encroachment within S. 180 — Nor was it hit by Section 181 601
——*S. 182*—Applicability — S. 182 applies to private streets as well as to public : 531*b*
——*Ss. 182 and 313* — Encroachment on lane—Accused charged under S. 313 read with S. 182 and acquitted — Bona fide dispute as to ownership of lane in general and part of it encroached upon in particular — Order of acquittal held should not be interfered with — Municipality held should establish its rights in civil suit before taking further action in respect of lane 531*c*
——*Ss. 249 and 313* — Whether place of sale is coffee-house—Test — Building with considerable accommodation—Regular meals served — All paraphernalia of coffee-house found in building—Building is coffee-house 293*a*
——*Ss. 249 and 313*—Building licensed as meals hotel — Whether coffee also can be sold without further license *(Quære)*: 293*b*
——*Ss. 249, 313*—Plea held misunderstood 281 (1)
——*Ss. 249, 313* — Acquittal on ground of refusal not valid is not sustainable : 279 (2)
——*S. 347*—Municipality making complaint on printed form in general use—Particulars

Madras District Municipalities Act
of offence specified—Name of person to conduct prosecution filled in — Health officer recommending prosecution and Commissioner sanctioning it—S. 347 held complied with 347 (2)
——*S. 354 (2), Proviso* — Relief as to double taxation refused — Suit to recover profession tax paid under protest is not barred 661
Madras District Police Act *(24 of 1859), S. 21*—Word "lawfully" in S. 21 refers to issue of "orders or warrants" 539*g*
——*S. 21*—It is incorrect to say that S. 21 is applicable between police officers inter se and has no application when they are dealing with private individuals 539*i*
——*S. 47*—S. 47 does not authorise act but punishes acts against police officers 530 (2)*b*
——*S. 53* — Accused charged with making false complaint against police officer—S. 53 does not apply 530 (2)*a*
Madras Estates Land Act *(1 of 1908), S. 3 (5)*—Order under S. 3 (5)—No revision lies under S. 115, Civil P. C. 742 (2)
——*S. 3 (5)* — Land granted by zamindar in 1811 — Grant "sarva inam" not subject to jodi and in enjoyment of grantee at time of inam settlement — Melwaram held must have been granted to inamdar — Inamdar held land-holder within S. 3 (5) 677*a*
——*Ss. 3 (5) and 67 and S. 3, Rules under, R. 2* — Object is to provide machinery for smooth management of estate pending settlement of disputes by Court so as to enable rents falling due during pendency to be duly collected without being time-barred and to enable tenants to obtain valid discharge on payment of rent 487*a*
——*Ss. 3 (5) and 67 and S. 3, Rules under, R. 2* — Collection of rents and profits of estate by person recognised as landholder by Collector under Act—Suit by true owner for account and payment of rents and profits against landholder—Collection by landholder is not wrongful—Art. 109, Limitation Act, does not apply—Suit is governed by Art. 120, Limitation Act — Right to sue accrues each time rents and profits are received by landholder 487*b*
——*Ss. 3 (5) and 67* — When Court can grant interest independently of Interest Act — Suit by true owner for account and payment of rents and profits against person recognized as landholder under Madras Act—Plaintiff's claim held attracted Court's equitable jurisdiction to award interest 487*d*

Madras Estates Land Act
——*S. 3 (5)*—Several landholders—Collector can recognize one as landholder only in case of dispute between them and not where dispute is raised by raiyat 282*c*
——*S. 20A* — Appeal to District Judge against proceedings under S. 20A — No second appeal lies from order of District Judge 599
——*S. 30*—Single crop land—Raiyat raising second crop with landholder's water — Landholder is entitled to additional charge and can recover it as rent in revenue Court —Second crops raised with aid of well dug by raiyat—Landlord is not entitled to additional rent in absence of contract to that effect 747
——*S. 38 (1) (b)* — S. 38 (1) (b) refers to permanent failure of supply and not mere diminution in supply 352*a*
——*Ss. 52 (3) and 112*—Effect — Raiyat accepting patta can file suit under S. 112 contesting legality of sale for rent as stipulated — Suit by inamdar holding melvaram right against tenant for rent — Tenant can repudiate patta which he has accepted — Same principles apply to deposit under S. 15, Madras Agriculturists' Relief Act and tenant can object that rate of rent stipulated in patta is not correct rate—Court must determine correct rate 677*b*
——*S. 61*—Scope—Kattubadi—Arrears of — Rules of Interest Act apply, not S. 61, Estates Land Act 419(1)*a*
——*Ss. 75, 74* — Appeal to District Court from order of Collector under S. 74 — Collector's order affirmed — No further appeal lies either under Estates Land Act or under S. 100, Civil P. C., as order of District Court is not decree 73
——*Ss. 111, 112*—Applicability — Ss. 111 and 112 are not applicable to case of execution of rent decree passed by revenue Court 398(2)*b*
——*Ss. 111 and 112*—More than one landholders — One cannot initiate proceedings under Ss. 111 and 112 without joining others 282*a*
——*S. 112*—Suit in revenue Court — Costs therein cannot be recovered under S. 112 398(2)*a*
——*S. 117*—Sale in execution of rent decree — Personal notice to defaulter is not necessary 84*a*
——*Ss. 124, 163 and 163A (as amended by Act 8 of 1934)* — Landlord purchasing raiyati holding at rent sale and subsequently obtaining possession—Suit for mesne profits against person in occupation between sale

Madras Estates Land Act
and delivery of possession—Procedure under S. 163 alone is available—Civil suit for different remedy with enhanced period of limitation is not maintainable — Nor is separate suit merely for mesne profits tenable 148
——*S 125 (as amended by Act 8 of 1934)* —Amendment is not retrospective 84*b*
——*Ss. 125 and 127 (as amended by Act 8 of 1934)*—Rent decree—Execution — Sale of holding puts an end to landlord's charge in respect of arrears accrued due since decree at time of sale 84*c*

Madras Forest Act *(5 of 1882), S. 56* — Presumption under stated 25

Madras Gaming Act *(3 of 1930), Ss. 5 and 10* — Money seized from persons in gaming house — Under S. 5 prosecution need not prove that money was or even intended to be used for gaming—Magistrate can confiscate it if satisfied that it was seized on reasonable suspicion 287*a*
——*S. 5* — Person from whom money is seized need not be shown to have been gaming 287*b*

Madras General Sales Tax Act *(9 of 1939), Rules under, R. 11*—Amendment of rules cannot create offence retrospectively 736 (1)
——*Ss. 15 and 5*—Word "wilfully" in S. 15 does not qualify words "fails to submit a return"—Sale of hand woven cloth—Licence necessary under rules under Act—Seller not taking out licence — Subsequent exemption from taxation — Failure to submit return held rendered seller liable to fine 290

Madras Hereditary Village Offices Act *(3 of 1895), Ss. 7, 23* — Suit by dismissed village headman that order of dismissal is ultra vires on ground that rules had not been followed does not lie 127

Madras High Court, Civil Rules of Practice, *R. 129* — Application for copies struck off under R. 129 for non-deposit of stamp paper — Subsequent application to restore previous application—Court can restore former application and treat subsequent application as continuation of original application 369*a*

Madras High Court (Original Side) Rules, *O. 13, R. 19 and O. 18, R. 8* — Whether order of Court is judicial or ministerial —Test—Order of Master of the High Court refusing or granting leave to bid under O. 18, R. 8 is ministerial and not judicial — No appeal lies under O. 13, R. 19 595

Madras Hindu Religious Endowments Act *(2 of 1927), S. 44B*—Inam of land granted in time of Karnatic Rajas—Inamdars to guard Sikaram of temple by four men night and day — Annual income of inam land not more than Rs. 136—Grant not produced — Inamdars in statement to Inam Commission alleging "this land was given to our ancestors by the Rajas of Karnatic for watching tower of aforesaid temple" — Inamdars held entitled both to melvaram and kudivaram rights in land—Contrary statements in mortgage deeds executed by inamdars held immaterial: 578
——*S. 44B (2) (d) (i)* — Appeal under — District Collector can reverse Collector's order — But notice to respondents is condition precedent to District Collector's right to exercise jurisdiction 706*a*
——*S. 44B (2) (d) (i)* — Application to High Court for writ of certiorari to quash District Collector's order opposed by District Collector — District Collector can be made liable for costs as public officer 706*b*
——*S. 68*—Endowment for nitya naivedya deeparadhana is general endowment and property is liable to contribute 722
——*S. 76*—Section 76 applies to voluntary transfers — It does not apply to compulsory renewal under S. 19 and Ss. 22 to 25, Malabar Tenancy Act 122*a*

Madras Impartible Estates Act *(2 of 1904), S. 4*—Applicability of Act — Holder of impartible estate can incorporate into it other immovable property owned by him — Incorporation—Proof of—Villages not part of impartible estate treated as impartible by zamindar and many of his successors—Succession to villages governed for generations on footing of their being impartible—Villages must be deemed to be incorporated into impartible estate 315

Madras Irrigation Cess Act *(7 of 1865), S. 1*—Cess in respect of water used for irrigation is land tax 719

Madras Land Encroachment Act *(3 of 1905), S. 6* — Section 6 does not deprive Government or their assignee of their right to proceed in civil Court and obtain assignment from previous lessee — Defendant in such suit not raising question of compensation for improvement in trial Court—High Court in appeal will not take notice of that question 76
——*S. 9* — Sale of defaulter's property for assessment and penalty passes property free of encumbrances 244*a*
——*S. 9*—Object of Act stated 244*b*
——*S. 14*—Notice to levy penalty—Suit for declaring title—Section 14 does not apply —Limitation Act, Art. 120 applies 660*a*

Madras Local Boards Act *(14 of 1920)*, —Surcharge—License not issued—Persons allowed still to carry on trade — Order of surcharge is justified 463*a*

——Board writing off item as irrecoverable —Board is not Judge to determine whether loss was due to President's negligence or not 463*b*

——Surcharge—Loss must be established—Difficulties in realization or costs not allowed is not sufficient 463*c*

——*S. 67 (as amended by Act 11 of 1930)*, — Resolution sanctioned by Board without being initiated by President — Resolution is illegal 321*a*

——*S. 67 (as amended by Act 11 of 1930)*, — Suit for declaration that Board's resolution is illegal — Onus is on plaintiff to give prima facie evidence of illegality or irregularity — Plaintiff alleging special meeting convened under S. 67 Proviso to be illegal as notice of purpose specified in S. 67 Proviso was not given to members—Plaintiff serving defendant Board with notice to produce notice calling for special meeting—No adverse inference can be drawn against Board from non-production of notice — Special meeting held validly convened 321*c*

——*S. 67, Proviso (as amended by Act 11 of 1930)* — Resolution reducing officer's salary cannot be made retrospective—But if so made, it is not illegal in toto—Resolution cannot be given effect to from date anterior to date when it was passed 321*d*

——*S. 67 (1) and Proviso (as amended by Act 11 of 1930)* — Validity of resolution under S. 67 Proviso does not depend upon validity of resolution under S. 67 (1)—Resolution reducing establishment charges — Question of validity of subsequent resolution reducing salary of officer over five years standing and drawing not less than fifty rupees in pursuance of former resolution does not depend upon former resolution 321*b*

——*S. 159*—Applicability—Person disobeying panchayat President's order is liable to fine—Fact that president and person making encroachment are of opposite faction in panchayat is irrelevant 279(1)*a*

——*S. 160 (6)* — S. 160 (6) does not deal with leases—Licence and lease—Distinction — S. 160 (6) does not create punishable offence 269*b*

——*Ss. 164 (1) and (2), 159 (1) and 160 (3)*—Applicability of S. 164 (2) and S. 159 (1)—Word "occupies" in S. 164 — Meaning of — Lessee of small road-side site under S. 160 (3) constructing small shed — Lessee

Madras Local Boards Act continuing in possession in spite of notice under S. 159 (1) to remove shed — Proper notice held should have been under S. 164 (2) and not S. 159 (1)—Lessee held liable under S. 164 (1)—Defect of notice held immaterial 269*a*

——*S. 166 (4) and S. 199, Rules under, R. 7 (as amended by Act 11 of 1930)* — Board recovering larger amount than legally leviable under Act — Party paying amount can come to Court and ask for refund — R. 7 is no bar — No question of estoppel arises 319(2)

——*S. 199, Rules under, R. 19* — Retrospective order reducing servant's salary being illegal does not amount to "statement to contrary" within R. 19 321*e*

——*S 223*—Government is not authorized to proceed with prosecution under Act stayed by Magistrate 756*a*

——*Ss. 227A and 208 (3) (as amended by Act 11 of 1930)* — Panchayat Board superseded by Special Officer — Ex-president refusing to hand over to Special Officer records of Panchayat — Sanction of Local Government under S. 227A is not necessary for prosecution of ex-president 745(2)

Madras Mappilla Murumakkattayam Act *(17 of 1939), S. 20 (1) and (3)* — Petition under S. 20 (1) — Orders can be passed before partition suit under Chap. 3 of Act is finally disposed of 320

Madras Prevention of Adulteration Act *(3 of 1918), Ss. 14 and 5* — Sanitary Inspector demanding commodity under S. 14 —Parting with commodity does not amount to sale—Sanitary Inspector not acting under S. 14 but merely tendering money and accused voluntarily handing over goods — Transaction is sale — Fact that goods were required not for consumption but for analysis is immaterial—Owner of shop held guilty of offering ghee for sale—Servant held neither guilty of selling ghee nor of offering it for sale 609*b*

——*Ss. 15 and 5*—Object of S. 15—Offence under S. 5 — Omission to give notice under S. 15 does not make offence cease 609*a*

——*S. 16 (5) (as amended by Act 19 of 1935)*—Sample in fact analyzed by Government Analyst — Magistrate is not bound to send it again to Government Analyst under Section 16 (5) 48

Madras Prohibition Act *(10 of 1937), S. 4 (1) (a) and (g)*—Pots containing illicit arrack and paraphernalia of distillation found in hut owned by accused and his brothers—

Madras Prohibition Act
Accused and his brothers also owning house in village—Brothers convicted—Accused not present when articles recovered — Accused living in hut as much as his brothers — Accused in circumstances held was in possession of articles found 530(1)
Madras Revenue Board's Standing Orders, *O. 15, sub-r. (18)* — Communal land not to be granted on darkhast—Tahsildar granting it believing that it was not required for communal purposes — Collector can cancel grant under revisional powers under O. 15, sub-r. (18)—Civil Court cannot review orders of Revenue Officers acting within scope of their authority even if wrong 121
Madras Revenue Recovery Act *(2 of 1864), S. 2* — "Land" in S. 2 means land of the landholder 230*b*
——*Ss. 25 to 47* — Sale of land in default of payment of revenue — Defaulter dying before sale — Sale is infructuous — Proper procedure to be followed by Collector in such case, stated 230*a*
Madras Village Courts Act *(1 of 1889), S. 13*—Suit against defendant not minor—Defendant dying after institution of suit — Minor legal representative can be brought on record 648*a*
——*Ss. 32 and 69* — Suit dismissed in absence of parties—Remedies open to plaintiff indicated—Defendant dying pending suit — Before expiry of period of 60 days provided in S. 69 suit dismissed in absence of parties—Second suit held competent under S. 32—Second suit held would be competent even if period of 60 days had expired on date of dismissal of suit 648*b*
——*Ss. 77, 73 (as amended in 1937)* — Village Court not making complaint under S. 476, Criminal P. C. — District Court is empowered to exercise powers under Criminal P. C., Ss. 476 and 195 (3) 471
Mahomedan law — Religious office — Woman can hold office unless duties are such as cannot be performed by her or deputy—This bar arises from special custom or usage and not by Mahomedan law—Onus to prove exclusion of woman is upon those pleading it — Woman held not disqualified from holding khatibaship 485*a*
——Wakf — Mutwalli — Mutwalli cannot grant lease of wakf land for more than three years without Quazi's sanction — Office of Quazi has long become obsolete—Court can exercise powers of Quazi — Lease by mutwalli for more than three years granted in 1891 when civil Courts were functioning —
Mahomedan law
No evidence of Court's sanction — Lease cannot be presumed to have had legal origin 641*a*
——Wakf—Mutwalli granting lease of wakf land more than three years without Court's sanction —Retrospective sanction when may be granted by Court 641*b*
——Wakf—Mutwalli — Lease of wakf land by mutwalli for more than three years without Court's sanction is not void but voidable —Succeeding mutwalli not recognizing lease —Limitation for suit for declaration of lease as void and for possession runs from death of last mutwalli who had granted lease: 641*c*
Malabar Compensation for Tenants' Improvements Act *(1 of 1900), S. 6 (2)* — Kanom—Suit for redemption by jenmi—Jenmi can set off decree for arrears of rent obtained by him against kanom amount and value of improvements even if decree is barred by limitation : ('27) 14 A. I. R. 1927 Mad. 189=98 I. C. 563, *OVERRULED* 307*a*
——*S. 10*—Tenant claiming compensation for trees—Onus is on him to show that trees were grown by him 307*d*
——*S. 11*—Tenant building compound wall — Compensation must be granted unless landlord can show that old walls were repaired 307*c*
Malabar law — Bequest by father to wife and children — Whether wife and children constitute tenancy in common or become joint tenants forming group of tavazhi and continue to remain so even after wife marries another after her husband's death and has fresh offspring *(Quære)* 36*b*
——Tarwad — Karnavan not shown to have renounced—He alone can bind family by alienation — Performance of minor acts of management by karnavan's mother during his absence cannot constitute her karnavastri of tarwad so as to alienate property on tarwad's behalf 90
——Will — Construction — Bequest of his property by testator to wife and children—Bequest to operate in favour of daughter already born at time of will and all progeny that might be yet born to testator by his wife—No person other than wife and children given right or claim to property bequeathed — Wife to act as guardian of children during their minority — Testator held did not intend to bequeath his property to tavazhi but to his wife and own children as tenants in common — Decree against mother held therefore could not bind children 36*a*

Malabar Tenancy Act *(14 of 1930), S. 3 (v)*—Usufructuary mortgagee is not tenant within S. 3 (v) and is not entitled to benefits of Act 652

——*Ss. 20 and 22* — Redemption suit by melkanom-holder against kanomdar — Kanomdar pleading suit to be incompetent by reason of renewal under S. 22 — Further claim that even if suit was barred, plaintiff as melkanom-holder was entitled to claim certain arrears from kanomdar held could not be allowed to be raised for first time in second appeal 122*c*

——*S. 20 (5)*—Words "requires the holding bona fide" mean genuine intention to cultivate and not real need to do so : (1941) 2 M. L. J. 456*n*=('41) 28 A. I. R. 1941 Mad. 816=197 I.C. 488, *OVERRULED*: 242(2)

——*Ss. 22 and 25* — Renewal application by kandomdar under S. 22 — Both jenmi and melkanom-holder made parties — Court granting renewal — Renewal is binding on melkanom-holder 122*b*

Married Women's Property Act *(3 of 1874), S. 6*—S. 6 applies to policy effected by Mahomedan male before 1913 136*a*

——*S. 6*—Whether "object" in S. 6 means beneficiary *(Quære)* 136*b*

——*S. 6*—Trust under S. 6 can be revoked by beneficiary—Beneficiary can transfer or release his interest — Beneficiary not party to release deed is not bound thereby 136*c*

Master and servant — Order by Government to police held did not enable them to do more than they were bound to do under Criminal Procedure Code or Madras District Police Act 539*n*

Merger—Merely because same person holds rights in one capacity against himself in another capacity, his rights and duties are not extinguished 558*v*

Mesne profits — Court in its discretion allowing certain per cent. allowance for collection expenses — Appellate Court will not interfere with discretion unless it is arbitrary and unreasonable — Discretion in allowing 10 per cent. held properly exercised 487*e*

——Zamindari estate — Expenses of rent suits must be regarded as expenses of management—Deduction of certain percentage allowed for expenses of management—Further deduction for expenses of rent suits under head "law charges" cannot be allowed —Expenses incurred in litigation occasioned by special circumstances ought to be allowed separately — Expenses incurred in survey and preparation of record of rights also must be allowed separately 487*f*

Mesne profits

——Lease of land—Lessor to be entitled to building erected by lessee on payment of market value at time of resuming possession — Landlord not to resume possession until value paid — Amount offered reasonable — Lessee must be treated as trespasser—Landlord is entitled to mesne profits — Amount offered ridiculously inadequate — Lessee cannot be treated as trespasser and is not liable for mesne profits — Court allowing lessor rent for occupation and ordering him to pay value of building fixed by it to lessee within fixed time — Court cannot allow interest in default 156*b*

Minor—Decree against — Minor can challenge on ground of guardian's gross negligence in conduct of suit 384

——Guardian—Negligence — Suit for possession by vendee from guardian on basis of sale deed — Guardian successful in his defence that sale should not be upheld and possession should not be decreed — Court finding minor liable for particular sum and granting decree for same — Decree held not erroneous 82*a*

——Decree against — No fraud or gross negligence on guardian's part in conduct of suit—Decree cannot be set aside merely because of guardian's failure to appeal — Guardian without funds cannot be said to be negligent in not preferring appeal 82*b*

Mortgage — Redemption — Mortgagee should not be made to pay costs of person redeeming unless his conduct has been vexatious or unreasonable 592*b*

——Lease by usufructuary mortgagee back to mortgagor expiring in 1934—Mortgagor continuing in possession on understanding that formal lease similar to previous one would be executed — Suit by mortgagee to recover mortgage amount and rent — Claim to mortgage amount admitted but for rent disputed — Mortgagee held entitled to rent at rate of previous lease from 1934 to date of suit—Costs of mortgagee—Failure to ask for decree on confession under O. 12, R. 6, Civil P. C.—Effect — Decree for rent held not decree for interest—Interest on arrears of rent and costs held could be scaled down under S. 9, Madras Agriculturists Relief Act 507*a*

——Equitable mortgage — Tenant of site putting up superstructure thereon and subsequently purchasing site — Deposit of title deed though relating only to land would create equitable mortgage of land and house standing thereon—Plea that since title deeds deposited related only to land equitable

Mortgage
mortgage was of land and not of house standing thereon is not question of law but of fact — Plea once rejected should not be allowed to be raised subsequently 369*b*
——Costs—Redemption suit — Ordinarily the mortgagor is liable to pay the costs of the mortgagee 307*e*
——Sale—*A* in 1917 purchased item 10 of property subject to mortgage after paying full consideration to mortgagee—*B* purchasing all properties comprised in mortgage in court auction in execution of money decree against mortgagor in 1925 and subsequently selling back properties purchased including items 6 to 9 except items 1 to 5 to mortgagor reserving bulk of consideration with mortgagor for discharging mortgage—Mortgagor defaulting—Subsequent sale of items 6 to 9 by mortgagor to *C*—*A* claiming that item 10 should be sold last while *B* claiming that items 1 to 5 should be sold after items 6 to 9 — Equity claimed by *A* and *B* held should prevail 200*b*

Motor Vehicles Act *(8 of 1914), S. 16* — Madras Motor Vehicles Rules (1938), R. 4, cl. (iii)—Car held used as "contract carriage" 276(2)
——*(4 of 1939), Ss. 3 (1), 11 (3) and 112* —Term of licence expired—Person driving car without renewing licence is guilty under S. 112—Subsequent renewal does not date back to date of expiry of old licence—Construction of S. 11 (3) stated 196

Negotiable Instruments Act *(26 of 1881), S. 50*—Pronote — Endorsee for collection is merely agent of endorser—If endorser could have sued other persons on debt, endorsee also can do so 742(1)
——*Ss. 50 and 117* — Manager of joint family executing pronote for debt incurred for family benefit—Payee indorsing note to third party without assigning debt—Indorsee obtaining decree on note and not on debt — Decree cannot be executed against other members 161*e*
——*S. 87* — Alteration apparent on face of pronote — Onus is on plaintiff to explain it and show that it is not material 709(2)*a*
——*S. 87*—Material alteration — Meaning of—Whether alteration material—That alteration does not ultimately involve change in rights and liabilities of parties is not germane — Whether change is beneficial or prejudicial to maker does not matter—Pronote — Addition of words "Proprietor of Karthika Stores" above signature of executant held material alteration 709(2)*b*

Negotiable Instruments Act
——*S. 120* — Defence independent of plea of invalidity of instrument is not barred by Section 120 169*a*

Ownership—Right in gross — Distinction between, explained 392*f*
——Death of owner—Effect of, stated: 230*c*

Opium Act *(1 of 1878), S. 11* — Unless owner knew that his conveyance was likely to be used for transporting contraband articles, conveyance should not be confiscated 724 (2)

Parsi Marriage and Divorce Act *(3 of 1936), Ss. 29 (3) and 47* — Leave granted under S. 29 (3)—Remedy of aggrieved party is to appeal under S. 47 and not to apply for revocation under O. 18, R. 14 (a), Madras High Court Original Side Rules 159*a*

Partnership—Dissolution—Suit for taking account — Onus of proving that dissolution had taken place three years before suit, is on defendant 104*b*

Partnership Act *(9 of 1932), S. 42* — Partnership for carrying on chit to run for 50 months—Partnership does not terminate immediately on expiry of 50th month — It comes to an end only when monies due are collected and liabilities discharged 104*a*
—— *S. 69* — Construction — Unregistered firm dissolved and accounts taken — Subsequent contract between partners — Suit to recover money due under contract — Bar of S. 69 does not apply 707
——*S. 69 (2)*—Non-registration of firm — Court is not bound to dismiss suit suo motu 634*a*
—— *S. 69 (2)* — Point of non-registration being one of law can be raised for first time in appeal 634*b*
——*S. 69 (2)* — Applicability — S. 69 (2) must be strictly construed— Contract entered into by partner personally — He can sue alone without joining other partners as plaintiffs — Suit does not fall within Section 69 (2) 634*c*
* —— *S. 69 (2)* — Registration after suit cannot cure defect: (1937) 2 M. L. J. 273= ('37) 24 A. I. R. 1937 Mad. 767=176 I. C. 916, *OVERRULED* 252

Penal Code *(45 of 1860), Ss. 21 and 186* —Sales Officer whose duty it is to take property in execution of decree is public servant 552(2)*c*
—— *S. 75* — Scope of — S. 39, Madras Children Act, does not prohibit application of S. 75 674*b*
——*S. 75*—Previous convictions when can be acted upon stated 669*b*

Penal Code
——*Ss. 75 and 511*—S. 75 does not apply to offence under S. 511—But previous convictions may be taken into account and higher sentence imposed 521*b*
——*S. 75* — To determine proper sentence Magistrate must know all previous convictions 521*c*
——*S. 75*—Prior convictions neither proved nor mentioned in charge under S. 75—It would be unfair to take them into account 521*d*
*——*Ss. 75 and 511*—S. 75 does not apply to offence under S. 511 440*a*
—— *S. 97* — Accused while apprehending further violence from his assailant committing violence upon him — Right of self-defence is established 295*a*
——*S. 97* — Murder — Onus is on accused to show circumstances justifying his causing death 295*b*
—— *Ss. 141 and 97* — Assembly of more than five persons with common object of maintaining possession does not come within S. 141 — Accused having no right of private defence of property in their possession—They are responsible for their individual acts — But if they have that right, it not only entitles them to defend land but also such other persons as they can gather to help them 58*b*
——*Ss. 147 and 148* — Rioter armed with deadly weapon is punishable under S. 148—He cannot be guilty both under S. 147 and S. 148 *(Per Burn J.)* 58*d*
——*Ss. 148 and 149* — Person cannot be convicted under S. 148 unless he actually has dangerous weapon in his hands — He cannot be held constructively guilty under S. 148 by reason of S. 149 unless that condition is satisfied 420*b*
——*Ss. 149, 302 and 324* — Construction of S. 149 — Words "in prosecution of" in S. 149 mean "in order to attain"—Accused *A* armed with dagger and *B* with knife — *A* and *B* along with their companions to avenge rough treatment meted out to them by trustees of temple, going to temple and killing two trustees — Accused other than *A* and *B* using hands in beating off men of party of trustees—Common object of unlawful assembly held to cause hurt — Use of threatening words by *A* and *B* that none of trustees should be left alive held did not show that rest of accused shared homicidal intention with them — *A* and *B* held guilty of murder and rest of hurt 446*d*
——*Ss. 149 and 326* — Unlawful assembly — Common object to cause grievous hurt — Which accused caused specific injuries not known—All accused can be held guilty under S. 326 by virtue of S. 149 420*a*
——*S. 186* — Shutting door in public servant's face when he wants to enter it is obstructing him 552 (2)*b*
——*S. 188 (2)* — Crop raised and removed prior to order for possession under S. 145, Criminal P. C. — Person removing crop is not guilty under S. 188, Penal Code 275 (1)
——*Ss. 192 and 193* — Accused attesting forged document purporting to discharge decree debt—Accused interested in bringing document into existence — Accused is guilty of abetment and fabrication of false evidence 92 (1)
——*Ss. 206 and 421* — Complainant alleging that he filed suit against *B* with respect to his land and attached crops standing on land and *B's* cattle — That *A* along with *B* had removed crops and cattle claiming them to be his so as to prevent receiver from taking possession thereof — Allegations in complaint held implicated both *A* and *B* — Offence held fell under S. 206 and not S. 421 — Magistrate held could not ignore essential ingredients of complaint and treat offence as one under S. 421 675 (1)
*——*S. 294A* — "Drawing a lottery" — Meaning explained—Lucky numbers calculated arithmetically in lottery is no drawing 404
——*S. 300* — Person can be guilty of murder even though death is not necessary consequence of blow given — Heavy blow on head fracturing skull and proving fatal — Accused must be presumed to have intended probable consequence of such blow—Injury caused being sufficient in ordinary course of nature to cause death accused is guilty of murder 227*c*
——*Ss. 300 and 304, Part. 2* — Accused striking old woman of 55 with heavy stick and fracturing temporal bone into pieces — Woman dying instantaneously — Offence falls under S. 300 (3) 218*a*
——*Ss. 302 and 201* — Question for decision whether accused was guilty of murder — While convicting accused of murder it is not desirable to convict him for concealing evidence though such course is legal 275 (2)*a*
——*S. 302* — Deliberate murder with attempt at concealment — Death sentence is justified 275 (2)*b*
——*Ss. 302 and 328*—Accused administering dhatura with food to three persons—All

Penal Code
of them found lying in open next day—Two of them recovering but third developing pneumonia and dying week after — Death not due to poisoning — Accused held not guilty under S. 302 100
——*Ss. 304 and 100* — Accused in exercise of right of private defence of property using dagger and causing death to members of other party not because of necessity but with desire of punishing other party entering upon their land — Accused exceed right of private defence and are guilty under Section 304 58*c*
——*Ss. 323, 326, 302 and 304* — Offence held one under S. 304 415 (2)*a*
——*S. 325* — Scope — Sentence—Mere fine for offence under, is not legal 550
——*S. 376* — Rape — Proof — Essentials of stated 285*a*
——*S. 376*—Rape — Sessions case — Member of Bar should be appointed as amicus curiae 285*b*
——*S. 379*—Only evidence against accused being confession said to have been made by them which led to discovery of stolen article — If article was discovered from statement of one accused statements of other accused held would be inadmissible — No evidence that accused 4 made crucial statement or led police to place where stolen article was found — Accused 4 held should be given benefit of doubt 532 (1)*b*
*——*Ss. 407 and 409* — Appropriation of money with dishonest intention attracts S. 407 — Doing of act, in anticipation of statute which would make it offence, is no offence — *V*, German Director of German Company on eve of declaration of war between Britain and Germany intending to realise as much money as he could selling his stock of enamels to *D* for Rs. 7643 — *D* coming with cheque on morning of 2nd September 1939 the day before war was declared but *V* insisting on cash — Cash paid in afternoon of 2nd September 1939—*V* handing over money to his wife—Act of accused in screening money from Government of India or custodian of enemy property in anticipation of war without any intention of causing wrongful loss or gain to any person held did not amount to any offence 182
*——*S. 426* — Cattle grazing on complainant's bund — Offence under S. 426 is committed 724 (1)
——*Ss. 426 and 427* — Distinction pointed out 594*b*
——*S. 448* — Intention to intimidate — Accused with number of persons entering a house to set up title to it held committed trespass 532(2)*a*
——*S. 448*—Sitting on pial of house is trespass 532(2)*b*
——*S. 504* — Gross insult is not in itself offence—Object of section explained 672*a*
——*Ss. 511 and 379*—Accused caught while attempting to take purse from *P's* pocket—*P* seizing purse from outside his pocket and also *P's* hand—Offence held fell under S. 511 and not S. 379 as purse was not removed from *P's* possession 521*a*
Pleadings — Second appeal—Plaintiff need not state reasons in support of his contention in plaint — Point that decree was not for payment of money and was not executable raised throughout—Contention that there is no reference to defendant in decree and therefore decree is not money decree is not new and can be raised in second appeal 748*d*
——They should not be interpreted rigidly 558*n*
——Court cannot compel party to seek particular relief 445(2)*b*
——Pure question of fact such as married couple had no access to each other not definitely raised in pleadings—It should not be allowed to be raised in course of arguments even in trial Court, much less in appeal 129*a*
Practice — Appeal — Suits for accounts — Appeals from preliminary and final decrees by plaintiff and defendant heard together—Point raised in any appeal may be dealt with as arising in either of appeals 487*g*
——Defendants requesting to pass decree so as to affect them in particular manner — Prayer may be granted but it should not affect plaintiff adversely 558*w*
——Duty of Court—It is clear duty of Court to apply law to facts which it finds 720*c*
——New plea — Limitation — Point of not pleaded in written statement and if pleaded might have been met by slight amendment of plaint—Point cannot be argued in revision 783*b*
——New plea — Revision—No materials in record to support argument — It cannot be raised for first time in revision 449*b*
——Reference to Full Bench — Division Bench dissenting from previous Division Bench ruling must refer question to Full Bench (Per *Full Bench*) **(FB)** 688*b*
——Relief—Equitable relief—Person seeking relief must come with clean hands — Transfer offending against S. 53, T. P. Act —Transferee prime mover in bringing about transaction—Court would refuse to give any relief to transferee 751*b*

Practice
——Relief — Necessary facts given — Court ought to grant relief to which party is found entitled even if it was mistakenly not asked for 93*b*
——Review—Appeal heard by Bench—One of Judges absent at time of review application—Review should be disposed of by other Judge alone and not by another Bench 23
——Revision—Contention of petitioner upheld by lower Court but rejected by High Court—Petitioner should be given opportunity to establish subsidiary contention which he would have raised in lower Court had it rejected his contention 296*e*
——Second appeal—New point—Point not raised in lower Courts nor in memorandum of second appeal allowed to be raised as case was one of trust 317*a*
——Written statement—No steps taken for long time after notice of suit—Extension of time for filing written statement not to be granted 159*b*
Presidency Small Cause Courts Act *(15 of 1882), S. 38* — Independent proceeding not a suit—Order passed with contest—Whether order can be questioned under S. 38 *(Quære)* 610*e*
——*S. 97*—Filing of false affidavit—S. 97 does not apply 326*a*
Presidency Towns Insolvency Act *(3 of 1909), S. 9 (e)* — Attachment before judgment—Decree-holder subsequently applying for sale of property attached — No order of Court is necessary 512
——*S. 9 (g)*— Adjudication under S. 9 (g) — Petition and affidavit verifying same should be read together — Sufficient details of facts on which creditor relies should be given 86
——*S. 31*—Creditor denied participation in dividend by reason of fraud practised on Court by insolvent—Payment of dividend to other creditors is not duly made 103(2)
——*S. 60* — S. 60, Civil P. C., cannot be invoked to get rid of appropriation of salary under S. 60, Presidency Towns Insolvency Act 27
*——*S. 68*—Settlement by Official Assignee with creditor of insolvent without leave of Court is not invalid 586*a*
——*S. 68 (1) (h)*—Scope — Clause (h) of S. 68 (1) does not make any distinction between compromises of claims in suits already instituted and those in respect of claims not brought before the Court 586*b*
Press (Emergency Powers) Act *(23 of 1931), S. 4 (1), Expl. 1* — Mere fact that certain passage is narrative is no excuse if it incites or encourages crime referred to in section 4 **(SB)** 690*c*
—— *Ss. 19, 4 (1)* — Government have power of forfeiture irrespective of action against press **(SB)** 690*b*
——*S. 23* — "Order" means notified order —Two months should be computed from date of notification of order and not from date of passing of order **(SB)** 690*a*
Principal and agent — Power to sell immovable property includes power to receive price thereof — Cases of moveable property must be decided on entirely different considerations—Authority to sell goods carries with it authority to receive price — Power to sell sandalwood held included power to agree to sell sandalwood that was not ready for delivery and had to be cut, dried and cleaned later on — Power to sell trees held included power to receive their price : 634*d*
——Agent cannot enter into transaction in which his personal interest is in conflict with his duty towards his principal — *A* holding general power of attorney from *B* agreeing to sell to *C* agent of *D* certain tons of sandalwood out of estates belonging to his principal—*C* paying Rs. 8700 by way of advance to *A* — Rs. 5000 in cash and balance of Rs. 3700 that was due by *A* to *D* was taken into account towards advance — Suit by *D* for refund of advance—*A* in absence of specific authority held could not accept money which he owed to *D* by way of advance on behalf of *B*—*B* held liable for money actually paid by *C* to *A* as advance—Question of *C's* authority to enter into contract held had no relevancy on question of refund though it would be material on question of plaintiff's liability to pay damages for breach 634*e*
Promissory note — Suit on by holder in due course— It is not permissible to go outside note 468*b*
****Provincial Insolvency Act** *(5 of 1920), Ss. 2 (d) and 28* — Joint Hindu family — Power of manager whether he is father or not to dispose of joint property is not property within Ss. 2 (d) and 28—Hence it cannot vest in Official Receiver under S. 28 (2) : 52 Mad. 246 = ('29) 16 A. I. R. 1929 Mad. 166=114 I. C. 345, *OVERRULED*; S. A. No. 165 of 1938, *REVERSED* **(FB)** 682
——*S. 4*—Official Receiver cannot use S. 4 to re-agitate questions finally decided against him 423*a*
——*Ss. 4 and 28 (2)* — Hindu father adjudicated insolvent—Suit against undivided sons for debt incurred by father for family

Provincial Insolvency Act
benefit — Leave of Insolvency Court is not necessary — Decree against insolvent father and sons — Court can declare under S. 4 that decree is not binding so far as Official Receiver is concerned as representing insolvent—But no such declaration can be made as regards decree against sons 360*b*
——*Ss. 4 (2), 38 and 39*—Scope of S. 4 (2) —S. 4 (2) does not apply to case of debts due to one creditor by another — Composition scheme under S. 38 imposing obligation on one creditor to give up claim against another — Scheme cannot under S. 39 bind creditor who did not consent to it 345
*——*S. 6 (e)*—Fact of sale of debtor's property in execution of decree is sufficient for purposes of S. 6 (e) — Subsequent setting aside of sale is immaterial—Words "property has been sold in execution of a decree" in S. 6 (e) of Act and O. 21, Rr. 89 and 90, Civil P. C.—Meaning of, explained 306
*——*Ss. 16, 9* — Object of S. 16 explained — Creditor who has filed petition subsequently found to be not qualified to do so—Subsequent creditor is not prevented from taking advantage of its date and continuing the petition — He cannot be compelled to prove qualification of original creditor: 172
——*S. 28 (2)*—Insolvency of Hindu father —Sons' shares do not vest in Official Receiver but father's right to sell son's share does—Sons can alienate their shares 360*a*
——*S. 28 (2)* — Joint Hindu family — Father — Insolvency of — Son's share does not vest in Official Receiver but father's power to dispose of son's interest does — That power ceases after severance of interest between father and son—Hence son's share is not "property of insolvent" within S. 28 (2) — Words "suit or any other legal proceedings" in S. 28 (2)—Meaning of—Severance of interest between father and son after father's adjudication — Suit against son — Leave of insolvency Court is not necessary 327*b*
——*S. 33 and S. 39 before amendment of 1935*—Under S. 33 Court can dispense with formal proof if debt is otherwise established and enter name of creditor in schedule—Insolvent admitting debt in insolvency petition and in addition admitting and mentioning it in application for composition—Court approving composition and entering name of creditor in schedule under S. 33—Debt held must be deemed to have been proved and admitted by Court though no formal proof was given — Composition held binding on creditor 474*c*

Provincial Insolvency Act
——*Ss. 34 and 44 (2)*—Liability of insolvent to indemnify his surety is provable under Act—Order of discharge absolves insolvent from that liability 745(1)
——*S. 37*—Adjudication annulled—Debtor ceases to be insolvent—Vesting order under S. 37—Effect of—After annulment property vested in Official Receiver under S. 37 on 1st October 1937 and 22nd March 1938—Debtor is not agriculturist within Madras Agriculturists' Relief Act and hence not entitled to benefits thereof—Debtor cannot be said to have saleable interest in property vested in receiver 523*b*
——*S. 37* — Vesting order under S. 37—Effect — Property does not revert to insolvent — Sale without impleading appointee under S. 37 is null and void 371
——*Ss. 38 and 39*—Object of Act—Debtor adjudicated — All remedies of creditor become subject to provisions of Act—Creditor has right to receive pro rata distribution of proceeds of insolvent's property equally with other creditors 474*a*
——*S. 39 before amendment of 1935* — Construction — Creditor's name and debt entered in schedule under S. 33—Composition is binding on creditor 474*b*
——*S. 39 as amended in 1935 and S. 38* —Ss. 38 and 39 deal with procedure—S. 39 itself does not confer any right of action—Amended S. 39 therefore applies to pending proceedings—Object of amendment—Legislature intended S. 39 to be retrospective 474*e*
——*S. 39*—On acceptance of proposal Court does not become functus officio — It retains control to see that composition is given effect to 474*f*
——*Ss. 44 (2), 34 (2), 28 (6) and 47* — Personal liability under mortgage is debt provable in insolvency within S. 44 (2): 151
*——*Ss. 47, 44, 34 and 28 (2) and (6)*—Secured creditor not realising, abandoning or valuing his security before insolvent's discharge—There is no provable debt — Creditor is entitled to personal decree against insolvent even after his unconditional discharge : (1941) 2 M. L. J. 690 = ('42) 29 A.I.R. 1942 Mad. 151, *OVERRULED*: 273
——*S. 50*—Debt expunged — Dividend already paid cannot be claimed back 644
*——*S. 51*—Benefit of execution refers to money—Decree-holder purchasing property in execution—Decree-holder must pay purchase money to Official Receiver and not property purchased : ('35) 22 A. I. R. 1935 Mad. 907=159 I. C. 244, *OVERRULED* 425*c*

Provincial Insolvency Act
——*S. 51*—"Assets realized"—Sale of three lots of property originating from single proclamation—Amounts deposited on different dates—Assets are realized on dates of deposit into Court for each lot and not only on date of last deposit 88*b*
——*S. 51*—"Benefit of execution"—Meaning of, stated 88*c*
——*S. 51*—Official Receiver is entitled to interest on assets realized 88*d*
——*S. 51 (3)*—Construction — Expression "a person" in S. 51 (3) includes decree-holder purchaser 425*a*
——*S. 51 (3)* — Execution proceedings — Intervention of judgment-debtor's insolvency cannot cancel proceedings 425*b*
——*S. 51 (3)* — Applicability — S. 51 (3) applies only to sales which have taken place before order of adjudication 415 (1)*b*
——*Ss. 53 and 54*—Application by Official Receiver under Ss. 53 and 54 dismissed — Appeal—Appellate Court has no jurisdiction to annul order of adjudication passed against insolvent — Trial Court alone can deal with it unless it came before appellate Court 483*a*
——*S. 53* — Transfer not in good faith — S. 53 applies even if insolvent had no intention to defeat creditors 294*a*
——*S. 53* — Setting aside transaction on application of Official Receiver — Effect stated 294*b*
——*S. 75* — New point — Point raised in trial Court and in memorandum of appeal but dropped in appellate Court—Such point affecting person not party to revision petition cannot be allowed to be raised in revision 294*c*
——*S. 75 (3)* — Recording of finding that Court had jurisdiction is not order within Section 75 (3) 305
Provincial Small Cause Courts Act *(9 of 1887), S. 25* — Interference is discretionary 92 (2)*c*
Railways Act *(9 of 1890), S. 55, cls. (1) and (5)* — Remedies of railway for recovering undercharges, explained — Remedy of suit is available even after goods are delivered to consignee 627
Receiver — *S* by will bequeathed house X to his son *N* and house Y to his minor son *R* — *N* taking possession of both properties — *R's* estate vesting in Official Trustee — Suit by Official Trustee on behalf of *R* on basis of *S's* will or for *R's* share by partition —Official Trustee appointed receiver in suit — Property X sold by Court's order to satisfy mortgage created by *N* over it and proceeds paid into Court to credit of suit — *A* suing *N* for specific performance of agreement by *N* to execute mortgage of property X in his favour—Official trustee as receiver not impleaded—*A* granted money decree for amount advanced by him and charge over sale proceeds of X property to extent of decretal amount — In Official Trustee's suit will found valid and *R* held entitled to property Y with mesne profits—Application by Official Trustee as decree-holder for attachment of balance of sale proceeds of property X — *A* held entitled to enforce his charge under decree passed by competent Court — Appointment of Official Trustee as receiver held did not give *R* a charge 670
Registration Act *(16 of 1908), Ss. 49 and 17 (i) (b)* — Express agreement to sell contained in sale deed — Deed not accepted by vendee or incomplete in terms or legally inoperative—Agreement to sell cannot necessarily be regarded to have merged in sale deed — Clause *A* relating to agreement to sell held distinct from Clause *B* relating to sale — Nothing to show that vendee had agreed to accept deed as sale deed — No definite words of conveyance by vendor of his title in Clause *B*—Clause *A* held admissible under S. 49, Proviso and could be made basis of suit for specific performance—Clause *B* held did not come within S. 17 (i) (b) 716*b*
Religious endowment — Promissory note executed by trustee — Liability restricted to personal promise — Suit on promissory note — Decree against temple properties cannot be passed 198
——Trustees—Powers of — One of trustees authorised by others to borrow executing promissory note for loan taken — Transaction is transaction of all 92 (2)*a*
——Loan incurred by trustees without sanction of temple committee but ratified by Religious Endowment Board—Loan expressed to be repayable out of properties of temple — Loan held binding on temple 92 (2)*b*
Res judicata — Final judgment in another case on same point pronounced pending appeal operates as res judicata 421
*——Cross-suits or applications — Suit on mortgage effected by insolvent and application to set it aside by Official Receiver heard together and disposed by one judgment holding mortgage to be valid — Official Receiver filing no appeal from mortgage decree but only from order of dismissal of his application — Appeal is not barred by res judicata

Res judicata
— Fact that appeal from mortgage decree and that from order of dismissal of application lay to different Courts does not matter: (1940) 1 M.L.J. 647=('40) 27 A.I.R. 1940 Mad. 564 = 192 I. C. 810, *REVERSED* 226

* **Riparian rights**—Common law rules are not applicable to rivers like Godavari in India—Bed of public navigable river is property of Government though banks may be subject of private ownership 406(2)

Sea Customs Act *(8 of 1878), Ss. 188, 191* — Goods seized on suspicion of smuggling — Inquiry by Inspector of Customs—Collector passing order on evidence recorded by Inspector—Central Board of Revenue on revision confirming Collector's order of confiscation — Suit in civil Court held barred 704

Second appeal — Competency—Lower appellate Court entertaining incompetent appeal and modifying trial Court's order — Second appeal lies 741*b*

——Whether dismissal of incompetent appeal gives rise to second appeal *(Quære)* 741*c*

——Lower appellate Court wrongly entertaining appeal and dismissing it on merits —High Court in second appeal can only set aside incompetent appellate order — Interference with trial Court's order can be only in revision 741*d*

——Finding of fact is binding 28*b*

Set-off. — Partition arrangement under which *S* to pay certain sum to some persons acting on behalf of whole joint family and to get certain sum on taking particular share from other party — Suit by *S* for such sum against such persons and their father who ratified partition — Latter held entitled to set off even though father was not party to partition arrangement 429*g*

Specific Relief Act *(1 of 1877), S. 42*— S. 42 relates only to suits and not to applications—It is not exhaustive even of declaratory suits 362*b*

——*S. 56 (e)*—Court cannot stay criminal proceedings by issuing injunction on complainant — Local Body should not be restrained from doing duty 756*b*

Stamp Act *(2 of 1899), S. 32* — Endorsement by Collector under S. 32 on instrument is final even if wrong and made out of time —Civil Court cannot question it 381*a*

——*S. 32 (2)*—S. 32 (2) does not contemplate endorsement on separate paper—Such endorsement does not bind civil Court — In such case Court may grant time to get endorsement on instrument — Endorsement on separate paper made out of time—Court is justified in not returning document for endorsement thereon 381*b*

——*Ss. 32 (2) and 38*—Probate—Suit on — Endorsement under S. 32 (2) made on separate letter and beyond time — Court pointing out defect and asking plaintiff to be ready with necessary stamp and penalty at next hearing and allowing fortnight's time —On plaintiff's persistence that endorsement was right Court dismissing suit—Dismissal held justified — Subsequent endorsement under S. 38 that document was properly stamped held could not avail plaintiff in revision 381*c*

Succession — Heir is not personally liable for debts of deceased 558*i*

——Hereditary office—There is no room for disposing of its rights and duties by assignment and settlement 485*b*

Succession Act *(39 of 1925), S. 373*— Application for succession certificate—District Judge cannot dismiss it under S. 373 on ground that complicated questions of law or fact have to be gone into — Application disclosing ground for entertaining it—Right to certificate contested—District Judge must grant certificate to one party or other 709(1)

Tort — Wrongful restraint or confinement explained—Plaintiff sitting in car in railway compound awaiting arrival of train—Police not allowing plaintiff to board train and also closing gate of compound and placing two constables there — Plaintiff not making attempt to go in any direction but sitting in car—Case held of wrongful restraint and not of wrongful confinement 539*a*

——"Good faith"—Definition of, in General Clauses Act is materially different from that in Penal Code — Penal Code definition cannot be applied in case of tort 539*b*

——Internment of Maharaja of Native State by Government is act of State — It cannot be questioned by Municipal Courts 539*l*

——Master and servant — Liability of Government for acts of its officers, explained 539*m*

——Defamation—Doctrine of absolute privilege — Documents filed by defendant in course of and for purpose of his defence in suit are absolutely privileged even if defamatory of plaintiff 348*c*

——Wrongful attachment — Damages — Municipality not being able to realise arrears of house tax from owner moving Magistrate to take action under Sch. 4, R. 36, Madras

Tort
District Municipalities Act — Magistrate issuing warrant to attach moveables found inside owner's house — House occupied by owner's divided brother — Tax Superintendent being asked to do so pointing out house to constable—Constable attaching moveables as per warrant and Superintendent attesting search list—Action against Municipality and Superintendent by owner's divided brother for damages held not maintainable 311*a*
——Seizure of goods authorised by warrant —No action lies for damages even if warrant was improperly obtained 311*b*
——Slander—Damages are at large—Until whole evidence is examined damages cannot be said to exceed particular sum so as to entitle Court to refer plaintiff to Court of lower pecuniary jurisdiction 16*b*
***Trade-mark** — Infringement of — Particular name becoming associated with goods manufactured or sold by plaintiff—Another person using that name on goods so similar to plaintiff's that purchaser might infer common origin—Plaintiff is entitled to protection of his name—Fact that plaintiff did not deal in article which defendant put upon market in plaintiff's name is no defence 179
Transfer of Property Act *(4 of 1882)*—Interpretation—English law—Applicability —Act is not exhaustive—English principles can be applied if case is not covered by Act — But if it is covered by Act, English law should be disregarded 558*a*
*——*Ss. 2 (d), 5 and 53*—Person obtaining transfer of property under order of Court by gross fraud — S. 53 does not apply — Court can remedy injustice by applying principles of common law for avoiding fraudulent conveyances — Party aggrieved can file suit to have transfer declared nullity 632*b*
——*S. 6 (a)*—Scope—A transfer of rights as prospective reversioners in some properties is invalid 720*a*
——*S. 6 (h)*—Portion of consideration forbidden by law—Whole transfer is invalid 720*b*
*——*S. 41*—S. 41 does not apply to mortgages — Assignee of mortgage though bona fide holder, mortgagor can plead want of consideration 730*c*
——*S. 41*—Applicability—Section 41 does not apply to court sales 193*c*
——*S. 41*—One of judgment-debtors paying off decree but getting it transferred to his benamidar — Decree bought from such benamidar for valuable consideration and in good faith—Principle of S. 41 held applied and judgment-debtor held liable 28*c*

T. P. Act
——*S. 53*—Defendant can take plea under Section 53 714*c*
——*S. 53*—Whether alienation was in fraud of creditors is pure question of fact — Finding is conclusive in second appeal 522*b*
——*S. 53 (as amended in 1929)* — Claim under O. 21, R. 58—Resistance by creditor is not in representative character 128*c*
——*S. 53A*—Scope—It cannot be used by person who has lost possession to sue for recovery of it 125*c*
*——*Ss. 54, 40*—Contract to sell property—Subsequent attachment of same in execution of decree does not prevail over the contract to sell even if attaching creditor has no notice of such contract—Sale completed is not contrary to attachment 67
——*S. 55 (5) (b)*—Money left with vendee to pay mortgagee not sufficient to pay off mortgagee — He may defer payment till vendor contributes remainder to pay him off 650*b*
——*S. 55 (5) (b)* — Right of vendee — Nature of stated 650*c*
——*S. 55 (5) (b)* — "Contract to the contrary" — Property sold free from encumbrance — Buyer's right to retain out of purchase money amount of encumbrance— Vendee to pay off creditor of vendor — Vendor undertaking in sale to pay off mortgage not doing so — Vendee is entitled to retain that sum—Neither direction to vendee to pay off creditor nor undertaking by mortgagor vendor to pay off mortgage or allowing vendee to pay it off and recover from him held contract to contrary 583
——*S. 55 (5) (b)*—Part of purchase money retained by purchaser for payment to mortgagee — Purchaser not having to pay full amount owing to debt being scaled down— He is liable to return to mortgagor money remaining unpaid 525*b*
——*S. 58 (e)*—English mortgage—Date of payment to be postponed in certain event— Mortgagor to pay cost of insurance and other charges payable in respect of mortgaged property—Provision for extension of time not accompanied by stipulation that mortgagee should reconvey — Provisions held did not alter character of mortgage 628*c*
——*Ss. 60 and 82 (before amendment of 1929)*—Mortgagee of several properties purchasing share of equity of redemption—His right to recover money under mortgage is extinguished pro tanto unless keeping his mortgagee rights alive is found to mortgagee's benefit or mortgagee intended to keep subsequently acquired rights distinct

T. P. Act
—For determining extent to which right is extinguished value of mortgaged properties at date of mortgage should be considered 44*b*
——*S. 67 (d)* — Suit by co-mortgagee for his share of mortgage amount is maintainable—Value for court-fee and jurisdiction is same under S. 8, Suits Valuation Act — Court-fee must be paid on full amount of mortgage and not on plaintiff's share alone —Such payment does not result in hardship to plaintiff: 59 M. L. J. 928 = ('30) 17 A. I. R. 1930 Mad. 985 = 129 I. C. 45, *OVERRULED* 205*c*
——*S. 69* — Mortgagor can give power of sale to second mortgagee, though such power not given to first mortgagee 232*c*
——*S. 70*—Applicability—S. 70 does not apply to mortgagee purchasing share of equity of redemption and suing to enforce his mortgage 44*c*
——*S. 72 (d)* — Amount spent by mortgagee in suit for making good his title to property as against mortgagor can be added to mortgage money 592*d*
——*S. 82* — Liability to contribute is liability imposed upon land and is not personal liability **(FB)** 685*a*
——*S. 82* — Principle of section explained **(FB)** 685*b*
*——*S. 82* — Portion of property sold and mortgage over whole property paid — Subsequent mortgagee of portion sold is entitled to sue holder of unsold portion for contribution whether he pays cash to discharge first mortgage or not : 24 Mad. 96, *OVERRULED* **(FB)** 685*c*
——*S. 82 (before amendment of 1929)* — Contribution — Meaning of — Right exists between mortgagors inter se and does not affect mortgagee's power to proceed against any of mortgaged properties 44*a*
——*S. 83* — Mortgagee accepting tender is not entitled to any further relief as against mortgagor or person making deposit : 592*c*
——*S. 92, para. 3 (as amended in 1929)* —Transferee of immovable property paying off mortgage on property — No registered agreement as contemplated by S. 92, para. 3 — Transferee is not entitled to charge on property in respect of amount paid to mortgagee — Nor can he be given charge on equitable grounds for it would defeat object of amendment of 1929 751*a*
——*S. 101 (before 1929)* — Scope—"Is or becomes" — They are used in contradistinction — Word "is" is not redundant — Section includes person who is owner of charge

T. P. Act
subsequently becoming absolutely entitled 558*c*
——*S. 101 (before 1929)* — "Or such continuance would be for his benefit" — Interpretation of, explained 558*d*
——*S. 101 (before 1929)* — Applicability —Existence of puisne or intervening incumbrance is not necessary to prevent merger 558*e*
——*S. 101 (before 1929)* — Extinguishment of charge or encumbrance — Relevant time for determination of question explained 558*f*
——*S. 101*—Section is exhaustive 558*g*
——*S. 101 (before 1929)* — Owner becoming charge or incumbrance holder—He can enforce same and not merely use it by way of defence 558*h*
——*S. 101 (before 1929)* — Person only qualified owner and not absolute owner — No merger 558*j*
——*S. 101 (before 1929)* — Intention to keep incumbrance alive need not be simultaneous with becoming absolute owner: 558*k*
——*S. 101 (before 1929)* — General principle of extinguishment of debt by merger in case of debtor and creditor is not applicable 558*l*
——*S. 101 (as amended in 1929)*—Amendment of S. 101 is not retrospective — Nor can principle underlying amended section be applied to cases before 1929 558*m*
——*Ss. 130 and 6 (e)* — Sale set aside — Vendee's right to recover purchase money is actionable claim within S. 130 and not mere right to sue under S. 6 (e) 209
***Trusts**—Trustees—Powers of — Majority of trustees cannot elect one of them as managing trustee so as to oust minority from taking part in management 397
——Creation of — Payment of money to insurance company for revival of policy — Company going into liquidation before policy revived — Receipt of money by company is not in fiduciary capacity and no question of trust arises 210
Trusts Act *(2 of 1882), S. 62*—Principle in S. 62 is equitable one and applies to public or private trust — Public religious trust — Trustee selling trust property to third person and for purchase price conveying his own property to trust—Sale of trust property set aside — Trust is bound to refund benefit it had by virtue of sale — Sale in such case is not void but only voidable 438
——*S. 88*—Scope—Property ceasing to be trust property—Person subsequently becom-

Trusts Act
ing trustee is not debarred from purchasing it 317*b*

Usurious Loans Act *(10 of 1918), S. 3 (as amended in Madras)* — "Agriculturist" — Meaning of explained 533*c*

——*S. 3 (as amended by Madras Act 8 of 1937)*—Mortgage bond carrying 9 per cent. per annum compound interest with annual rests — Lower Court reducing rate to 7 per cent. compound interest with biennial rests —Reduced rate held not unduly high—Fact that reduced interest amounted to more than twice amount of principal originally advanced held no ground for further reduction 428*b*

——*S. 3 (1) (i) and (ii)* — There is no redundancy or overlapping between cls. (i) and (ii) of S. 3 (1)—S. 3 (1) (ii) is not confined to cases where there has been agreement purporting to close previous dealings and creating new obligation 600

Will — Construction — Demonstrative or specific gift — Intention of testator must be gathered from will as a whole — First gift and subsequent direction of fund out of which it should be paid — Absence of existence of such fund at death of testator—It is payable out of general estate 17

Workmen's Compensation Act *(8 of 1923), Rules under, R. 19 and S. 22* — Claim for compensation — Omission to give particulars under S. 22 or file certificate under R. 19 is not fatal defect—Application held amounted to claim for compensation 116*b*

——*S. 2 (1) (d) and (2) (as amended in 1933)* — Father must show that he was dependent wholly or partly on earnings of son at time of his death 401

——*Ss. 3 (5) (a) and 10 (1)* — Construction of S. 10 (1) — Claim even if rejected in limine is claim instituted within S. 3 (5) (a) 116*c*

——*Ss. 10 (1) and 22* — Word "claim" in Ss. 10 (1) and 22 — Meaning of, explained 116*a*

——*S. 10 (1)* — Commissioner condoning delay and rejecting claim as barred without going into merits—Rejection is illegal: 116*d*

CASES OVERRULED & REVERSED IN (29) A. I. R. 1942 MADRAS

Athiappa Chettiar v. Ibramsa Pulavar, (1941) 54 M. L. W. 523 = (1941) 2 M. L. J. 690 = 1941 M. W. N. 937=(29) A.I.R. 1942 Mad 151	Overruled in (29) A. I. R. 1942 Mad. 273.
Bansiram Jashamal v. Gunnia Naga Iyer, (1930) 59 M.L.J. 928=32 M.L.W. 901=(17) A.I.R. 1930 Mad. 985=129 I. C. 45	Overruled in (29) A. I. R. 1942 Mad. 205.
Chandanmal v. Ramakrishnayya, ('42) 54 M. L. W. 571=(1941) 2 M. L. J. 827 = 43 Cr. L. J. 734 = (29) A. I. R. 1942 Mad. 173 = 201 I. C. 91	Reversed in (29) A. I. R. 1942 Mad. 662 (1).
Ganapathi Asari v. Kuppusami Asari, (1939) 1939 M W N 320=49 M L W 456=(1939) 1 M L J 614=1939 M Cr C 110=40 Cr L J 757 = (26) A I R 1939 Mad 493=183 I C 179	Overruled in (29) A. I. R. 1942 Mad. 19.
Govindaswami Chettiar v. Kothandapani Chettiar, ('27) 52 M. L. J. 203=24 M. L. W. 766=(14) A. I. R. 1927 Mad. 111=99 I. C. 158	Overruled in (29) A. I. R. 1942 Mad. 622 (F.B.).
Henry Merien v. Official Receiver, Madura, ('35) 22 A. I. R. 1935 Mad. 907=159 I.C. 244	Overruled in (29) A. I. R. 1942 Mad. 425.
Kalitheertha Pillai v. Chellathammal, ('42) (1942) 1 M. L. J. 28=1942 M. W. N. 19=55 M. L. W. 104=(29) A.I.R. 1942 Mad. 300=201 I.C. 689	Reversed in (29) A. I. R. 1942 Mad. 606.
Kanyakaparameswaramma v. Venkataramayya, ('36) 71 M. L. J. 294 = 1936 M. W. N. 769 = 44 M. L. W. 201 = (23) A.I.R. 1936 Mad. 698= 164 I. C. 853	Overruled in (29) A. I. R. 1942 Mad. 330.
Krishna Ayyar v. Muthukumaraswamiya Pillai, ('06) 29 Mad. 217	Impliedly Overruled in (29) A. I. R. 1942 P. C. 50.
Kumara Goundan v. Thevaraya Reddi, (1925) 1925 M.W.N. 406=48 M.L.J. 616=(12) A.I.R. 1925 Mad. 1113=87 I. C. 635	Overruled in (29) A. I. R. 1942 Mad. 41 (F.B.).
Kunhi Krishnan v. Kunhipennu, (1927) 38 M.L.T. 139=(14) A. I. R. 1927 Mad. 189=98 I.C. 563	Overruled in (29) A. I. R. 1942 Mad. 307.

Lakshmanacharyulu v. Venkataramanujacharyulu, ('26) 51 M. L. J. 414=23 M. L. W. 771=1926 M. W. N. 392=(13) A. I. R. 1926 Mad. 827 = 96 I. C. 700	Overruled in (29) A. I. R. 1942 Mad. 680.
Lakshminarasamma v. N. Pydanna, (1925) 12 A. I. R. 1925 Mad. 265=80 I. C. 233	Overruled in (29) A. I. R. 1942 Mad. 41 (F. B.).
Lingama Naidu v. Official Receiver, Madura, (1928) 110 I. C. 511	Overruled in (29) A. I. R. 1942 Mad. 41 (F. B.).
Maharaja Saheb of Venkatagiri v. Rajeshwara Rao, ('39) I. L. R. 1939 Mad. 622=49 M. L. W. 717= 1939 M. W. N. 522 = (1939) 1 M. L. J. 831= (26) A. I. R. 1939 Mad. 614 = 189 I. C. 123	Reversed in (29) A. I. R. 1942 P. C. 3.
Moideen v. Kunhalikutti, ('35) 42 M. L. W. 798= (22) A. I. R. 1935 Mad. 1059=159 I. C. 1021	Overruled in (29) A. I. R. 1942 Mad. 622 (F.B.).
Muthukrishna Iyengar v. Sankaranarayana Iyer, ('15) 27 M. L. J. 600 = 16 M. L. T. 196 = 1 M.L.W. 699=1914 M. W. N. 708=(2) A. I. R. 1915 Mad. 447=25 I. C. 573	Overruled in (29) A. I. R. 1942 Mad. 622 (F.B.).
Official Receiver, Anantapur v. Ramachandrappa, ('29) 52 Mad. 246=55 M.L.J. 721=28 M.L.W. 603=(16) A.I.R. 1929 Mad. 166=114 I. C. 345	Overruled in (29) A. I. R. 1942 Mad. 682 (F.B.).
Official Receiver, Coimbatore v. Arunachalam Chettiar, ('31) 33 M. L. W. 607=(18) A. I. R. 1931 Mad. 118=130 I. C. 479	Overruled in (29) A. I. R. 1942 Mad. 330.
Ponnusami Mudaliar v. Srinivasa Naickan, ('08) 31 Mad. 333	Impliedly Overruled in (29) A. I. R. 1942 P. C. 50.
President, Co-operative Credit Society, Kaikaran v. Narasimharao, (1941) 52 M. L. W. 354=1940 M.W.N. 889=(1940) 2 M.L.J. 402=(28) A.I.R. 1941 Mad. 77	Overruled in (29) A. I. R. 1942 Mad. 41 (F.B.).
Ramachandra Deo v. Kamoju Balaji, ('40) I. L. R. 1940 Mad. 245 = 50 M. L. W. 721=(1940) 1 M.L.J. 673=1940 M. W. N. 433=(27) A. I. R. 1940 Mad. 91=190 I. C. 42	Overruled in (29) A. I. R. 1942 Mad. 622 (F. B.).
Raman Nayar v. Kesavan Embarandiri, (1941) 1941 M. W. N. 698 = (1941) 2 M. L. J. 456*n* = (28) A. I. R. 1941 Mad. 816=197 I. C. 488	Overruled in (29) A. I. R. 1942 Mad. 242(2).
Ramaswami Konar v. Nachiar Ammal, (1940) 1940 M. W. N. 867=(1940) 2 M. L. J. 491=52 M. L. W. 350=1940 M. Cr. C. 198	Overruled in (29) A. I. R. 1942 Mad. 19.
Second Appeal No. 165 of 1938	Reversed in (29) A. I. R. 1942 Mad. 682 (F.B.).
Sesha Iyer v. Krishna Iyengar, ('01) 24 Mad. 96= 10 M. L. J. 383	Overruled in (29) A. I. R. 1942 Mad. 685 (F.B.).
Sevadappa Gounder v. Narayanaswami Ayyar, (1940) 51 M. L. W. 429=1940 M. W. N. 365=(1940) 1 M.L.J. 647=(27) A.I.R. 1940 Mad. 564=192 I. C. 810	Reversed in (29) A. I. R. 1942 Mad. 226.
Shanmugasundaram Pillai v. Manicka Mudaliar, (1939) 1939 M.W.N. 192=(1939) 1 M.L.J. 412 =1939 M.Cr.C. 77=49 M.L.W. 102=40 Cr.L.J. 542=(26) A. I. R. 1939 Mad. 368=181 I.C. 86	Overruled in (29) A. I. R. 1942 Mad. 19.
Sitaramayya v. Venkanna, (1940) 50 M.L.W. 432= (1939) 2 M.L.J. 509 = 1939 M.W.N. 961=(27) A.I.R. 1940 Mad. 15=187 I. C. 30	Reversed in (29) A. I. R. 1942 Mad. 166.
Srinivasa Ayyangar v. Kuppuswami Ayyangar, (1921) 44 Mad. 801=14 M.L.W. 78=1921 M.W.N. 630=(8) A.I.R. 1921 Mad. 447=64 I.C. 698	(Remarks in Conflict), Overruled in (29) A.I.R. 1942 Mad. 183 (F. B.).
Subbarao v. Official Receiver, Guntur, ('35) 42 M.L.W. 295=1935 M.W.N. 1028=(22) A.I.R. 1935 Mad. 427=156 I. C. 205	Overruled in (29) A. I. R. 1942 Mad. 330.
Varadarajulu Naidu v. Rajamanicka Mudaliar, (1937) 1937 M.W.N. 754=(1937) 2 M.L.J. 273 = (24) A. I. R. 1937 Mad. 767=176 I. C. 916	Overruled in (29) A. I. R. 1942 Mad. 252.
Venkatarama Iyer v. Subramania Sastri, ('24) 20 M. L. W. 122=(11) A.I.R. 1924 Mad. 741=78 I. C. 37	Overruled in (29) A. I. R. 1942 Mad. 622 (F.B.).

COMPARATIVE TABLES

Comparative Table of cases reported in Other Journals in 1942 which were already reported in the All India Reporter in 1940 and 1941.

A. I. R. Madras = Other Journals

AIR 1940 Madras				AIR 1941 Madras				AIR 1941 Madras				AIR 1941 Madras			
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
598	194	I C	544	524	200	I C	77	672	199	I C	424	853 *con*	43	Cr L J	425
				528	200	I C	748	682	200	I C	124	854	200	I C	327
AIR 1941 Madras				538	198	I C	338	688	200	I C	254	855	200	I C	603
AIR	Other Journals			549	198	I C	519	690	200	I C	577	858	200	I C	287
235**FB**	198	I C	760	552	200	I C	698	693	200	I C	38	861	200	I C	324
375	200	I C	49	557	200	I C	245	695	200	I C	58	865	200	I C	433
383	199	I C	534	558	198	I C	422	697	199	I C	449	866	200	I C	239
385	198	I C	811	561	199	I C	774	699	200	I C	375	868	200	I C	342
387	200	I C	83	563	198	I C	328	704	198	I C	843	870	200	I C	95
389	199	I C	817	564	200	I C	36	706	199	I C	432		1942	M W N	173
391	200	I C	338	565	199	I C	848	713	200	I C	691		43	Cr L J	596
394	199	I C	828	567	198	I C	600	719	200	I C	13	873	199	I C	769
398	200	I C	10	569	198	I C	305	727	200	I C	70	877	199	I C	472
399	199	I C	895	571	200	I C	333	733	200	I C	119	878	200	I C	459
401	199	I C	443	572	198	I C	805	736	199	I C	596	886	200	I C	163
405	199	I C	15	577	200	I C	366	737	200	I C	543	889(1)	199	I C	617
406	198	I C	816	580	198	I C	562	739	199	I C	599	890	199	I C	867
408	199	I C	620	582	198	I C	870	741	199	I C	746	891(1)	199	I C	448
410	198	I C	801	584	200	I C	517	742	200	I C	722		1942	M W N	832
411	200	I C	67	588	199	I C	480	745	200	I C	34	891(2)	200	I C	592
412	199	I C	366	589	199	I C	651	751(1)	43	Cr L J	344	892	198	I C	611
414	199	I C	20	593	201	I C	724	753	200	I C	492	895	ILR	1942 M	147
428	199	I C	693	600	198	I C	512	761	198	I C	893		199	I C	796
430	199	I C	466	602	198	I C	606		43	Cr L J	445	897	ILR	1942 M	143
434	200	I C	659	605	198	I C	292	767(2)	200	I C	249		200	I C	587
437	199	I C	790	606	198	I C	417	769	200	I C	615	898 **FB**	ILR	1942 M	271
439	200	I C	346	607	198	I C	616	772**FB**	ILR	1942 M	95	905**SB**	43	Cr L J	233
440	200	I C	27	609	200	I C	725	788	200	I C	40	906	ILR	1942 M	199
446	200	I C	205	611	199	I C	436	796	200	I C	110		200	I C	582
449**FB**	199	I C	225	612	200	I C	102	800(2)	200	I C	639	908	200	I C	139
475	199	I C	710	615	199	I C	474	806	199	I C	602	910	43	Cr L J	215
477	199	I C	812	616	198	I C	531	810	200	I C	503		ILR	1942 M	322
479	199	I C	704	618	198	I C	438	811	198	I C	506	912	200	I C	610
480	199	I C	23	620	198	I C	787	814	ILR	1942 M	153	913	199	I C	356
487	199	I C	854	622	198	I C	578	817	200	I C	520	921	200	I C	55
491	201	I C	316	626	198	I C	597	825	43	Cr L J	218	922	198	I C	260
493	199	I C	528	628	198	I C	425		ILR	1942 M	410	**SB**	ILR	1942 M	182
495	200	I C	283	629	200	I C	810	827	200	I C	477	924**SB**	199	I C	393
497	200	I C	388	632	198	I C	573	829	200	I C	321	925**FB**	ILR	1942 M	251
498	198	I C	798	635	198	I C	552	831	200	I C	257	929**FB**	ILR	1942 M	346
	43	Cr L J	433	636	200	I C	113	833(1)	199	I C	542	933**FB**	ILR	1942 M	264
500	199	I C	591	639	198	I C	322	838	200	I C	483	935	198	I C	248
502	198	I C	560	641	199	I C	577	841	200	I C	357	**FB**	ILR	1942 M	163
505	200	I C	648	650	200	I C	729	845	1942	M W N	223	937**FB**	ILR	1942 M	173
506	200	I C	612	654	200	I C	17	847	200	I C	443	940(1)	199	I C	594
507	199	I C	753	660	198	I C	732	851	ILR	1942 M	137	941	43	Cr L J	250
510	199	I C	822	666	198	I C	309		200	I C	353		ILR	1942 M	328
513	199	I C	882	669	200	I C	369	853	198	I C	765	944	200	I C	336

A. I. R. 1942 Madras = Other Journals

AIR 1942 Madras				AIR 1942 Madras				AIR 1942 Madras				AIR 1942 Madras			
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	54	M L W	128	13 *con*	1941	M W N	838	20 *con*	198	I C	109	26	54	M L W	423
	1941-2	M L J	263		ILR 1942	M	243		43	Cr L J	372		1941-2	M L J	581
	1941	M W N	978		201	I C	176	21	54	M L W	429		1941	M W N	893
	ILR 1942	M	24	16	1941-2	M L J	505		1941-2	M L J	631		ILR 1942	M	220
	200	I C	794		1941	M W N	921		1942	M W N	148		200	I C	884
4	1941-2	M L J	671		201	I C	122		201	I C	148	27	1941	M W N	924
	1941	M W N	783	17	1941	M W N	773	23	54	M L W	444		54	M L W	570
	200	I C	868		1941-2	M L J	677		1941-2	M L J	644		1941-2	M L J	845
5	54	M L W	45		201	I C	143		1941	M W N	898		201	I C	112
	1941	M W N	752	19	1941-2	M L J	618		201	I C	453				
	1941-2	M L J	754		54	M L W	445	24	1941-2	M L J	588	28	54	M L W	426
	200	I C	815		1941	M W N	1076		54	M L W	435		1941-2	M L J	601
12	1941-2	M L J	566		1942	M Cr C	16		1941	M W N	895		1941	M W N	917
	54	M L W	471		ILR 1942	M	158		200	I C	873		ILR 1942	M	225
	1941	M W N	946		198	I C	809	25	1941	M W N	845		201	I C	128
	199	I C	290		43	Cr L J	441		1941	M Cr C	270	29	1941	M W N	748
13	54	M L W	345	20	1941	M W N	867		197	I C	214		1941-2	M L J	291
	1941-2	M L J	481		1941	M Cr C	305		43	Cr L J	161		54	M L W	234

AIR 1942 Madras			
AIR	Other Journals		
30	1941	M W N	775
	54	M L W	716
	201	I C	145
31	1941	M W N	811
	1941-2	M L J	420
	1941	M Cr C	244
	54	MLW	738
	198	I C	428
	43	Cr L J	361
33	1941	MWN	876
	1941	M Cr C	322
	197	I C	579
	43	Cr L J	212
34	1941-2	M L J	653
	54	M L W	468
	1941	M W N	991
	201	I C	265
3	54	M L W	315
	1941	M W N	817
	1941-2	M L J	450
	201	I C	119
36	1941-2	M L J	287
	201	I C	301
38	1941	M W N	789
	1941	M Cr C	279
	196	I C	882
	43	Cr L J	163
39	54	M L W	408
	1941	M W N	881
	1941-2	M L J	636
	201	I C	351
41	54	M L W	671
FB	1941-2	M L J	956
	1941	M W N	1064
	198	I C	197
	ILR 1942	M	336
44	1941-2	M L J	520
	201	I C	612
48	1941	M W N	844
	1941	M Cr C	277
	55	M L W	30
49	54	M L W	327
	1941	M Cr C	246
	1941	M W N	929
	1941-2	MLJ	1070
	198	I C	295
	43	Cr L J	346
56	1941-2	MLJ	159
	54	M L W	120
	1941	M W N	904
	200	I C	881
58	1941	M Cr C	146
	1942	M W N	42
	201	I C	390
62	1941	M W N	819
	1941-2	MLJ	1050
	201	I C	55
67	1941	M W N	896
	54	M L W	474
	1941-2	M L J	722
	201	I C	307
69	1941	MWN	844
	1941	M Cr C	303
	198	I C	16
	43	Cr L J	340
70	54	M L W	295
	1941-2	M L J	514
	1941-4	FLJHC	326
	200	I C	886
73	54	M L W	382
	1941	M W N	855
	1941-2	M L J	529
	ILR 1942	M	236
	201	I C	97

AIR 1942 Madras			
AIR	Other Journals		
75	1941-2	M L J	487
	1941	M W N	846
	54	M L W	726
	1941	M Cr C	306
	197	I C	265
	43	Cr L J	138
76	1941-2	M L J	507
	54	M L W	394
	1941	M W N	951
	201	I C	348
77	1941-2	M L J	375
	54	M L W	314
	1941	M Cr C	284
	196	I C	887
	43	Cr L J	103
	1942	M W N	424
	1942	M Cr C	82
78	1941-2	M L J	655
	54	M L W	464
	1941	M W N	997
	201	I C	195
79	1941-2	M L J	604
	54	M L W	433
	1941	M W N	913
	201	I C	164
81(1)	1941	M W N	809
	1941-2	M L J	486
	1941	M Cr C	266
	54	M L W	737
	197	I C	146
	43	Cr L J	133
81(2)	1941	M W N	875
	54	M L W	562
	1941	M Cr C	319
	198	I C	26
	43	Cr L J	300
82	54	M L W	370
	1941	M W N	857
	200	I C	871
84	54	M L W	416
	1941	M W N	860
	1941-2	M L J	947
	201	I C	22
86	1941-2	M L J	598
	54	M L W	438
	1941	M W N	916
	200	I C	780
88	1941	M W N	852
	1941-2	M L J	918
	201	I C	238
90	1941-2	M L J	472
	54	M L W	379
	1941	M W N	849
	201	I C	132
92(1)	1941	M Cr C	263
	1941-2	M L J	746
	1941	M W N	1036
	197	I C	630
	43	Cr L J	227
92(2)	1941-2	M L J	587
	1941	M W N	876
	54	M L W	470
	201	I C	227
93	1941-2	M L J	510
	54	M L W	362
	1941	M W N	865
	1941	M Cr C	323
	198	I C	203
	43	Cr L J	325
95	1941-2	M L J	595
	54	M L W	440
	1941	M W N	1022
	ILR 1942	M	230
	201	I C	374

AIR 1942 Madras			
AIR	Other Journals		
97	54	M L W	365
	1941-2	M L J	550
	1941	M W N	985
	201	I C	156
100	1941	M Cr C	257
	1941-2	M L J	661
	1941	M W N	1038
	198	I C	225
	43	Cr L J	320
101	1941	M W N	793
	1941-2	M L J	650
	200	I C	774
102	1941-2	M L J	557
	1941	M W N	879
	54	M L W	561
	201	I C	400
103(1)	1941-2	M L J	567
	54	M L W	428
	1941	M W N	926
	197	I C	738
103(2)	54	M L W	560
	1941	M W N	928
	1941-2	M L J	847
	201	I C	30
104	54	M L W	355
	1941-2	M L J	490
	1941	M W N	1045
	201	I C	242
105	54	M L W	353
	1941-2	M L J	509
	1941	M W N	887
	201	I C	410
106	54	M L W	250
	1941-2	M L J	406
	198	I C	169
	ILR 1942	M	42
111	1941-2	M L J	216
	1941	M W N	885
	54	M L W	488
	201	I C	81
113	1941	M W N	813
	1941	M Cr C	277
	198	I C	131
	43	Cr L J	314
114	54	M L W	373
	1941-2	M L J	640
	200	I C	798
	1942	M W N	673
116	1941	M W N	910
	1941-2	M L J	665
	201	I C	94
119	54	M L W	503
	1941-2	M L J	682
	1941	M W N	941
	201	I C	229
120	1941-2	M L J	584
	54	M L W	466
	1941	M W N	914
	200	I C	859
121	1941-2	M L J	564
	54	M L W	404
	201	I C	160
122	54	M L W	244
	1941-2	M L J	424
	200	I C	791
124	1941	M W N	871
	1941	M Cr C	298
125	54	M L W	499
	1941-2	M L J	707
	1941	M W N	944
	201	I C	367
127	54	M L W	405
	1941-2	M L J	577
	1941	M W N	883

AIR 1942 Madras			
AIR	Other Journals		
127 *con*	201	I C	126
128	1941-2	M L J	784
	1941	M W N	982
	201	I C	199
129	54	M L W	411
	201	I C	39
133	54	M L W	461
	1941-2	M L J	658
	1941	M W N	922
	201	I C	15
134	54	M L W	105
	1941-2	M L J	340
	1941	M W N	927
	201	I C	161
136	1941-2	M L J	740
	54	M L W	544
	1942	M W N	63
	201	I C	320
139	54	M L W	217
	1941-2	M L J	281
	1941	M W N	769
	ILR 1942	M	33
	201	I C	244
143	54	M L W	517
	1941-2	M L J	703
	1941	M W N	1070
	201	I C	67
145	1941-2	M L J	751
	54	M L W	553
	1941	M W N	992
	201	I C	305
146	1941-2	M L J	848
	54	M L W	624
	1942	M W N	31
	ILR 1942	M	405
	201	I C	182
148	1941-2	M L J	781
	201	I C	272
149	54	M L W	699
	1941-2	MLJ	1010
	1942	M W N	61
	201	I C	79
151	54	M L W	523
	1941-2	M L J	690
	1941	M W N	937
	201	I C	384
152	54	M L W	526
	1941-2	M L J	774
	1941	M W N	970
	201	I C	86
154	1941-2	M L J	717
	54	M L W	539
	1941	M W N	962
	201	I C	11
156	54	M L W	508
	1941-2	M L J	711
	1941	M W N	938
	201	I C	74
159	54	M L W	668
	1941-2	M L J	935
	201	I C	48
161	1941-2	M L J	816
	ILR 1942	M	204
	201	I C	3
166	1941-2	M L J	768
	54	M L W	594
	1941	M W N	1072
	201	I C	202
167	54	M L W	591
	1941-2	M L J	939
	1942	M W N	102
	201	I C	172
169	54	M L W	577

A I R 1942 Madras			
AIR	Other Journals		
169 *con*	1941-2 M L J	808	
	201 I C	117	
	1941-4 FLJHC	398	
170	1941 M W N	989	
	1941-2 M L J	873	
	201 I C	84	
172	54 M L W	548	
	1941-2 M L J	778	
	1941 M W N	994	
	ILR 1942 M	316	
	201 I C	109	
173	54 M L W	571	
	1941-2 M L J	827	
	201 I C	91	
	43 Cr L J	734	
177	1942-1 M L J	18	
SB	1942-10 I T R	7	
	55 M L W	13	
	1942 M W N	195	
	ILR 1942 M	281	
	199 I C	761	
178	1941-2 M L J	854	
	54 M L W	632	
	1941 M Cr C	295	
	199 I C	54	
	43 Cr L J	454	
	1942 M W N	384	
	ILR 1942 M	661	
	1942 M Cr C	82	
179	54 M L W	207	
	1941-2 M L J	435	
	1941 M W N	1018	
	201 I C	232	
181	1941-2 M L J	852	
	54 M L W	633	
	1941 M Cr C	292	
	1941 M W N	1073	
	198 I C	549	
	43 Cr L J	397	
	ILR 1942 M	587	
182	54 M L W	521	
	1941-2 M L J	748	
	1941 M Cr C	300	
	1942 M W N	41	
	198 I C	543	
	43 Cr L J	395	
183	1942 M W N	11	
FB	55 M L W	4	
	1942-1 M L J	57	
	198 I C	588	
	ILR 1942 M	502	
191	1942-1 M L J	16	
SB	55 M L W	15	
	1942 M W N	119	
	ILR 1942 M	91	
	199 I C	175	
	1942-10 I T R	1	
193	54 M L W	563	
	1941-2 M L J	877	
	1941 M W N	1003	
	201 I C	50	
196	1941 M Cr C	291	
	54 M L W	730	
	1941-2 M L J	1040	
	1942 M W N	39	
	199 I C	143	
	43 Cr L J	524	
198	1941-2 M L J	568	
	1941 M W N	877	
	54 M L W	472	
	201 I C	332	
199	1941 M W N	1035	
	1942 M Cr C	14	
	199 I C	368	

A I R 1942 Madras			
AIR	Other Journals		
199 *con*	43 Cr L J	538	
200	54 M L W	579	
	1941 M W N	1000	
	1941-2 M L J	913	
	ILR 1942 M	308	
	201 I C	218	
202	54 M L W	697	
	1941 M W N	1042	
	1941-2 M L J	1008	
	201 I C	33	
204(1)	54 M L W	422	
	1941-2 M L J	580	
	1941 M W N	879	
	200 I C	848	
204(2)	54 M L W	551	
	1941-2 M L J	795	
	1941 M W N	995	
	201 I C	324	
205	54 M L W	679	
	1941-2 M L J	986	
	1941 M W N	1055	
	ILR 1942 M	438	
	201 I C	103	
209	54 M L W	491	
	1941-2 M L J	695	
	1942 M W N	29	
	201 I C	258	
210	1941-2 M L J	910	
	1941 M W N	1067	
	201 I C	204	
212	1941-2 M L J	862	
	54 M L W	651	
	201 I C	152	
	ILR 1942 M	630	
213	1941 M W N	1028	
	1941 M Cr C	326	
	199 I C	139	
	43 Cr L J	516	
216	54 M L W	708	
	1941-2 M L J	1018	
	201 I C	113	
219	1941-2 M L J	770	
	1941 M W N	998	
	201 I C	191	
221(1)	1941 M W N	1027	
	197 I C	799	
	1942 M Cr C	15	
	43 Cr L J	278	
221(2)	1941-2 M L J	1014	
	1941-4 FLJHC	390	
	1942 M W N	35	
	1942 M Cr C	4	
	55 M L W	77	
	ILR 1942 M	414	
	43 Cr L J	477	
	199 I C	128	
223	54 M L W	556	
	1941-2 M L J	787	
	1941 M W N	1032	
	1941 M Cr C	310	
	199 I C	406	
	43 Cr L J	557	
	ILR 1942 M	494	
226	54 M L W	654	
	1941-2 M L J	932	
	201 I C	187	
227	1941 M W N	1025	
	1941-2 M L J	999	
	1942 M Cr C	6	
	199 I C	133	
	43 Cr L J	521	
230	54 M L W	684	
	1941-2 M L J	1002	
	1941 M W N	1061	

A I R 1942 Madras			
AIR	Other Journals		
230 *con*	ILR 1942 M	300	
	201 I C	369	
232	54 M L W	656	
	1941-2 M L J	923	
	ILR 1942 M	287	
	201 I C	62	
237	1941 M W N	956	
	1942 M Cr C	9	
	43 Cr L J	463	
	199 I C	87	
240	1941-2 M L J	1049	
	55 M L W	30	
	1942 M Cr C	8	
	198 I C	515	
	43 Cr L J	401	
	1942 M W N	428	
241	1941-2 M L J	1038	
	1942 M Cr C	1	
	198 I C	258	
	43 Cr L J	336	
	1942 M W N	426	
	55 M L W	756	
242(1)	1941-2 M L J	1036	
	1942 M Cr C	2	
	198 I C	528	
	43 Cr L J	409	
	1942 M W N	426	
	55 M L W	757	
242(2)	1941-2 M L J	455	
	54 M L W	339	
	1941 M W N	851	
	ILR 1942 M	133	
	201 I C	288	
244	54 M L W	702	
	1941-2 M L J	993	
	1942 M W N	268	
	201 I C	335	
247	54 M L W	663	
	1941-2 M L J	962	
	1941 M W N	1058	
	ILR 1942 M	455	
	201 I C	261	
249	1941-2 M L J	1047	
	1942 M W N	38	
	1942 M Cr C	3	
	43 Cr L J	487	
	199 I C	320	
251	1941-2 M L J	693	
	1941 M W N	1037	
	1942 M Cr C	12	
	197 I C	883	
	43 Cr L J	383	
252	54 M L W	676	
	1941-2 M L J	968	
	ILR 1942 M	355	
	199 I C	99	
254	54 M L W	513	
	1941-2 M L J	698	
	1941 M W N	947	
	200 I C	784	
256	54 M L W	754	
	1941-2 M L J	1093	
	1942 M W N	267	
	200 I C	895	
258	1942 M W N	306	
	54 M L W	751	
	1942-1 M L J	49	
	ILR 1942 M	431	
	201 I C	167	
260	54 M L W	688	
	1941-2 M L J	1024	
	ILR 1942 M	360	
	199 I C	105	

A I R 1942 Madras			
AIR	Other Journals		
266	1942-1 M L J	158	
SB	55 M L W	87	
	1942-10 I T R	64	
	1942 M W N	199	
	199 I C	272	
267	1942-1 M L J	160	
SB	55 M L W	42	
	1942 M W N	124	
	1942 M Cr C	39	
	199 I C	149	
	ILR 1942 M	428	
268	1942-1 M L J	164	
SB	55 M L W	75	
	1942-10 I T R	71	
	1942 M W N	263	
	199 I C	211	
269	1941-2 MLJ	1042	
	1942 M W N	36	
	1942 M Cr C	35	
	199 I C	316	
	43 Cr L J	547	
271	1941-2 MLJ	1060	
	1942 M W N	27	
	55 M L W	33	
	200 I C	876	
273	54 M L W	741	
	1942-1 M L J	11	
	1942 M W N	134	
	ILR 1942 M	448	
	201 I C	407	
275(1)	1941 M W N	1030	
	1942 M Cr C	14	
275(2)	1941 M W N	874	
	54 M L W	561	
	1941 M Cr C	304	
	199 I C	310	
	43 Cr L J	543	
276 (1)	1942-1 M L J	36	
	55 M L W	16	
	1941-9 I T R	693	
	1942 M W N	197	
	200 I C	743	
276(2)	1941 M W N	1075	
	55 M L W	18	
	1942 M Cr C	19	
	198 I C	396	
	43 Cr L J	359	
277	54 M L W	748	
	1942-1 M L J	21	
	1942 M W N	308	
	201 I C	207	
278	1941-2 M L J	309	
	54 M L W	228	
	1941 M W N	971	
	200 I C	765	
279(1)	1941 M Cr C	260	
	1941-2 M L J	1034	
	1942 M W N	160	
	198 I C	649	
	43 Cr L J	411	
279(2)	1941 M W N	1073	
	1942 M Cr C	21	
280	1941-2 M L J	1085	
	201 I C	284	
281(1)	1941 M W N	1074	
	1942 M Cr C	22	
	198 I C	104	
	43 Cr L J	368	
281(2)	1941 M Cr C	227	
	1942-1 M L J	48	
	55 M L W	40	
	1942 M W N	124	
	199 I C	50	
	43 Cr L J	457	

A I R 1942 Madras			A I R 1942 Madras			A I R 1942 Madras			A I R 1942 Madras		
AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
282	1941-2 M L J	1088	300 *con*	201 I C	689	343 *con*	1942 M W N	155	365	55 M L W	165
	201 I C	275	303	55 M L W	56	345	1942 M W N	140		1942-1 M L J	207
283	1941 M Cr C	271		1942-1 M L J	187		1942-1 M L J	316		204 I C	425
	1942-1 M L J	230		1942 M W N	348		55 M L W	172	368	1942 M W N	136
	1942 M W N	121	305	1942-1 M L J	113		203 I C	574		1942-1 M L J	309
	202 I C	28		55 M L W	40	346	55 M L W	97		204 I C	456
	43 Cr L J	785		1942 M W N	92		1942 M W N	108	369	1942-1 M L J	372
285	1941 M Cr C	201	306	1942-1 M L J	38		1942-1 M L J	233		55 M L W	113
	199 I C	742		55 M L W	28		1942 M Cr C	44		1942 M W N	261
	43 Cr L J	576		1942 M W N	117		202 I C	21		204 I C	523
287	1941 M Cr C	294		199 I C	793	347(1)	1942-1 M L J	104	371	1942 M W N	114
	1942-1 M L J	202	307	55 M L W	18		1942 M W N	168		1942-1 M L J	311
	55 M L W	128		1942-1 M L J	166		1942 M Cr C	34		203 I C	516
	1942 M W N	289		ILR 1942 M	550		55 M L W	253	373	1942 M W N	58
	201 I C	385	311	55 M L W	68		201 I C	457		1942-1 M L J	190
	43 Cr L J	660		1942-1 M L J	267		43 Cr L J	764		55 M L W	385
288(1)	54 M L W	172	313	55 M L W	58	347(2)	1942 M Cr C	24	375(1)	1942-1 M L J	87
	1941-2 M L J	242		1942-1 M L J	235		198 I C	182		1942 M W N	128
	1941 M W N	734		1942 M W N	360		1942 M W N	123		55 M L W	176
	200 I C	813	315	1942-1 M L J	41		43 Cr L J	318		201 I C	781
288(2)	1941 M Cr C	267		1942 M W N	285	348	1942-1 M L J	70		203 I C	594
	199 I C	833		55 M L W	317		1942 M W N	94	375(2)	55 M L W	140
	43 Cr L J	582	316	55 M L W	88		55 M L W	311		1942 M W N	186
	1942 M W N	591		1942-1 M L J	226		203 I C	607		1942-1 M L J	596
	55 M L W	771		1942 M W N	109	349	1942-1 M L J	182	377	1942-1 M L J	241
289	1941 M W N	763		202 I C	122		55 M L W	99		1942 M W N	342
	1941 M Cr C	241	317	1942-1 M L J	99		1942 M W N	347	379	55 M L W	154
	54 M L W	478		55 M L W	324		204 I C	164		1942-1 M L J	331
	197 I C	102		1942 M W N	396	351	1942-1 M L J	161		1942 M W N	188
	43 Cr L J	11		201 I C	745		1942 M W N	211		ILR 1942 M	608
290	1941 M Cr C	273	319(1)	1941 M W N	1039		55 M L W	252	381	55 M L W	156
	1941-2 M L J	1045		1942 M Cr C	20		203 I C	588		1942-1 M L J	325
	198 I C	195		198 I C	671	352	1942-1 M L J	116		1942 M W N	192
	43 Cr L J	327		43 Cr L J	536		1942 M W N	57		202 I C	77
	1942 M W N	425	319(2)	55 M L W	63		55 M L W	103	382	1942-1 M L J	24
	55 M L W	758		1942-1 M L J	203		201 I C	749		1942 M W N	23
291	1941-2 M L J	1064		1942 M W N	350	353	1942-1 M L J	469		55 M L W	24
	55 M L W	180	320	1942 M W N	120	**FB**	55 M L W	240	384	1942-1 M L J	155
	1942 M W N	385		1942-1 M L J	217		1942 M W N	325		55 M L W	43
	201 I C	378		55 M L W	178		201 I C	586		1942 M W N	104
293	1941 M Cr C	261		202 I C	8		ILR 1942 M	590		ILR 1942 M	526
	1942-1 M L J	34	321	1942 M W N	77	354	1942 M W N	161		203 I C	526
	1942 M W N	56		1942-1 M L J	195		1942-1 M L J	357	385	55 M L W	118
	198 I C	207	323	1942 M W N	137		55 M L W	255		1942-1 M L J	290
	43 Cr L J	331		1942-1 M L J	341		1942 M Cr C	50		1942 M W N	182
	55 M L W	373		55 M L W	170		202 I C	468		202 I C	64
294	1941-2 M L J	212	324	1942 M W N	67		43 Cr L J	851	386	55 M L W	90
	54 M L W	173		1942-1 M L J	184	356	1942 M W N	128		1942 M W N	129
	1941 M W N	818		55 M L W	148		55 M L W	170		1942-1 M L J	274
	200 I C	808	326	1942-1 M L J	105		1942 M Cr C	57	388	1942 M W N	139
295	1941 M Cr C	287		1942 M W N	126		201 I C	515		1942-1 M L J	289
	1942-1 M L J	200		1942 M Cr C	33		43 Cr L J	768		55 M L W	127
	55 M L W	125		55 M L W	321	357(1)	1942 M W N	142		201 I C	790
	1942 M W N	172		201 I C	437		1942-1 M L J	291	389	1942-1 M L J	90
	201 I C	609		43 Cr L J	738		55 M L W	163		55 M L W	23
	43 Cr L J	753	327	1942 M W N	81		202 I C	75		1942 M W N	91
296	54 M L W	184		1942-1 M L J	173	357(2)	1942 M W N	164		201 I C	758
	1941-2 M L J	298		55 M L W	108		55 M L W	144	390	1942-1 M L J	111
	1941 M W N	975		201 I C	782		1942-1 M L J	360		1942 M W N	66
	200 I C	861	330	55 M L W	35		1942 M Cr C	53		55 M L W	323
297	1942-1 M L J	86		1942-1 M L J	318		200 I C	735		201 I C	753
	55 M L W	33		1942 M W N	338		43 Cr L J	710	391	1942-1 M L J	292
	1942 M W N	120	334	1942-1 M L J	92	360	1942 M W N	69		55 M L W	130
	202 I C	149		55 M L W	82		1942-1 M L J	177		1942 M W N	179
298	1942-1 M L J	88		1942 M W N	97		55 M L W	101		ILR 1942 M	640
	55 M L W	27	337	1941-2 M L J	908		202 I C	17		203 I C	200
	1942 M W N	96		1942 M W N	148	362	1942 M W N	151	392	55 M L W	142
299	1942 M W N	25		55 M L W	254		55 M L W	136		1942-1 M L J	373
	1942-1 M L J	44	338	1942-1 M L J	119		1942-1 M L J	303		1942 M W N	209
	55 M L W	319		1942 M W N	84		ILR 1942 M	647	395	1942 M W N	153
	201 I C	766		55 M L W	388	364	55 M L W	61		1942-1 M L J	285
300	1942-1 M L J	28		204 I C	355		1942-1 M L J	219		55 M L W	132
	1942 M W N	19	343	1942-1 M L J	247		1942 M W N	363		ILR 1942 M	682
	55 M L W	104		55 M L W	111		204 I C	209		204 I C	393

A I R 1942 Madras				A I R 1942 Madras				A I R 1942 Madras				A I R 1942 Madras			
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
396	55	M L W	89	415(2) *con*	1942	M Cr C	43	439	1942-1	M L J	380	460	55	M L W	190
	1942	M W N	116		201	I C	444		1942	M W N	222		1942	M W N	237
	1942-1	M L J	217		43	Cr L J	671		55	M L W	214		1942-1	M L J	396
	203	I C	529	417	1942-1	M L J	445		200	I C	232		202	I C	23
397	55	M L W	98		1942	M W N	289		1942	M Cr C	66	462	1942	M W N	215
	1942	M W N	143		1942	M Cr C	72		43	Cr L J	618		1942-1	M L J	416
	1942-1	M L J	272		202	I C	302	440	1942-1	M L J	455		55	M L W	203
	203	I C	179		43	Cr L J	807		55	M L W	229		201	I C	771
398(1)	1942-1	M L J	335	418	1942	M W N	141		1942	M W N	297	463	55	M L W	188
	1942	M W N	185		55	M L W	157		200	I C	740		1942-1	M L J	394
	55	M L W	251		1942-1	M L J	314		1942	M Cr C	96		1942	M W N	249
	202	I C	67		201	I C	721		43	Cr L J	715	464	1942	M W N	206
398(2)	55	M L W	139	419(1)	55	M L W	185	441	55	M L W	236		1942-1	M L J	451
	1942-1	M L J	336		1942-1	M L J	385		1942-1	M L J	495		55	M L W	250
	1942	M W N	184		1942	M W N	244		1942	M W N	305		202	I C	420
	203	I C	513		202	I C	88	442	1942-1	M L J	439	465	1942-1	M L J	108
399	55	M L W	152	419(2)	1942	M W N	80		55	M L W	212		1942	M W N	125
	1942-1	M L J	338		1942-1	M L J	181		1942	M W N	283		1942	M Cr C	31
	1942	M W N	246		55	M L W	86		202	I C	475		55	M L W	176
401	1942-1	M L J	406		202	I C	124	444	55	M L W	263		201	I C	521
	55	M L W	206	420	1942-1	M L J	498		1942-1	M L J	517		43	Cr L J	743
	1942	M W N	248		1942	M W N	294		201	I C	461	466	55	M L W	186
402	55	M L W	160		201	I C	442		1942	M W N	443		1942	M W N	230
	1942-1	M L J	327		1942	M Cr C	93		43	Cr L J	750		1942-1	M L J	390
	1942	M W N	191		43	Cr L J	745		1942	MCrC	115		ILR 1942	M	654
403	1942-1	M LJ	245		55	M L W	856	445(1)	1942-1	M L J	467	468	55	M L W	258
	55	M L W	115	421	1942-1	M L J	281		55	M L W	237		1942-1	M L J	535
	1942	M W N	182		55	M L W	128		1942	M W N	332		1942	M W N	345
	201	I C	785		1942	M W N	178	445(2)	55	M L W	239		201	I C	607
404	55	M L W	95		201	I C	733		1942-1	M L J	499	470	1942-1	M L J	425
	1942-1	M L J	228		ILR 1942	M	677		1942	M W N	351		55	M L W	200
	1942	M W N	170	422	1942	M W N	113	446	55	M L W	192		1942	M W N	252
	1942	M Cr C	41		1942-1	M L J	222		1942-1	M L J	460		201	I C	731
	201	I C	617		55	M L W	228		1942	M W N	298		ILR 1942	M	875
	43	Cr L J	751		201	I C	703		1942	M Cr C	89	471	1942	M W N	218
	ILR 1942	M	802	423	1942-1	M L J	238		202	I C	311		1942-1	M L J	436
405(1)	1942-1	M L J	370		55	M L W	117		43	Cr L J	813		55	M L W	225
	1942	M W N	236		1942	M W N	146	449	1942-1	M L J	466		1942	M Cr C	67
	55	M L W	210		201	I C	693		55	M L W	238		201	I C	713
	202	I C	81		ILR 1942	M	691		1942	M W N	331	472	55	M L W	369
405(2)	1942	M W N	80	425	55	M L W	134		202	I C	19		1942-1	M L J	575
	1942-1	M L J	180		1942-1	M L J	306	450	1942-1	M L J	503		1942	M W N	388
	55	M L W	89		1942	M W N	176		1942	M W N	291		202	I C	159
	202	I C	44		201	I C	686		1942	M Cr C	83		ILR 1942	M	949
406(1)	55	M L W	159		ILR 1942	M	635		202	I C	290	474	1942	M W N	202
	1942	M W N	190	426	1942-1	M L J	378		43	Cr L J	810		1942-1	M L J	511
	1942-1	M L J	386		1942	M W N	220	451	55	M L W	223		202	I C	565
406(2)	1942-1	M L J	344		55	M L W	215		1942-1	M L J	489	478(1)	1942-1	M L J	435
	1942	M W N	225		1942	M Cr C	69		1942	M Cr C	99		55	M L W	211
	55	M L W	217		201	I C	387		1942	M W N	595		1942	M W N	282
	ILR 1942	M	532		43	Cr L J	670	452(1)	55	M L W	232		201	I C	773
410	55	M L W	164	427	1942-1	M L J	457		1942	M W N	296		ILR 1942	M	746
	1942	M W N	208		55	M L W	257		1942-1	M L J	520	478(2)	1942-1	M L J	430
	1942-1	M L J	388		1942	M W N	302		1942	M Cr C	78		55	M L W	207
412	1942-1	M L J	329		200	I C	590		201	I C	701		1942	M W N	313
	1942	M W N	213		1942	M Cr C	75		43	Cr L J	770		202	I C	526
	55	M L W	226		43	Cr L J	704	452(2)	55	M L W	231	481	55	M L W	285
	201	I C	709	428	1942	M W N	287		1942	M W N	293		1942-1	M L J	554
413(1)	1942-1	M L J	205		1942-1	M L J	559		200	I C	594		1942	M W N	429
	55	M L W	72		1942-10	I T R	226		1942	M Cr C	76		202	I C	84
	1942	M W N	214		55	M L W	352		43	Cr L J	702	482	55	M L W	151
	202	I C	89		202	I C	456	453	1942-1	M L J	500		1942	M W N	284
413(2)	55	M L W	161	429	1942-1	M L J	250		55	M L W	260		203	I C	345
	1942-1	M L J	366		ILR 1942	M	464		1942	M W N	333		1942-2	M L J	41
	1942	M W N	201		201	I C	595		202	I C	94	483	55	M L W	301
	202	I C	426	437	1942-1	M L J	369	455SB	1942-1	M L J	599		1942-1	M L J	588
415(1)	55	M L W	119		55	M L W	179		55	M L W	327		1942	M W N	430
	1942-1	M L J	283		1942	M W N	221		ILR 1942	M	663		202	I C	490
	1942	M W N	198		200	I C	171		202	I C	306		ILR 1942	M	862
	ILR 1942	M	614		1942	M Cr C	63		1942	M W N	763	485	55	M L W	303
	201	I C	769		43	Cr L J	594	456	1942-1	M L J	418		1942-1	M L J	564
415(2)	55	M L W	71	438	1942-1	M L J	353		1942	M W N	274		202	I C	323
	1942-1	M L J	224		55	M L W	183		202	I C	538	487	1942-1	M L J	472
	1942	M W N	169		1942	M W N	193						55	M L W	264

A I R 1942 Madras		
AIR	Other Journals	
487 *con*	ILR 1942 M	562
	202 I C	514
494	1942-1 M L J	458
	1942 M W N	303
	55 M L W	316
	1942 M Cr C	85
495	1942 M W N	254
	1942-1 M L J	542
	202 I C	211
501(1)	55 M L W	231
	1942-1 M L J	490
	1942 M W N	304
	200 I C	352
	1942 M Cr C	80
	43 Cr L J	674
501(2)	1942-1 M L J	377
	55 M L W	175
	1942 M W N	245
	202 I C	139
	ILR 1942 M	688
502	55 M L W	173
	1942-1 M L J	400
	1942 M W N	243
	202 I C	65
503	1942-1 M L J	528
	55 M L W	294
	201 I C	776
	ILR 1942 M	844
505	55 M L W	277
	1942-1 M L J	538
	1942 M W N	358
	202 I C	73
	ILR 1942 M	749
507	1942 M W N	232
	1942-1 M L J	448
	55 M L W	247
	202 I C	531
509	1942-1 M L J	403
	1942 M W N	250
	55 M L W	245
	202 I C	294
511	55 M L W	93
	1942 M W N	132
	1942-1 M L J	278
	202 I C	86
512	1942-1 M L J	428
	55 M L W	205
	1942 M W N	265
	202 I C	429
513	1942-1 M L J	382
	1942 M W N	217
	55 M L W	223
	199 I C	688
	1942 M Cr C	64
	43 Cr L J	574
514	1942 M W N	239
	1942-1 M L J	408
	55 M L W	196
	202 I C	78
517	1942-1 M L J	522
	55 M L W	313
	201 I C	797
519	55 M L W	287
	1942-2 M L J	38
	202 I C	380
521	55 M L W	297
	1942 1 M L J	591
	1942 M W N	376
	1942 M Cr C	98
522	55 M L W	274
	1942-1 M L J	556
	1942 M W N	412
	202 I C	451
523	1942 M W N	279

A I R 1942 Madras		
AIR	Other Journals	
523 *con*	1942-1 M L J	491
	55 M L W	242
	202 I C	298
525	1942-1 M L J	506
	55 M L W	280
	1942 M W N	365
	202 I C	402
527	1942-1 M L J	510
	55 M L W	283
	203 I C	417
528	1942 M W N	272
	1942-1 M L J	485
	202 I C	274
530(1)	1942 M W N	374
	55 M L W	354
	1942 M Cr C	74
	1942 2 M L J	37
	201 I C	459
	43 Cr L J	762
530(2)	1941 M Cr C	296
	1942-1 M L J	602
	1942 M W N	383
	201 I C	455
	43 Cr L J	758
531	1942-1 MLJ	586
	1942 M W N	370
	55 M L W	366
	1942 M Cr C	79
	201 I C	440
	43 Cr L J	665
532(1)	1942 M W N	377
	55 M L W	355
	201 I C	524
	1942 M Cr C	81
	43 Cr L J	772
532(2)	1942-1 M L J	585
	1942 M W N	371
	55 M L W	367
	1942 M Cr C	71
	201 I C	654
	43 Cr L J	755
533	55 M L W	288
	1942-1 M L J	571
	1942 M W N	415
	202 I C	6
534(1)	55 M L W	297
	1942-1 M L J	592
	1942 M W N	372
	201 I C	477
	1942 M Cr C	97
	43 Cr L J	741
534(2)	55 M L W	283
	1942-1 M L J	573
	202 I C	14
535	55 M L W	120
	1942-1 M L J	296
	1942 M W N	399
	ILR 1942 M	618
	202 I C	170
539	1942-2 M L J	14
	ILR 1942 M	696
	1942 M W N	602
	203 I C	45
	1942-5 FLJHC	103
	44 Cr L J	45
550	1942-1 M L J	595
	1942 M W N	377
	55 M L W	354
	1942 M Cr C	99
	203 I C	425
	44 Cr L J	65
551	1942 M W N	235
	1942-1 M L J	453

A I R 1942 Madras		
AIR	Other Journals	
551 *con*	55 M L W	201
	203 I C	598
552(1)	55 M L W	240
	1942-1 M L J	527
	1942 M W N	444
	1942 M Cr C	100
	203 I C	672
552(2)	1942-1 M L J	583
	1942 M W N	375
	55 M L W	368
	1942 M Cr C	77
	201 I C	627
	43 Cr L J	757
553	55 M L W	481
SB	1942-2 M L J	196
	1942 M W N	483
	202 I C	184
	43 Cr L J	798
	1942 MCrC	121
	ILR 1943 M	30
554	55 M L W	405
FB	1942-2 M L J	90
	1942 M W N	413
	202 I C	191
	ILR 1942 M	738
556	1942-2 M L J	158
SB	ILR 1942 M	598
	202 I C	178
	1942-5 FLJHC	94
	1942-10 I T R	349
558	1942-2 M L J	47
	202 I C	697
578	55 M L W	471
	1942-2 M L J	175
	1942 M W N	459
580	1942-2 M L J	43
	55 M L W	407
	1942 M W N	638
	202 I C	674
	ILR 1942 M	836
581	1942-1 M L J	532
	55 M L W	276
	1942 M W N	367
	202 I C	629
	ILR 1942 M	770
583	1942-1 M L J	603
	1942 M W N	353
	55 M L W	374
585	55 M L W	293
	1942-1 M L J	569
	1942 M W N	352
	203 I C	457
586	ILR 1942 M	189
	203 I C	266
588	55 M L W	308
	1942-1 M L J	580
	1942 M W N	356
590	1942 1 M L J	441
	55 M L W	233
	1942 M W N	335
	ILR 1942 M	669
	204 I C	169
592	1942-2 M L J	124
	55 M L W	413
594	1942-1 M L J	594
	1942 M W N	373
	55 M L W	372
	201 I C	451
	1942 M Cr C	86
	43 Cr L J	760
595	1942-2 M L J	148
	1942 M W N	449
	203 I C	187

A I R 1942 Madras		
AIR	Other Journals	
596	55 M L W	468
	1942-2 M L J	218
	1942 M W N	457
	ILR 1942 M	831
	203 I C	544
597	1942-2 M L J	185
	55 M L W	491
	1942 M W N	494
	203 I C	481
598	1942-2 M L J	153
	55 M L W	470
	1942 M W N	447
	ILR 1942 M	941
599	1942-2 M L J	162
	55 M L W	463
	1942 M W N	446
	203 I C	475
	ILR 1942 M	959
600	55 M L W	479
	1942-2 M L J	170
	1942 M W N	463
	203 I C	504
	ILR 1943 M	56
601	1942-2 M L J	145
	55 M L W	466
	1942 M W N	481
	1942 M Cr C	104
	202 I C	610
	43 Cr L J	866
602	55 M L W	298
	1942-1 M L J	561
	1942 M W N	391
	202 I C	765
603	1942-2 M L J	146
	55 M L W	467
	1942 M W N	441
	1942 M Cr C	107
	202 I C	603
	43 Cr L J	859
604	1942-2 M L J	104
	55 M L W	426
	1942 M W N	503
	203 I C	5
	ILR 1942 M	868
606	55 M L W	476
	1942-2 M L J	206
	1942 M W N	496
	202 I C	747
608	55 M L W	402
	1942-2 M L J	89
	1942 M W N	505
	202 I C	725
609	55 M L W	464
	1942-2 M L J	172
	1942 M W N	439
	1942 M Cr C	108
	202 I C	607
	43 Cr L J	863
610	55 M L W	73
	1942 M W N	110
	1942-1 M L J	213
	202 I C	771
612	1942 M W N	144
	1942-1 M L J	413
	202 I C	728
614	1942-1 M L J	137
	55 M L W	45
	ILR 1942 M	376
	203 I C	17
	1942-5 FLJHC	14
622	55 M L W	532
FB	1942 M W N	525
	1942-2 M L J	321
	203 I C	195

AIR 1942 Madras			
AIR	Other Journals		
622	**FB** *con*	ILR 1943 M	15
625		1942-2 M L J	230
SB		55 M L W	500
		203 I C	220
		1942-10 I T R	358
		ILR 1942 M	921
627		1942 M W N	493
		1942-2 M L J	348
		203 I C	228
628		55 M L W	417
		1942-2 M L J	406
		ILR 1942 M	851
630		55 M L W	502
SB		1942-2 M L J	234
		1942 M W N	481
		1942 MCrC	116
		203 I C	182
		44 Cr L J	17
632		55 M L W	422
		1942-2 M L J	213
		1942 M W N	640
		202 I C	732
		ILR 1943 M	47
634		55 M L W	446
		1942 M W N	644
		1942-2 M L J	636
		ILR 1942 M	775
641		1942-2 M L J	164
		55 M L W	494
		1942 M W N	534
		ILR 1943 M	61
644		1942-2 M L J	202
		55 M L W	504
		1942 M W N	467
		203 I C	246
		ILR 1942 M	879
646		1942-2 M L J	128
		55 M L W	430
		1942 M W N	529
648		1942-2 M L J	272
		55 M L W	556
		1942 M W N	537
649		1942-2 M L J	100
		55 M L W	416
		1942 M W N	506
		203 I C	249
650		55 M L W	403
		1942-2 M L J	94
		1942 M W N	507
652		55 M L W	441
		1942-2 M L J	154
		1942 M W N	465
		203 I C	325
653		1942-2 M L J	103
		55 M L W	424
		1942 M W N	438
		1942 MCrC	100
		203 I C	205
		44 Cr L J	70
654		1942-2 M L J	112
		55 M L W	462
		1942 M W N	436
		1942 MCrC	105
		203 I C	479
		44 Cr L J	72
655		1942-2 M L J	275
		55 M L W	527
		1942 M W N	541
		203 I C	596
656		1942-2 M L J	228
		1942 M W N	475
		55 M L W	521
		203 I C	243
657(1)		1942-2 M L J	277

AIR 1942 Madras			
AIR	Other Journals		
657(1)		1942 M W N	491
con		1942 MCrC	122
		55 M L W	757
		203 I C	500
657(2)		1942-2 M L J	99
		55 M L W	425
		1942 M W N	508
658		1942-2 M L J	269
		55 M L W	528
		1942 M W N	528
		203 I C	233
659		1942-2 M L J	110
		1942 M W N	448
		204 I C	25
660		1942-2 M L J	223
		1942 M W N	633
		203 I C	271
661		1942-2 M L J	265
		55 M L W	514
		1942 M W N	570
		203 I C	235
662(1)		1942-2 M L J	191
		55 M L W	493
		1942 M W N	487
		203 I C	272
		1942 M Cr C	140
		44 Cr L J	29
662(2)		1942-2 M L J	123
		55 M L W	457
		1942 M W N	432
		203 I C	192
663		1942-2 M L J	281
		55 M L W	529
		1942 M W N	539
		203 I C	212
664(1)		1942-2 M L J	217
		55 M L W	524
		1942 MCrC	110
		1942 M W N	490
		203 I C	421
		44 Cr L J	13
664(2)		55 M L W	569
		1942-2 M L J	354
		1942 MCrC	132
		203 I C	284
		1943 M W N	72
665		55 M L W	460
		1942-2 M L J	137
		1942 M W N	456
		203 I C	567
666		55 M L W	306
		1942 M W N	369
		1942-2 M L J	134
		1942 M Cr C	87
668		1942-2 M L J	278
		55 M L W	517
		1942 M W N	581
		1942 M Cr C	128
		203 I C	461
		44 Cr L J	5
669		1942-2 M L J	280
		55 M L W	530
		1942 M W N	590
		1942 M Cr C	132
		203 I C	433
670		1942-2 M L J	115
		55 M L W	433
		1942 M W N	453
		ILR 1942 M	933
672		1942-2 M L J	101
		55 M L W	421
		1942 M W N	437
		1942 M Cr C	101

AIR 1942 Madras			
AIR	Other Journals		
672	*con*	203 I C	321
		44 Cr L J	10
673		55 M L W	458
		1942 M W N	445
674		1942-2 M L J	132
		55 M L W	457
		1942 M W N	442
		1942 M Cr C	102
		203 I C	177
		43 Cr L J	924
		ILR 1942 M	963
675(1)		1942-2 M L J	246
		55 M L W	518
		1942 M W N	492
		1942 M Cr C	120
		203 I C	670
675(2)		1942-2 M L J	198
		1942 M W N	545
		55 M L W	684
		203 I C	659
677		55 M L W	400
		1942 M W N	410
		1942-2 M L J	211
		ILR 1942 M	944
679		1942-2 M L J	225
		1942 M W N	476
		55 M L W	522
		203 I C	478
680		55 M L W	398
		1942-2 M L J	242
		1942 M W N	532
		ILR 1942 M	927
682		55 M L W	618
FB		1942-2 M L J	457
		1942 M W N	654
		203 I C	507
685		1942-2 M L J	525
FB		55 M L W	759
		204 I C	17
688		55 M L W	623
FB		1942-2 M L J	463
		1942 M W N	657
		204 I C	96
690		ILR 1942 M	9
SB		1942-2 M L J	509
		203 I C	498
		1942 M Cr C	143
		55 M L W	844
691		1942-2 M L J	479
SB		1942 M Cr C	147
		55 M L W	845
		203 I C	585
693		1942-2 M L J	292
FB		55 M L W	540
		1942 M W N	518
		ILR 1942 M	807
		203 I C	648
698		55 M L W	548
		1942-2 M L J	305
		1942 M W N	543
		204 I C	382
699		1942-2 M L J	187
		55 M L W	509
		1942 M W N	548
		204 I C	131
700		1942-2 M L J	240
		55 M L W	519
		1942 M W N	489
		1942 M Cr C	119
		203 I C	591
701		1942-2 M L J	621
SB		55 M L W	799
		1942 M Cr C	164
		204 I C	93

AIR 1942 Madras			
AIR	Other Journals		
701	**SB** *con*	1942 M W N	758
702		55 M L W	410
		1942-2 M L J	140
		1942 M W N	433
		1942 M Cr C	111
704		1942-2 M L J	193
		55 M L W	498
705		1942 M Cr C	18
		55 M L W	568
		1942 M W N	582
		203 I C	615
		1943-1 M L J	120
706		55 M L W	616
		1942-2 M L J	470
		204 I C	470
		1942 M W N	806
707		55 M L W	547
		1942-2 M L J	309
		1942 M W N	542
		203 I C	644
708		55 M L W	577
		1942 M W N	558
		1942-2 M L J	412
709(1)		55 M L W	637
		1942 M W N	620
		1942-2 M L J	562
		204 I C	264
709(2)		55 M L W	554
		1942-2 M L J	303
		1942 M W N	544
		204 I C	511
711(1)		1942-2 M L J	622
SB		1942 M W N	722
		55 M L W	799
		1942 M Cr C	163
		204 I C	167
		ILR 1943 M	26
711(2)		55 M L W	633
		1942 M W N	816
713		1942-2 M L J	515
		55 M L W	644
		1942 M W N	820
714		1942-2 M L J	491
		55 M L W	682
		1942 M W N	826
715		55 M L W	549
		1942-2 M L J	308
		1942 M W N	593
		1942 M Cr C	133
		203 I C	620
716		55 M L W	563
		1942 M W N	571
718		55 M L W	569
		1942-2 M L J	355
		1942 M W N	554
		204 I C	468
719		1942-2 M L J	150
		55 M L W	482
		1942 M W N	461
		ILR 1943 M	34
		204 I C	393
720		1942-2 M L J	364
		1942 M W N	642
		55 M L W	689
		204 I C	184
721		55 M L W	508
		1942-2 M L J	233
		1942 M W N	480
		204 I C	245
		ILR 1943 M	53
722		1942-2 M L J	493
		55 M L W	631
		1942 M W N	808
		204 I C	241

AIR 1942 Madras				AIR 1942 Madras				AIR 1942 Madras				AIR 1942 Madras			
AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
723	1942-2 M L J		357	729 *con*	55	M L W	607	736(2) *con*	204	I C	472	745(1)	55	M L W	726
	55	M L W	587		1942	M W N	790	737(1)	55	M L W	532		1942-2	M L J	626
	1942	M W N	592		204	I C	373		1942-2	M L J	307		1942	M W N	678
	1942	M Cr C	134	730	1942-2	M L J	518	737(2)	55	M L W	700		204	I C	248
	204	I C	65		55	M L W	652		1942-2	M L J	571	745(2)	1942-2	M L J	576
724(1)	1942-2	M L J	545		204	I C	128		1942	M W N	748		55	M L W	755
	55	M L W	695	731	1942-2	M L J	585		1942	M Cr C	151		1942	M W N	759
	1942	M Cr C	146		55	M L W	721		204	I C	33		1942	M Cr C	161
	1942	M W N	756		1942	M W N	664	738	55	M L W	694		204	I C	152
	204	I C	67		204	I C	147		1942-2	M L J	616	746	1942	M W N	472
724(2)	1942-2	M L J	550	732	1942-2	M L J	361		1942	M W N	666		55	M L W	558
	55	M L W	692		55	M L W	672		204	I C	409		1942-2	M L J	359
	1942	M Cr C	150		1942	M W N	663	739	1942-2	M L J	512		204	I C	367
	1942	M W N	749	733	1942-2	M L J	421		55	M L W	763	747	1942-2	M L J	414
	204	I C	22		55	M L W	610	740	1942-2	M L J	553		55	M L W	611
725	1942-2	M L J	415		1942	M W N	721		55	M L W	693		1942	M W N	805
	55	M L W	614		204	I C	450		204	I C	88		204	I C	422
	1942	M W N	803	734	1942-2	M L J	520		1942	M Cr C	142	748	55	M L W	627
726(1)	1942-2	M L J	575		55	M L W	646		1942	M W N	749	751	1942-2	M L J	444
	55	M L W	713		1942	M W N	822	741	1942-2	M L J	450		55	M L W	714
	1942	M W N	727		204	I C	474		1942	M W N	632		204	I C	441
	1942	M Cr C	150	735	55	M L W	593	742(1)	1942-2	M L J	468	753	1942	M W N	484
	204	I C	37		1942	M W N	583		55	M L W	847		55	M L W	536
726(2)	1942-2	M L J	498		1942	M Cr C	139		204	I C	380		1942	M Cr C	129
	55	M L W	635		1942-2	M L J	718	742(2)	1942-2	M L J	511	756	1942-2	M L J	543
	1942	M W N	809		204	I C	47		55	M L W	644		55	M L W	697
	204	I C	478	736(1)	55	M L W	507		204	I C	376		1942	M W N	745
727	55	M L W	531		1942-2	M L J	248		1942	M W N	791		1942	M Cr C	159
	1942-2	M L J	311		1942	M W N	586	743	1942-2	M L J	496		204	I C	30
	1942	M W N	550		1942	M Cr C	127		55	M L W	638	757	1942-2	M L J	589
	204	I C	256		204	I C	12		1942	M W N	810		55	M L W	718
728	1942	M W N	478	736(2)	55	M L W	718		204	I C	343		1942	M W N	694
	1942-2	M L J	266		1942-2	M L J	620	744	1942-2	M L J	418		204	I C	517
	55	M L W	515		1942	M W N	679		55	M L W	612	758	1942-2	M L J	500
729	1942-2	M L J	424		1942-10	I T R	484		1942	M W N	802		55	M L W	769

OTHER JOURNALS=ALL INDIA REPORTER

ILR 1942 Mad				ILR 1942 Mad				ILR 1942 Mad				ILR 1942 Mad				(1942) 1 M L J			
ILR	AIR			ILR	AIR			ILR	AIR			ILR	AIR			MLJ	AIR		
1	1941	M	903	287	1942	M	232	630	1942	M	212	941	1942	M	598	104	1942	M	347
9	1942	,,	690	300	,,	,,	230	635	,,	,,	425	944	,,	,,	677	105	,,	,,	326
13	,,	,,	822	308	,,	,,	200	640	,,	,,	391	949	,,	,,	472	108	,,	,,	465
24	,,	,,	1	316	,,	,,	172	647	,,	,,	362	959	,,	,,	599	111	,,	,,	390
33	,,	,,	139	322	1941	,,	910	654	,,	,,	466	963	,,	,,	674	113	,,	,,	305
42	,,	,,	106	328	,,	,,	941	661	,,	,,	178					116	,,	,,	352
57	1941	,,	799	336	1942	,,	41	663	,,	,,	455	(1942) 1 M L J				119	,,	,,	338
60	,,	,,	817	346	1941	,,	929	669	,,	,,	590	MLJ	AIR			132	,,	PC	3
73	,,	,,	749	355	1942	,,	252	677	,,	,,	421	1	1941	PC	128	137	,,	M	614
77	,,	,,	765	360	,,	,,	260	682	,,	,,	395	5	,,	,,	132	155	,,	,,	384
82	,,	PC	90	376	,,	,,	614	688	,,	,,	501	8	,,	,,	130	158	,,	,,	266
91	1942	M	191	405	,,	,,	146	691	,,	,,	423	11	1942	M	273	160	,,	,,	267
95	1941	,,	772	410	1941	,,	825	696	,,	,,	539	16	,,	,,	191	161	,,	,,	351
133	1942	,,	242	414	1942	,,	221	738	,,	,,	554	18	,,	,,	177	164	,,	,,	268
137	1941	,,	851	419	,,	PC	3	746	,,	,,	478	21	,,	,,	277	166	,,	,,	307
143	,,	,,	897	428	,,	M	267	749	,,	,,	505	24	,,	,,	382	173	,,	,,	327
147	,,	,,	895	431	,,	,,	258	757	1943	,,	118	28	,,	,,	300	177	,,	,,	360
153	,,	,,	814	438	,,	,,	205	770	1942	,,	581	34	,,	,,	293	180	,,	,,	405
158	1942	,,	19	448	,,	,,	273	775	,,	,,	634	36	,,	,,	276	181	,,	,,	419
163	1941	,,	935	455	,,	,,	247	802	,,	,,	404	38	,,	,,	306	182	,,	,,	349
173	,,	,,	937	464	,,	,,	429	807	,,	,,	693	41	,,	,,	315	184	,,	,,	324
182	,,	,,	922	494	,,	,,	223	831	,,	,,	596	44	,,	,,	299	187	,,	,,	303
189	1942	,,	586	502	,,	,,	183	836	,,	,,	580	48	,,	,,	281	190	,,	,,	373
199	1941	,,	906	526	,,	,,	384	844	,,	,,	503	49	,,	,,	258	195	,,	,,	321
204	1942	,,	161	532	,,	,,	406	851	,,	,,	628	57	,,	,,	183	200	,,	,,	295
220	,,	,,	26	550	,,	,,	307	862	,,	,,	483	70	,,	,,	348	202	,,	,,	287
225	,,	,,	28	562	,,	,,	487	868	,,	,,	604	74	,,	FC	1	203	,,	,,	319
230	,,	,,	95	587	,,	,,	181	875	,,	,,	470	77	,,	,,	3	205	,,	,,	413
236	,,	,,	73	590	,,	,,	353	879	,,	,,	644	86	,,	M	297	207	,,	,,	365
243	,,	,,	13	598	,,	,,	556	886	1941	PC	48	87	,,	,,	375	213	,,	,,	610
251	1941	,,	925	608	,,	,,	379	893	1942	,,	21	88	,,	,,	298	217a	,,	,,	320
264	,,	,,	933	614	,,	,,	415	921	,,	M	625	90	,,	,,	389	217b	,,	,,	396
271	,,	,,	898	618	,,	,,	535	927	,,	,,	680	92	,,	,,	334	219	,,	,,	364
281	1942	,,	177					933	,,	,,	670	99	,,	,,	317	222	,,	,,	422

(1942) 1 M L J				(1942) 1 M L J				(1942) 2 M L J				(1942) 2 M L J				(1942) 2 M L J			
MLJ	A I R			MLJ	A I R			MLJ	A I R			MLJ	A I R			MLJ	A I R		
224	1942	M	415	453	1942	M	551	110	1942	M	659	327	1942	FC	33	554	1943	M	178
226	„	„	316	455	„	„	440	112	„	„	654	337	1943	M	13	555	„	„	135
228	„	„	404	457	„	„	427	115	„	„	670	340	„	„	29	556	„	„	34
230	„	„	283	458	„	„	494	120	1943	„	74	343	1942	PC	39	558	„	„	55
233	„	„	346	460	„	„	446	123	1942	„	662	345	1943	M	11	559	1942	PC	67
235	„	„	313	466	„	„	449	124	„	„	592	346	„	„	10	562	„	M	709
238	„	„	423	467	„	„	445	128	„	„	646	348	1942	„	627	563	1943	„	190
241	„	„	377	469	„	„	353	132	„	„	674	350	1943	„	67	565	„	„	183
245	„	„	403	472	„	„	487	134	„	„	666	354	1942	„	664	568	„	„	185
247	„	„	343	485	„	„	528	137	„	„	665	355	„	„	718	571	1942	„	737
250	„	„	429	489	„	„	451	140	„	„	702	356	1943	„	260	572	1943	„	38
267	„	„	311	490	„	„	501	145	„	„	601	357	1942	„	723	574	„	„	56
272	„	„	397	491	„	„	523	146	„	„	603	359	„	„	746	575	1942	„	726
274	„	„	386	495	„	„	441	148	„	„	595	361	„	„	732	576	„	„	745
278	„	„	511	498	„	„	420	150	„	„	719	364	„	„	720	577	1943	„	41
281	„	„	421	499	„	„	445	153	„	„	598	367	„	PC	21	579	„	„	9
283	„	„	415	500	„	„	453	154	„	„	652	381	1943	M	50	580	„	„	66
285	„	„	395	503	„	„	450	158	„	„	556	384	1942	PC	47	581	„	„	33
289	„	„	388	506	„	„	525	162	„	„	599	390	„	„	50	583	„	„	54
290	„	„	385	510	„	„	527	164	„	„	641	398	1943	M	100	585	1942	„	731
291	„	„	357	511	„	„	474	170	„	„	600	403	„	„	104	587	1943	„	242
292	„	„	391	517	„	„	444	172	„	„	609	406	1942	„	628	589	1942	„	757
296	„	„	535	520	„	„	452	175	„	„	578	412	„	„	708	592	1943	„	5
303	„	„	362	522	„	„	517	178	1943	„	118	414	„	„	747	595	„	„	59
306	„	„	425	527	„	„	552	185	1942	„	597	415	„	„	725	599	„	„	160
309	„	„	368	528	„	„	503	187	„	„	699	418	„	„	744	601	„	„	42
311	„	„	371	532	„	„	581	191	„	„	662	420	1943	„	53	603	„	„	231
314	„	„	418	535	„	„	468	193	„	„	704	421	1942	„	733	607	„	„	165
316	„	„	345	538	„	„	505	196	„	„	553	422	1943	„	31	610	„	„	183
318	„	„	330	542	„	„	495	198	„	„	675	424	1942	„	729	612	„	„	171
325	„	„	381	554	„	„	481	202	„	„	644	425	1943	„	51	613	„	„	169
327	„	„	402	556	„	„	522	206	„	„	606	427	„	„	38	615	„	„	170
329	„	„	412	559	„	„	428	211	„	„	677	431	„	„	15	616	1942	„	738
331	„	„	379	561	„	„	602	213	„	„	632	442	„	„	80	617	1943	„	150
335	„	„	398	564	„	„	485	217	„	„	664	444	1942	„	751	620	1942	„	736
336	„	„	398	569	„	„	585	218	„	„	596	448	1943	„	12	621	„	„	701
338	„	„	399	571	„	„	533	221	1943	„	6	450	1942	„	741	622	„	„	711
341	„	„	323	573	„	„	534	223	1942	„	660	452	1943	„	77	624	1943	„	57
344	„	„	406	575	„	„	472	225	„	„	679	457	1942	„	682	626	1942	„	745
353	„	„	438	580	„	„	588	228	„	„	656	463	„	„	688	628	1943	„	208
357	„	„	354	583	„	„	552	230	„	„	625	468	„	„	742	629	„	„	61
360	„	„	357	585	„	„	532	233	„	„	721	470	„	„	706	631	„	„	196
366	„	„	413	586	„	„	531	234	„	„	630	472	1943	„	122	636	1942	„	634
369	„	„	437	588	„	„	483	237	1943	„	32	479	1942	„	691	651	1943	„	243
370	„	„	405	591	„	„	521	240	1942	„	700					653	„	„	212
372	„	„	369	592	„	„	534	242	„	„	680	482	1943	„	28	656	1942	PC	42
373	„	„	392	594	„	„	594	246	„	„	675	484	„	„	25	658	1943	M	106
377	„	„	501	595	„	„	550	248	„	„	736	486	„	„	35	661	„	„	244
378	„	„	426	596	„	„	375	249	„	PC	54	487	„	„	258	663	„	„	191
380	„	„	439	599	„	„	455	256	„	„	6	491	1942	„	714	667	„	„	208
382	„	„	513	602	„	„	530	261	„	„	11	493	„	„	722	668	„	„	246
385	„	„	419	603	„	„	583	265	„	M	661	496	„	„	743	670	„	„	217
386	„	„	406	607	„	FC	8	266	„	„	728	498	„	„	726	672	„	„	234
388	„	„	410					269	„	„	658	500	„	„	758	673	„	„	145
390	„	„	466	(1942) 2 M L J				272	„	„	648	504	1943	„	72	676	„	„	194
394	„	„	463	MLJ	A I R			275	„	„	655	506	„	„	87	678	„	„	43
396	„	„	460	1	1942	FC	14	277	„	„	657	509	1942	„	690	684	„	„	90
400	„	„	502	6	„	„	17	278	„	„	668	511	„	„	742	686	„	„	209
403	„	„	509	14	„	M	539	280	„	„	669	512	„	„	739	687	„	„	136
406	„	„	401	37	„	„	530	281	„	„	663	515	„	„	713	689	„	„	83
408	„	„	514	38	„	„	519	283	1943	„	8	518	„	„	730	691	„	„	1
413	„	„	612	41	„	„	482	285	„	„	47	520	„	„	734	698	„	„	172
416	„	„	462	43	„	„	580	289	1942	PC	35	523	1943	„	167	705	„	„	131
418	„	„	456	47	„	„	558	292	„	M	693	525	1942	„	685	707	„	„	177
425	„	„	470	89	„	„	608	303	„	„	709	532	1943	„	216	710	„	„	207
428	„	„	512	90	„	„	554	305	„	„	698	535	„	„	81	712	„	„	84
430	„	„	478	94	„	„	650	307	„	„	737	538	„	„	97	714	„	„	26
435	„	„	478	97	1943	„	22	308	„	„	715	543	1942	„	756	716	„	„	235
436	„	„	471	99	1942	„	657	309	„	„	707	545	„	„	724	718	1942	„	735
439	„	„	442	100	„	„	649	311	„	„	727	547	1943	„	211	720	1943	„	127
441	„	„	590	101	„	„	672	312	1943	„	69	549	„	„	89	722	„	„	107
445	„	„	417	103	„	„	653	315	„	„	36	550	1942	„	724	724	„	„	236
448	„	„	507	104	„	„	604	319	„	„	24	551	1943	„	7	732	„	„	193
451	„	„	464	107	„	PC	30	321	1942	„	622	553	1942	„	740	735	„	„	245

(1942) 2 M L J

MLJ			
739	1943	M	116
742	"	"	247
744	"	"	181
748	"	"	210
750	"	"	149
753	"	"	157
757	"	"	228
761	1942	PC	57
768	1943	M	297
775	"	"	220
778	"	"	230
781	"	"	132
782	"	"	137
785	"	"	146
789	"	"	138
790	"	"	128
791	"	"	248
794	1942	FC	47
797	"	"	48
800	1943	M	85

55 M L W

MLW			
1	1941	PC	132
3	1942	FC	1
4	"	M	183
13	"	"	177
15	"	"	191
16	"	"	276
18a	"	"	276
18c	"	"	307
23	"	"	389
24	"	"	382
27	"	"	298
28	"	"	306
30a	"	"	48
30b	"	"	240
31	1941	PC	130
33a	1942	M	297
33b	"	"	271
35	"	"	330
40a	"	"	281
40b	"	"	305
42	"	"	267
43	"	"	384
45	"	"	614
56	"	"	303
58	"	"	313
61	"	"	364
63b	"	"	319
65	"	PC	3
68	"	M	311
71	"	"	415
72	"	"	413
73	"	"	610
75	"	"	268
77	"	"	221
79	1941	PC	128
82	1942	M	334
86	"	"	419
87	"	"	266
88	"	"	316
89a	"	"	405
89b	"	"	396
90	"	"	386
93	"	"	511
95	"	"	404
97	"	"	346
98	"	"	397
99	"	"	349
101	"	"	360
103	"	"	352
104	"	"	300
108	"	"	327

55 M L W

MLW			
111	1942	M	348
113	"	"	369
115	"	"	403
117	"	"	423
118	"	"	385
119	"	"	415
120	"	"	535
125	"	"	295
127	"	"	388
128a	"	"	287
128b	"	"	421
130	"	"	391
132	"	"	395
134	"	"	425
136	"	"	362
139	"	"	398
140	"	"	375
142	"	"	392
144	"	"	357
148	"	"	324
151	"	"	482
152	"	"	399
154	"	"	379
156	"	"	381
157	"	"	418
159	"	"	406
160	"	"	402
161	"	"	413
163	"	"	357
164	"	"	410
165	"	"	365
170a	"	"	356
170b	"	"	323
172	"	"	345
173	"	"	502
175	"	"	501
176a	"	"	375
176b	"	"	465
178	"	"	320
179	"	"	437
180	"	"	291
183	"	"	438
185	"	"	419
186	"	"	466
188	"	"	463
190	"	"	460
192	"	"	446
196	"	"	514
200	"	"	470
201	"	"	551
203	"	"	462
205	"	"	512
206	"	"	401
207	"	"	478
210	"	"	405
211	"	"	478
212	"	"	442
214	"	"	439
215	"	"	426
216	1941	"	845
217	1942	"	406
223a	"	"	451
223b	"	"	513
225	"	"	471
226	"	"	412
228	"	"	422
229	"	"	440
231a	"	"	452
231b	"	"	501
232	"	"	452
233	"	"	590
236	"	"	441
237	"	"	445
238	"	"	449

55 M L W

MLW			
239	1942	M	445
240a	"	"	552
240b	"	"	353
242	"	"	523
245	"	"	509
247	"	"	507
250	"	"	464
251	"	"	398
252	"	"	351
253	"	"	347
254	"	"	337
255	"	"	354
257	"	"	427
258	"	"	468
260	"	"	453
263	"	"	444
264	"	"	487
274	"	"	522
276	"	"	581
277	"	"	505
280	"	"	525
283a	"	"	527
283b	"	"	534
285	"	"	481
287	"	"	519
288	"	"	533
289	"	PC	6
293	"	M	585
294	"	"	503
297a	"	"	521
297b	"	"	534
298	"	"	602
301	"	"	483
303	"	"	485
306	"	"	666
308	"	"	588
311	"	"	348
313	"	"	517
316	"	"	494
317	"	"	315
319	"	"	299
321	"	"	326
323	"	"	390
324	"	"	317
327	"	"	455
329	"	PC	11
332	"	"	19
334	"	"	28
337	"	FC	33
344	"	"	22
352	"	M	428
354a	"	"	550
354b	"	"	530
355	"	"	532
356	"	PC	21
366	"	M	531
367	"	"	532
368	"	"	552
369	"	"	472
372	"	"	594
373	"	"	293
374	"	"	583
377	"	PC	13
385	"	M	373
388	"	"	338
396	1943	"	22
398	1942	"	680
400	"	"	677
402	"	"	608
403	"	"	650
405	"	"	554
407	"	"	580
410	"	"	702

55 M L W

MLW			
413	1942	M	592
416	"	"	649
417	"	"	628
421	"	"	672
422	"	"	632
424	"	"	653
425	"	"	657
426	"	"	604
428	1943	"	74
430	1942	"	646
433	"	"	670
436	1943	"	118
441	1942	"	652
445	"	PC	39
446	"	M	634
457a	"	"	662
457b	"	"	674
458	"	"	673
460	"	"	665
462	"	"	654
463	"	"	599
464	"	"	609
466	"	"	601
467	"	"	603
468	"	"	596
470	"	"	598
471	"	"	578
472	"	PC	35
474	"	"	42
476	"	M	606
479	"	"	600
481	"	"	553
482	"	"	719
484	"	FC	27
491	"	M	597
493	"	"	662
494	"	"	641
498	"	"	704
500	"	"	625
502	"	"	630
504	"	"	644
506	1943	"	32
507	1942	"	736
508	"	"	721
509	"	"	699
511	1943	"	86
514	1942	"	661
515	"	"	728
517	"	"	668
518	"	"	675
519	"	"	700
521	"	"	656
522	"	"	679
524	"	"	664
525	1943	"	6
526	"	"	8
527	1942	"	655
528	"	"	658
529	"	"	663
530	"	"	669
531	"	"	727
532a	"	"	737
532b	"	"	622
536	"	"	753
540	"	"	693
547	"	"	707
548	"	"	698
549	"	"	715
550	1943	"	104
552	"	"	69
554	1942	"	709
556	"	"	648
558	"	"	746
560	1943	"	10

55 M L W

MLW			
561a	1943	M	11
561b	"	"	26
563	1942	"	716
566	1943	"	29
568	1942	"	705
569a	"	"	664
569b	"	"	718
570	1943	"	100
573	"	"	51
575	"	"	24
576	"	"	260
577	1942	"	708
578	1943	"	15
585	"	"	13
587	1942	"	723
589	1943	"	67
591	"	"	50
593	1942	"	735
594	1943	"	77
597	1942	PC	47
602	"	"	50
607	"	M	729
608	1943	"	31
609	"	"	53
610	1942	"	733
611b	"	"	747
612	"	"	744
614	"	"	725
615	1943	"	12
616	1942	"	706
618	"	"	682
622	1943	"	80
623	1942	"	688
627	"	"	748
631	"	"	722
633	"	"	711
635	"	"	726
636	1943	"	35
637	1942	"	709
638	"	"	743
640	1943	"	72
641	"	"	59
644a	1942	"	742
644b	"	"	713
646	"	"	734
648	1943	"	91
652	1942	"	730
653	1943	"	111
661	"	"	109
663	"	"	55
664	"	"	216
666	"	"	210
668	"	"	185
670	"	"	81
672	1942	"	732
673	1943	"	97
677	"	"	89
678	"	"	62
682	1942	"	714
684	"	"	675
687	1943	"	167
689	1942	"	720
690	1943	"	178
691	"	"	56
692	1942	"	724
693a	1943	"	7
693b	1942	"	740
694	"	"	738
695	"	"	724
696	1943	"	34
697	1942	"	756
699	1943	"	242
700	1942	"	737

55 M L W				55 M L W				1942 M W N				1942 M W N				1942 M W N			
MLW		AIR		MLW		AIR		MWN		AIR		MWN		AIR		MWN		AIR	
701	1943	M	190	832	1943	M	116	126	1942	M	326	250	1942	M	509	403	1942	FC	27
702	"	"	231	833	"	"	107	128a	"	"	356	252	"	"	470	410	"	M	677
705	"	"	211	837	"	"	161	128b	"	"	375	254	"	"	495	412	"	"	522
706	"	"	5	840	"	"	160	129	"	"	386	261	"	"	369	413	"	"	554
709	"	"	73	842	"	"	236	132	"	"	511	263	"	"	268	415	"	"	533
711	"	"	33	844a	"	"	245	134	"	"	273	265	"	"	512	417	"	FC	22
712a	"	"	9	844b	1942	"	690	136	"	"	368	267	"	"	256	424	"	M	77
712b	"	"	135	845	"	"	691	137	"	"	323	268	"	"	244	425	"	"	290
713	1942	"	726	847	"	"	742	139	"	"	388	272	"	"	528	426a	"	"	242
714	"	"	751	848	1943	"	84	140	"	"	345	274	"	"	456	426b	"	"	241
717	1943	"	42	849	"	"	193	141	"	"	418	279	"	"	523	428	"	"	240
718a	1942	"	736	851	"	"	258	142	"	"	357	282	"	"	478	429	"	"	481
718b	"	"	757	854	1942	PC	67	143	"	"	397	283	"	"	442	430	"	"	483
720	1943	"	66	856	"	M	420	144	"	"	612	284	"	"	482	432	"	"	662
721	1942	"	731	857	1943	"	129	146	"	"	423	285	"	"	315	433	"	"	702
722	1943	"	61	1942 M W N				148a	"	"	337	287	"	"	428	436	"	"	654
723	"	"	183					148b	"	"	21	289a	"	"	287	437	"	"	672
725	"	"	38	MWN		AIR		151	"	"	362	289b	"	"	417	438	"	"	653
726	1942	"	745	1	1941	PC	95	153	"	"	395	291	"	"	450	439	"	"	609
727	1943	"	57	4	"	"	120	155	"	"	343	293	"	"	452	441	"	"	603
729	"	"	87	11	1942	M	183	157	"	PC	3	294	"	"	420	442	"	"	674
731	"	"	54	19	"	"	300	160	"	M	279	296	"	"	452	443	"	"	444
733	"	"	165	23	"	"	382	161	"	"	354	297	"	"	440	444	"	"	552
735	"	"	202	25	"	"	299	164	"	"	357	298	"	"	446	445	"	"	673
740	"	"	28	27	"	"	271	168	"	"	347	302	"	"	427	446	"	"	599
741	"	"	196	29	"	"	209	169	"	"	415	303	"	"	494	447	"	"	598
745	"	"	170	31	"	"	146	170	"	"	404	304	"	"	501	448	"	"	659
746	"	"	169	33	1941	PC	132	172	"	"	295	305	"	"	441	449	"	"	595
747a	"	"	171	35	1942	M	221	173	1941	"	870	306	"	"	258	450	1943	"	74
747b	"	"	106	36	"	"	269	176	1942	"	425	308	"	"	277	453	1942	"	670
749	"	"	153	38	"	"	249	178	"	"	421	310	"	PC	6	456	"	"	665
754	"	"	41	39	"	"	196	179	"	"	391	313	"	M	478	457	"	"	596
755	1942	"	745	41	"	"	182	182a	"	"	385	316	"	FC	8	459	"	"	578
756	"	"	241	42	"	"	58	182b	"	"	403	325	"	M	353	461	"	"	719
757a	"	"	242	48	"	FC	1	184	"	"	398	326	1941	PC	128	463	"	"	600
757b	"	"	657	49	"	"	3	185	"	"	398	328	"	"	45	465	"	"	652
758	"	"	290	54	1941	M	853	186	"	"	375	331	1942	M	449	467	"	"	644
759	"	"	685	56	1942	"	293	188	"	"	379	332	"	"	445	469	1943	"	32
763	"	"	739	57	"	"	352	190	"	"	406	333	"	"	453	470	"	"	94
765	"	FC	14	58	"	"	373	191	"	"	402	335	"	"	590	472	1942	"	746
769	"	M	758	61	"	"	149	192	"	"	381	338	"	"	330				
771	"	"	288	63	"	"	136	193	"	"	438	342	"	"	377	474	1943	"	8
772	1943	"	38	66	"	"	390	195	"	"	177	345	"	"	468	475	1942	"	656
775	"	"	47	67	"	"	324	197	"	"	276	347	"	"	349	476	"	"	679
778	"	"	208	69	"	"	360	198	"	"	415	348	"	"	303	478	"	"	728
779	"	"	127	77	"	"	321	199	"	"	266	350	"	"	319	480	"	"	721
780	"	"	194	80a	"	"	419	201	"	"	413	351	"	"	445	481a	"	"	601
782	"	"	131	80b	"	"	405	202	"	"	474	352	"	"	585	481b	"	"	630
783	"	"	191	81	"	"	327	206	"	"	464	353	"	"	583	483	"	"	553
785	"	"	168	84	"	"	338	208	"	"	410	356	"	"	588	484	"	"	753
786	"	"	145	91	"	"	389	209	"	"	392	358	"	"	505	487	"	"	662
788	"	"	243	92	"	"	305	211	"	"	351	360	"	"	313	489	"	"	700
789	"	"	1	94	"	"	348	213	"	"	412	363	"	"	364	490	"	"	664
794	"	"	43	96	"	"	298	214	"	"	413	365	"	"	525	491	"	"	657
799a	1942	"	701	97	"	"	334	215	"	"	462	367	"	"	581	492	"	"	675
799b	"	"	711	102	"	"	167	217	"	"	513	369	"	"	666	493	"	"	627
800	1943	"	244	104	"	"	384	218	"	"	471	370	"	"	531	494	"	"	597
802a	"	"	136	106	1941	PC	130	220	"	"	426	371	"	"	532	496	"	"	606
802b	"	"	83	107	"	M	928	221	"	"	437	372	"	"	534	498	1943	"	118
804	"	"	90	108	1942	"	346	222	"	"	439	373	"	"	594	503	1942	"	604
805	"	"	157	109	"	"	316	223	1941	"	845	374	"	"	530	505	"	"	608
808	"	"	133	110	"	"	610	225	1942	"	406	375	"	"	552	506	"	"	649
809	"	"	150	113	"	"	422	230	"	"	466	376	"	"	521	507	"	"	650
811	"	"	235	114	"	"	371	232	"	"	507	377b	"	"	550	508	"	"	657
812	"	"	134	116	"	"	396	235	"	"	551	377a	"	"	532	509	"	PC	21
814	"	"	172	117	"	"	306	236	"	"	405	378	"	FC	17	518	"	M	693
819	"	"	247	119	"	"	191	237	"	"	460	383	"	M	530	525	"	"	622
820	"	"	248	120a	"	"	320	239	"	"	514	384	"	"	178	528	"	"	658
823	"	"	246	120b	"	"	297	243	"	"	502	385	"	"	291	529	"	"	646
824	"	"	181	121	"	"	283	244	"	"	419	388	"	"	472	532	"	"	680
827a	"	"	208	123	"	"	347	245	"	"	501	391	"	"	602	534	"	"	641
827b	"	"	217	124a	"	"	267	246	"	"	399	393	"	FC	14	537	"	"	648
828	"	"	234	124b	"	"	281	248	"	"	401	396	"	M	317	539	"	"	663
829	1942	FC	48	125	"	"	465	249	"	"	463	399	"	"	535	541	"	"	655

1942 M W N

MWN			
542	1942	M	707
543	,,	,,	698
544	,,	,,	709
545	,,	,,	675
548	,,	,,	699
550	,,	,,	727
551	1943	,,	26
552	,,	,,	10
553	,,	,,	11
554	1942	,,	718
555	1943	,,	104
557	,,	,,	29
558	1942	,,	708
560	1943	,,	51
561	,,	,,	13
563	,,	,,	24
565	,,	,,	67
567	,,	,,	36
570	1942	,,	661
571	,,	,,	716
574	,,	FC	33
580	1943	M	260
581	1942	,,	668
582	,,	,,	705
583	,,	,,	735
584	1943	,,	69
586	1942	,,	736
587	1943	,	47
590	1942	,,	669
591	,,	,,	288
592	,,	,,	723
593	,,	,,	715
594	1943	,,	50
595	1942	,,	451
601	1943	,,	6
602	1942	,,	539
618	1943	,,	59
620	1942	,,	709
621	1943	,,	72
622	,,	,,	80
623	,,	,,	216
625	,,	,,	62
630	,,	,,	12
631	,,	,,	28
632	1942	,,	741
633	,,	,,	660
635	1943	,,	100
638	1942	,,	580
640	,,	,,	632
642	,,	,,	720
644	,,	,,	634
654	,,	,,	682
657	,,	,,	688
660	1943	,,	55
661	,,	,,	210
663	1942	,,	732
664	,,	,,	731
665	1943	,,	38

1942 M W N

MWN			
666	1942	M	738
667	1943	,,	181
669	,,	,,	231
671	,,	,,	54
673	1942	,,	114
675	1943	,,	42
676	,,	,,	235
677	,,	,,	171
678	1942	,,	745
679	,,	,,	736
680	1943	,,	244
681	,,	,,	160
682	,,	,,	165
685	,,	,,	133
686	,,	,,	247
687	,,	,,	150
689	,,	,,	248
691	,,	,,	57
692	,,	,,	73
694	1942	,,	757
696	1943	,,	7
697	,,	,,	242
698	,,	,,	183
700	,,	,,	187
703	,,	,,	246
704	,,	,,	43
708	,,	,,	194
709	,,	,,	90
711	,,	,,	168
712	,,	,,	234
713	,,	,,	145
714	,,	,,	191
717	,,	,,	127
718	,,	,,	84
719	,,	,,	5
721	1942	,,	733
722	,,	,,	711
723	1943	,,	207
724	,,	,,	217
725	,,	,,	218
726	,,	,,	209
727	1942	,,	726
728a	1943	,,	34
728b	,,	,,	1
733	,,	,,	83
734	,,	,,	131
735	,,	,,	136
736	,,	,,	134
737	,,	,,	157
740	,,	,,	179
742	,,	,,	177
744	,,	,,	53
745	1942	,,	756
746	1943	,,	9
747	,,	,,	211
748	1942	,,	737
749a	,,	,,	724
749b	,,	,,	740

1942 M W N

MWN			
750	1943	M	89
751	,,	,,	213
752	,,	,,	35
753	,,	,,	193
755	,,	,,	208
756a	,,	,,	56
756b	1942	,,	724
757	1943	,,	208
758a	,,	,,	178
758b	1942	,,	701
759	,,	,,	745
760a	1943	,,	41
760b	,,	,,	169
761	,,	,,	214
763	1942	,,	455
764	1943	,,	61
765	,,	,,	135
766	,,	,,	199
769	,,	,,	222
775	,,	,,	161
779	,,	,,	236
784	,,	,,	220
786	,,	,,	107
788	,,	,,	116
789	,,	,,	245
790	1942	,,	729
791a	,,	,,	742
791b	1943	,,	190
792	,,	,,	106
794	,,	,,	153
798	,,	,,	196
802	1942	,,	744
803	,,	,,	725
804	1943	,,	31
805	1942	,,	747
806	,,	,,	706
808	,,	,,	722
809	,,	,,	726
810	,,	,,	743
811	1943	,,	172
816	1942	,,	711
818a	1943	,,	66
818b	,,	,,	33
819	,,	,,	170
820a	,,	,,	128
820b	1942	,,	713
822	,,	,,	734
824	1943	,,	185
826	1942	,,	714
828	1943	,,	202
832	1941	,,	891

1942 M Cr C

MCrC			
1	1942	M	241
2	,,	,,	242
3	,,	,,	249

1942 M Cr C

MCrC			
4	1942	M	221
6	,,	,,	227
8	,,	,,	240
9	,,	,,	237
12	,,	,,	251
14a	,,	,,	275
14b	,,	,,	199
15b	,,	,,	221
16	,,	,,	19
18	,,	,,	705
19	,,	,,	276
20b	,,	,,	319
21	,,	,,	279
22a	,,	,,	281
24	,,	,,	347
31	,,	,,	465
33	,,	,,	326
34	,,	,,	347
35	,,	,,	269
37	1941	PC	132
39	1942	M	267
41	,,	,,	404
43	,,	,,	415
44	,,	,,	346
46	,,	FC	1
50	,,	M	354
53	,,	,,	357
57	,,	,,	356
58	,,	FC	3
63	,,	M	437
64	,,	,,	513
66	,,	,,	439
67	,,	,,	471
69	,,	,,	426
71b	,,	,,	532
72	,,	,,	417
74	,,	,,	530
75	,,	,,	427
76	,,	,,	452
77	,,	,,	552
78	,,	,,	452
79	,,	,,	531
80	,,	,,	501
81	,,	,,	532
82a	,,	,,	77
82b	,,	,,	178
83	,,	,,	450
85	,,	,,	494
86	,,	,,	594
87	,,	,,	666
89	,,	,,	446
93	,,	,,	420
96	,,	,,	440
97	,,	,,	534
98	,,	,,	521
99a	,,	,,	451
99b	,,	,,	550

1942 M Cr C

MCrC			
100a	1942	M	552
100b	,,	,,	653
101	,,	,,	672
102	,,	,,	674
104	,,	,,	601
105	,,	,,	654
107	,,	,,	603
108	,,	,,	609
110a	,,	,,	664
110b	1943	,,	6
111	1942	,,	702
115	,,	,,	444
116	,,	,,	630
119	,,	,,	700
120	,,	,,	675
121	,,	,,	553
122	,,	,,	657
123	1943	,,	47
127	1942	,,	736
128	,,	,,	668
129	,,	,,	753
132a	,,	,,	664
132b	,,	,,	669
133	,,	,,	715
134	,,	,,	723
135	1943	,,	69
138	,,	,,	50
139	1942	,,	735
140	,,	,,	662
142	,,	,,	740
143a	1943	,,	135
143b	1942	,,	690
144	1943	,,	34
145	,,	,,	178
146	1942	,,	724
147	,,	,,	691
150a	,,	,,	726
150b	,,	,,	724
151	,,	,,	737
152	1943	,,	211
153	,,	,,	89
154	,,	,,	56
155	,,	,,	66
156	,,	,,	208
157	,,	,,	169
158	,,	,,	61
159a	,,	,,	170
159b	1942	,,	756
161	,,	,,	745
162	1943	,,	33
163	1942	,,	711
164a	,,	,,	701
164b	1943	,,	9
165	,,	,,	209
166	,,	,,	217
167	,,	,,	207
168	,,	,,	41

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1942

Madras High Court

* (29) A. I. R. 1942 Madras 1

LEACH C. J. AND MOCKETT J.

Vasantam Venkayya — Appellant

v.

Vasantam Raghavamma— Respondent.

Appeal No. 261 of 1940, Decided on 29th April 1941, against appellate order of Sub-Judge, Tenali, in A. S. No. 63 of 1940.

*** Hindu law—Maintenance—Wife obtaining decree for maintenance—Subsequent co-habitation with husband—Decree becomes ineffective and cannot be enforced.**

A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation, and therefore when the wife subsequent to the decree resumes co-habitation with her husband, the English principle can be applied viz., that the decree becomes ineffective and cannot be enforced. If she is compelled to leave him after resuming co-habitation she should apply for a fresh decree : (1887) 18 Q B D 778, *Applied* ; *Case law reviewed.*

[P 2*c* ; P 3*d*,*e*,*f*]

A. Lakshmayya — for Appellant.

K. Kotayya — for Respondent.

Leach C. J.—This appeal raises the question whether a wife who has obtained a decree for maintenance can enforce it after having co-habited with her husband. The appellant is the husband of the respondent. In 1930 the respondent instituted a suit in the Court of the District Munsif of Bapatla for a decree for maintenance. She alleged that her husband had so illtreated her that she was unable to live with him. On 23rd June 1930, by consent, a decree was passed in her favour for Rs. 120 per annum. Shortly after this decree had been passed the parties decided that they could live together happily and the wife returned to the husband. They lived together for several years. According to the appellant the second separation did not take place until 24th August 1937, but according to the respondent, it took place on 15th July 1935. Admittedly they lived together for over five years and during this period the respondent bore a son to her husband. On 2nd May 1939 the respondent filed an application for execution of the decree which she had obtained on 23rd June 1930. She asked for the payment of Rs. 663-12-0 being maintenance calculated at the decretal rate from 15th January 1935. The appellant opposed the application. He contended that by reason of the fact that his wife had returned to him and had lived with him for five years thereafter the decree had become a nullity. The District Munsif overruled the objection and his decision was concurred in by the Subordinate Judge of Tenali on appeal. This appeal is from the order of the Subordinate Judge. The appellant maintains the contention which he advanced below. For the respondent it is said that the decree not having been set aside, adjusted or satisfied, she is at liberty to execute it. Her learned advocate went so far at one stage to say that she could have executed the decree against her husband during the five years she was living with him but later asked the Court to regard the decree as being suspended during the period they were living together.

In (1813) 1 Dow 235 : 3 E R 684[1] Lord Eldon held the general doctrine to be clear that a reconciliation after a separation entirely did away with the effects of the separation. This doctrine was applied by a Division Bench composed of Hawkins and A. L. Smith JJ.

1. (1813) 1 Dow 235 : 14 R R 55 : 3 E R 684, Bateman v. Countess of Ross.

in (1887) 18 Q B D 778[2] and by Jeune P. and Gorell Barnes J. in (1904) L R P 145.[3] In (1887) 18 Q B D 778[2] the Justices of the County of Leicester made an order under S. 4, Matrimonial Causes Act, 1878, that the wife should be no longer bound to co-habit with her husband and that he should pay to her a weekly sum for her maintenance. After the order had been passed the wife resumed co-habitation with the husband but the reunion did not prove to be permanent. The question was whether she was entitled to enforce the order which she had obtained against him before she resumed co-habitation. It was held that the order was annulled by reason of the subsequent resumption of co-habitation and therefore the wife could not enforce payment of the weekly sums. Hawkins J. said :

> It is impossible to suppose that the Legislature, in giving Magistrates power to release a wife from the obligation of co-habitation by reason of imminent danger from her husband's violence, intended to confer upon them jurisdiction to make an order which should give a wife liberty to live apart from, and resume co-habitation with her husband when and as often as she should think fit, and compel her husband to maintain her at all times when it pleased her to separate from him, even though her safety no longer required a separation.

If she was compelled to leave him after resuming co-habitation she should apply for a new order. In discussing the judgment of Lord Eldon in (1813) 1 Dow 235,[1] Hawkins J. pointed out that the general principle stated by Lord Eldon was expressly recognized by the Court of Appeal in (1886) 31 Ch D 524[4] and that in (1885) 15 Q B D 239[5] Lord Esher in speaking of weekly alimony ordered to be paid to a wife by the Divorce Court had said that they were not payments of a life annuity; they might be stopped at any moment if the husband and wife returned to co-habitation. In (1904) L R P 145,[3] it was held that the effect of the condonation of an offence which is specified as a ground of complaint within the terms of the Summary Jurisdiction (Married Women) Act, 1895, does not depend on the wording of any section of the Act but on the common law. In that case the Court had no hesitation in holding that the resumption of co-habitation put an end to the cause of complaint and therefore the power of the Justices to make an order passed away altogether.

The decision in (1887) 18 Q B D 778[2] was applied by Beasley J. in 2 Rang 163.[6] In that case the petitioner obtained a decree for judicial separation from her husband and embodied in it was an order for the payment to her of permanent alimony. The decree was passed in 1903 and the wife lived apart from her husband until 1st February 1907. On that date she returned to him and they lived together until 25th October 1921, a period of over 14 years. The wife then left the husband and applied for execution of the decree for alimony which she had obtained in 1903. Relying on (1887) 18 Q B D 778,[2] Beasley J. held that she was not entitled to execute the decree. If she desired to obtain an order for maintenance or alimony she was bound to institute fresh proceedings, founded on her allegations of further cruelty. The same principle was applied in 8 Rang 460[7] where it was held that a bona fide reunion must be interpreted as removing the basis on which an order for maintenance rests and therefore as vacating the order. In 20 M L J 12,[8] a Division Bench of this Court held that a Magistrate was bound to refuse to enforce an order under S. 488, Criminal P. C., on the ground that the relationship of husband and wife had ceased to exist since the date of the order. The Allahabad High Court has given similar decisions: *see* 1888 ALL W N 217[9] and 19 ALL 50.[10]

The learned advocate for the respondent has relied on 50 Mad 663,[11] 58 ALL 379,[12] I L R (1938) ALL 535[13] and 26 Bom 707[14] and this is a convenient stage to examine these decisions. In 50 Mad 663,[11] Curgenven J. held that when a wife has obtained an order for maintenance under S. 488, Cri-

2. (1887) 18 Q B D 778 : 56 L J M C 69 : 56 L T 716 : 51 J P 486, Haddon v. Haddon.
3. (1904) L R P 145 : 73 L J P 31 : 90 L T 174 : 68 J P 188 : 20 T L R 213, Williams v. Williams.
4. (1886) 31 Ch D 524 : 55 L J Ch 437 : 54 L T 470 : 34 W R 283 : 50 J P 468, Nicol v. Nicol.
5. (1885) 15 Q B D 239 : 54 L J Q B 529 : 52 L T 782 : 33 W R 714 : 49 J P 597, Linton v. Linton.
6. ('24) 11 A I R 1924 Rang 314 : 83 I C 566 : 2 Rang 163, Ellan Ma Noo v. William Po Thit.
7. ('31) 18 A I R 1931 Rang 89: 128 I C 353: 32 Cr L J 114: 8 Rang 460, U Po Shein v. Ma Sein Mya.
8. ('10) 20 M L J 12: 4 I C 140: 7 M L T 33, Syed Sahib v. Meeran Bee.
9. ('88) 1888 A W N 217, Phul Kali v. Harnam.
10. ('96) 19 All 50: 1896 A W N 173, Shah Abu Ilyas v. Ulfat Bibi.
11. ('27) 14 A I R 1927 Mad 376: 100 I C 239: 28 Cr L J 271: 50 Mad 663: 52 M L J 176, Kanagammal v. Pandar Nadar.
12. ('35) 22 A I R 1935 All 977: 159 I C 308: 37 Cr L J 62: 1935 A L J 1186: 58 All 379, Pearey Lal v. Mt. Naraini.
13. ('38) 25 A I R 1938 All 362: 176 I C 139: I L R (1938) All 535: 1938 A L J 495, Kallu Mal v. Mt. Barfo.
14. ('02) 26 Bom 707: 4 Bom L R 531, Ranmal Sangji v. Kundankuwar.

minal P. C., and has subsequently returned to her husband the order is not thereby put an end to but its operation is merely suspended during the period of co-habitation. This decision runs directly counter to the principle embodied in the judgment in (1887) 18 Q B D 778.[2] I can see no difference in principle between an order passed under S. 488 of the Indian Code of Criminal Procedure and an order under the Matrimonial Causes Act of 1878 or the English Summary Jurisdiction (Married Women) Act, 1895. If the principle stated by Lord Eldon is to be applied there can be no question of the suspension of the order. The order goes entirely.

In 26 Bom 707[14] a wife had obtained a decree for maintenance against her husband and when she applied to execute it he objected to the execution on the ground that she had lost her right to maintenance inasmuch as she left his house without any cause and without his consent. It was held that no modification of the decree could be allowed in execution on grounds not recognized in the decree itself as giving a right to such modification. This decision has really no bearing here. 58 ALL 379[12] was decided by a single Judge of the Allahabad High Court who concurred in the opinion expressed by Curgenven J. in 50 Mad 663.[11] In I L R (1938) ALL 535[13] the question was whether reduction of a decree for maintenance could be claimed in execution proceedings but it was held that it could not. That question is also far from the present one. The English authorities are in favour of the appellant and most of the Indian authorities. The learned advocate for the respondent has, however, suggested that the English decisions have no application because the provisions of the Indian Divorce Act cannot be applied to them and a Hindu wife is not entitled to sue for a judicial separation. This is an argument which I am not prepared to accept. It is true that the Indian Divorce Act does not apply to the parties and that a Hindu wife may not sue for a decree for judicial separation, but she can sue for a decree requiring her husband to maintain her if she is compelled to live apart. A decree obtained by a Hindu wife against her husband for maintenance differs in no important respect from an order for permanent alimony embodied in a decree for judicial separation. There being no difference in principle I can see no reason why the English authorities should not be applied.

The respondent mainly relies on the provisions of the Civil Procedure Code. She points to the fact that under that Code a decree remains in force unless it has been satisfied or adjusted and the satisfaction or the adjustment has been recorded. The present case is not concerned with a matter of procedure or the adjustment or satisfaction of a decree. The question is whether the Court is to disregard a sound principle of law and enforce a decree the basis of which has by the action of the parties themselves been demolished. By returning to her husband the respondent became disentitled to claim maintenance against him. The decree which she had obtained must, it seems to me, be regarded in the circumstances as having become ineffective. By going back to her husband the wife restores the position to what it was when they were married. It seems to me that the rule stated in (1887) 18 Q B D 778[2] must be given effect to here if justice is to be done. For these reasons I would allow the appeal and dismiss the application for execution. This will not prevent the respondent from obtaining a fresh decree if she left her husband on the second occasion as the result of his illtreatment of her, but this is not a question which can be considered in this case. There will be no order as to costs here or below.

Mockett J. —I agree with the judgment of my Lord. I prefer the judgment of Beasley J., in 2 Rang 263[6] to the judgment of Curgenven J., in 50 Mad 663[11] and to that of Ganganath J., in 58 ALL 379.[12] I consider that the judgment of Beasley J. should be followed. As the learned Judge has pointed out, and as my Lord has pointed out, the decree in a case as this in the words of A. L. Smith J., comes to an end from the resumption of co-habitation. I have asked the learned counsel for the respondent whether it is possible for him to distinguish a decree passed in a suit for maintenance from a decree passed under the Divorce Act or an order passed under S. 488, Criminal P. C. He has said that it is impossible to do so, so far as the basis is concerned. That must be so because the basis of all these orders is that if the husband neglects to maintain his wife, she by reason of his unlawful neglect is entitled to maintenance. That is important in this case, for this reason. The parties, as my Lord has indicated, went before the Court and admitted that shortly after the consent decree, they had lived together as husband and wife, there being a difference as to whether the period was five or seven years. That fact was therefore within the

knowledge of the Court and therefore no investigation by the Court was required to ascertain it. In a decision of Burn J., and myself in which Burn J., gave the judgment of the Court, A. A. O. No. 446 of 1938, a question arose which is of some assistance to us here. It is a well ascertained principle, and supported by innumerable decisions, that an uncertified adjustment cannot be recognized by an executing Court.

In the case before us, it was within the knowledge of the Court from its own records that the decree sought to be executed had been paid. The Court took the view that no question of O. 21, R. 2 arose as there was no question of an uncertified adjustment. The only question was whether there was any provision in the Code of Civil Procedure which compelled the Court to perpetrate what it knew to be an injustice, and the decision was that with those facts within its knowledge execution should be refused. I think that the position is analogous to this case. It was within the knowledge of the executing Court that the whole basis of this decree had disappeared by act of parties. I think that it would be equally wrong for such a decree to be executed with that knowledge as it would be to execute the decree in the case to which I have just referred. I desire to emphasise again, as my Lord has done, that nothing in the decision in any way affects the law as it has been held to be by this High Court in relation to O. 21, R. 2 of the Code. I further wish to guard myself against deciding anything with regard to a case in which the Court is invited to make an inquiry in the circumstances of the case. When such a case arises it can be decided. As already indicated I agree with my Lord that this appeal should be allowed.

C.R.K./K.S. *Appeal allowed.*

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* (29) A. I. R. 1942 Madras 4

HAPPELL J.

Seemakurthi Manikyam — Petitioner

v.

Jonnavithula Manikyamma — Respondent.

Civil Revn. Petn. No. 9 of 1939, Decided on 20th January 1941, to revise order of District Munsif, Rajahmundry, D/- 4th November 1938.

* **Civil P. C. (1908), S. 60 (1) (b) — "Tools of an artisan" — Artisan does not include musician.**

The word "artisan" does not mean "artist" and therefore it does not include musician. Hence, the musical instruments used to earn a livelihood are not "tools of an artisan" within the meaning of S. 60 (1) (b): ('17) 4 A I R 1917 U B 4, *Ref.*; ('32) 19 A I R 1932 All 344 and 32 Bom 10, *Expl.* [P 5c,e,g]

P. V. Vallabhacharyulu — for Petitioner.

T. Satyanarayana — for Respondent.

Order.—The petitioner in this civil revision petition in execution of the decree obtained by him in Small Cause Suit No. 633 of 1937 on the file of the District Munsif of Rajahmundry attached a sewing machine, a harmonium, a fiddle and a veena which belonged to his judgment-debtor, who was a Brahmin widow. The judgment-debtor filed an application for the release of the articles from attachment, and the order passed by the District Munsif of Rajahmundry on that application has given rise to this revision petition. The learned District Munsif, finding that the judgment-debtor made her living by sewing and teaching music and that the sewing machine and musical instruments were consequently "tools of an artisan" within the meaning of S. 60 (1), cl. (b), Civil P. C., allowed the application and released the articles from attachment. It is conceded for the petitioner that the finding that the sewing machine was a "tool of an artisan" cannot be questioned. The only questions for determination are, therefore, whether a musician is an artisan within the meaning of S. 60 (1) (b), Civil P. C., and whether, if so, musical instruments are the tools of an artisan within the meaning of the same section.

It is urged by the learned advocate for the petitioner that the cases cited by the learned District Munsif do not support his conclusion. The District Munsif referred to the ruling of a single Judge of the Upper Burma Judicial Commissioner's Court in 38 I C 414[1] and to decisions of the Allahabad and Bombay High Courts in A I R 1932 ALL 344[2] and 32 Bom 10.[3] The first case is of no assistance as the learned Judge, without deciding whether a musician was an artisan, held that his musical instruments were not tools within the meaning of S. 60 (1), cl. (b) Civil P. C. With respect, if I was of opinion that a musician was an artisan, I should have no hesitation in holding that the musician's instruments were tools of an artisan within the meaning of S. 60. In the Allahabad case[2] it was held that cooking vessels (utensils) and the "paraphernalia" of a soap-

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1. ('17) 4 A I R 1917 U B 4 : 38 I C 414 : 2 U B R 133, Maung Tha U v. Maung Hla.
2. ('32) 19 A I R 1932 All 344 : 136 I C 280 : 54 All 399, Bindeshari v. Banshilal.
3. ('08) 32 Bom 10 : 7 Cr L J 238 : 9 Bom L R 1059, Emperor v. Haji Shaik Mohamed Shustari.

maker were tools of an artisan, and in the Bombay case,[3] that a person engaged to drive an engine on board a steamer was an artisan within the meaning of the Emigration Act. It does not seem to me that it necessarily follows from either of these decisions that a musician is an artisan. The learned District Munsif however was of opinion that these decisions justified a liberal interpretation of the terms "artisan" and "tools of an artisan" and relying on a definition of artisan in Dr. Anandale's Dictionary as "one skilled in any art or trade, a handicraftsman, a mechanic" found that the musical instruments in question were "tools of an artisan" within the meaning of S. 60 (1) (b), Civil P. C.

In the Allahabad and Bombay cases referred to above, the learned Judges who decided the cases based their decisions on the definitions of "artisan" given in standard dictionaries. In the Allahabad case, Niamatullah J. referred to the definition in Murray's dictionary—namely "one who practises or cultivates an art—an artist." A musician would no doubt fall within the scope of this definition but I do not think that the definition is one which can be accepted. In 32 Bom 10,[3] the definition of an artisan given in Webster's dictionary was accepted—"one who is engaged in a mechanical employment." The Oxford English dictionary defines an artisan as (i) "an artist"—a meaning attached to the word which was stated to be obsolete and (ii) "one who is employed in any of the industrial arts, a mechanic, handicraftsman, artificer." I have no doubt that in common speech "artisan" does not mean "artist" now and has not meant it for a very long time.

For the petitioners I have been referred to a ruling of this High Court in an old case reported in 1 Mad 174.[4] In that case it was ruled that a washerman was not an artisan within the meaning of Madras Act, 3 of 1871. Section 3 of the Act sets out the classes of village officers to which the Act applies, and it is plain that under the ruling of this High Court the only village artisans among the classes mentioned in S. 33, cl. (4) would be the village carpenter, blacksmith and potter. Neither a village barber, washerman, astrologer, a priest is an artisan within the meaning of the Act. The ruling of course relates to an artisan within the meaning of the Madras Hereditary Village Offices Act, but it is not of interest as, in my opinion, it follows common usage, and it certainly would not permit the inclusion of musicians in the category of artisans. Moreover, the Bombay and Allahabad decisions referred to by the learned District Munsif, while they no doubt give a wider meaning to "artisan" than "handicraftsman" or "artificer" do not take the definition beyond the scope of "one who is employed in any of the industrial arts." A musician is not employed in an industrial art, and I think that the learned District Munsif was wrong in his conclusion that there was authority for attaching a sufficiently wide meaning to "artisan" to include a musician. This view is justified by a reference to S. 60 (1) (b), Civil P. C., itself. In the same clause "tools of artisans" are freed with the "implements of husbandry" of an agriculturist from liability to attachment. It seems plain that probably the Legislature intended to provide that the tools of certain types of working men should not be liable to attachment. If a musician's instruments are within the meaning of "tools of an artisan" it is clear that the implements required for his profession by any professional man must come within the definition, as, for instance, the instruments of a surgeon or a dentist. I have no doubt that if the Legislature had intended that the implements required by any man in order to carry on his profession should be freed from liability to attachment it would have made its intention plain.

For the reasons given I am of opinion that the musical instruments in question in this case were not "tools of an artisan" within the meaning of S. 60 (1), cl. (b), Civil P. C., and should not have been released from attachment. The order of the lower Court is therefore reversed and the petition is allowed. The lower Court has found that the respondent used the musical instruments in order to earn her livelihood. In the circumstances of the case, I make no order as to costs.

C.R.K./K.S. *Petition allowed.*

4. ('76-78) 1 Mad 174 : 1 Weir 726, Ex parte Poonen.

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* (29) A. I. R. 1942 Madras 5

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Surisetti Ramasubbayya — Appellant

v.

Palur Thimmiah and others — Respondents.

Appeal No. 9 of 1939, Decided on 14th February 1941, against appellate order of Sub-Judge, Kurnool, D/- 24th September 1938.

*** Civil P. C. (1908), O. 21, Rr. 58 and 63 — Order under R. 58 becomes conclusive when it is passed and continues to be so unless decision in suit under R. 63 is different — Property attached in execution of decree released on objection of third party — Execution application not having asked for any other relief dismissed —Decree-holder's suit under O. 21, R. 63 eventually dismissed — Order dismissing execution petition becomes conclusive when it was passed — Execution petition cannot be said to remain pending until suit under R. 63 is instituted or between date of its institution and its final disposal — Second execution petition filed more than three years from date of dismissal of first execution petition is time-barred — Plaint in suit under O. 21, R. 63 cannot be treated as application in accordance with law within Art. 182 (5), Limitation Act — Nor can declaratory suit under O. 21, R. 63 be regarded as step-in-aid of execution within Art. 182 (5), Limitation Act.**

The words, "subject to the result of such suit" in O. 21, R. 63 come into operation only when the result of the suit under O. 21, R. 63 is different from the result arrived at by the executing Court under O. 21, R. 58. The order of the executing Court is otherwise final and conclusive when it is passed and continues to be so unless the result of the suit under O. 21, R. 63 is different. [P 8*d*,*e*]

Where the property attached in execution of a decree is released from attachment on objection by a third party and the execution petition not having asked for any further relief is dismissed and the suit by the aggrieved decree-holder under O. 21, R. 63 is also eventually dismissed the order dismissing the execution application cannot be said to have remained pending until the institution of the suit under O. 21, R. 63 or between the date of its institution and its final disposal, but must be deemed to have become conclusive on the date on which the execution was dismissed and any execution application filed more than three years after that date must be taken to be time-barred. The plaint in the declaratory suit cannot be treated as an application in accordance with law within the meaning of Art. 182 (5), Limitation Act nor can the declaratory suit under O. 21, R. 63 be regarded as a step-in-aid of execution within the meaning of that article. Nor can the Court in which the suit under O. 21, R. 63 is filed be regarded as a proper Court within Art. 182, Expl. 2 : ('30) 17 AIR 1930 Oudh 468, *Dissent.* ; ('15) 2 A I R 1915 Mad 495 ; ('39) 26 AIR 1939 Pat 138; ('28) 15 AIR 1928 Mad 1201 and 17 Cal 268, *Expl.* [P 10*e*,*f*,*g*,*h*; P 11*a*,*c*; P 12*a*,*b*]

A. Bhujanga Rao and D. R. Krishna Rao — for Appellant.

A. C. Sampath Ayyangar — for Respondents.

Abdur Rahman J. — The only question to decide in this appeal is whether an application for execution presented by the decree-holder more than three years after the dismissal of his first petition can be, in view of the pendency of a subsequent declaratory suit, which he had brought to get rid of an order made by the executing Court accepting a third party's claim petition, held to be within time in spite of the fact that the suit instituted by the decree-holder challenging the validity of the order of the executing Court had failed. This would depend on the decision as to the character and effect of the order of dismissal passed by the executing Court on accepting the objections raised by the third party to the attachment and on the question whether the declaratory suit can be regarded to be a step-in-aid of execution of the decree within the meaning of that expression as used in Art. 182, sub-cl. (5), Limitation Act. If the order accepting the claim petition and cancelling the attachment is to become final only on the dismissal of the suit brought against the third party claimant and the execution application in which the order had been passed in his favour is to be deemed to remain pending in spite of its dismissal by the executing Court or if the steps, consisting of the institution of a declaratory suit questioning the correctness of the order passed in execution and on its failure of carrying the matter in appeal, taken by the decree-holder to remove the obstruction caused to him by the third party in raising objections to the attachment successfully, despite their failure to achieve the desired result, can be regarded to have been taken in continuation of the execution proceedings in such a manner as to keep the execution petition pending and alive, the execution petition filed by the decree-holder subsequently must be held to be within time. If, on the other hand, the order passed by the executing Court accepting the objections is to be held as final and remains in view of the dismissal of the declaratory suit, unaffected and if the steps taken by the decree-holder in instituting such a suit cannot be considered to be passed in execution of the decree or in continuance of the execution proceedings, the subsequent application for execution must be held to be barred and the time spent in carrying on the declaratory suit cannot be calculated in counting the three years within which the second application should have been made after the disposal of the first one and/ or disregarded as being irrelevant altogether.

The facts out of which the above question of limitation has emerged for decision are that a decree was passed on 25th September 1929 in O. S. No. 825 of 1929. The decree-holder made an application for execution (E. P. No. 610 of 1930) on 17th October 1930 for attachment and sale of an immovable property. It was attached but the third party objected to the attachment on the ground that the property had been sold to him on 2nd June 1928 and that the judgment-debtor was not

in possession of the attached property. This claim was allowed on 8th September 1931 and the application for execution dismissed. The decree-holder brought a suit (O. S. No. 774 of 1931) to set aside the order passed by the executing Court and for a declaration that the property attached by him belonged to his judgment-debtors and was liable to attachment in execution of his decree. The suit was dismissed on 14th December 1934 by the trial Court. An appeal was taken against that decree by the decree-holder to the Subordinate Judge of Kurnool (A. S. No. 70 of 1935). This was also dismissed but the learned Subordinate Judge in his judgment observed that a sum of Rs. 600 towards the unpaid balance of the price of the property purchased by him was still in the hands of the respondent who had put forward the sale in his favour and that the decree-holder might take out execution of that amount by appropriate proceedings. As the Subordinate Judge inspite of this observation, considered that the only questions to decide in that appeal were whether the property belonged to the judgment-debtor, and was liable to attachment in execution of the decree and on those two points he found himself against the decree-holder, he dismissed the appeal. In paras. 9, 10 and 11 of his judgment, he observed as follows:

> 9. The further question that was argued and has to be considered is whether in the circumstances it is open to the plaintiff, in the present suit to proceed against the said sum of Rs. 600, as being the unpaid purchase money in the hands of the vendee. I should agree with the lower Court (*vide* 31 All 443[1]), 'that when on a sale part of the sale consideration remains unpaid, the vendor has a lien on the property sold for the unpaid purchase money. But this does not entitle any decree-holder of the vendor to bring the property to sale in execution of his decree as property of his judgment-debtor. He may attach the unpaid portion of the purchase money which is due to his judgment-debtor and enforce his lien on the property but he cannot cause the property purchased by a third party to be sold for the recovery of the unpaid purchase money to which he, as decree-holder, is not entitled': *vide also* A I R 1935 Mad 872.[2]
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> 10. For plaintiff, reliance is placed on the ruling reported in 40 Mad 733.[3] It cannot however be said on the facts of this case, that the plaintiff's right to proceed against the unpaid purchase money is a consequential relief. As observed, all that has to be considered in this case is whether the property, which plaintiff now seeks to proceed against, still belongs to his judgment-debtor, or it has ceased to be his property. The sale, it should be found, is a true and bona fide transaction and was not a fraudulent one brought about with a view to cheat the creditors; on the other hand, it was brought about with a view to help the creditors, and to see that the best advantage is secured to them.
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> 11. Thus the suit having been brought to vacate the claim order and mainly to establish the right of the plaintiff to proceed against the properties conveyed to defendant 1, in execution of his decree in O. S. No. 825 of 1929 and since it has been found that the properties have by virtue of the sale ceased to be the properties of defendants 2 and 3, plaintiff can be held entitled to no relief in the present suit as brought.

After the suit was dismissed, a fresh application for execution (E. P. No. 338 of 1936) was presented by the decree-holder on 16th March 1936, that is, after the expiry of almost four years and a half after his petition E. P. No. 610 of 1930 had been disposed of. This was made with the object of attaching the sum of Rs. 600 alleged to have been in the hands of the respondent as observed by the learned Subordinate Judge, Kurnool, towards the balance of the price which had remained unpaid. The application having been presented more than three years after the last petition was dismissed, it would be apparently barred by time. But limitation was attempted to be saved, (a) as the second application of 1938 was alleged to be in continuation or revival of the first application (E. P. No. 610 of 1930) and (b) as the suit to set aside the order of the executing Court allowing the claim was claimed to be a continuation of the execution proceedings and regarded to be a step-in-aid of the execution under Art. 182, sub-cl. (5). These contentions did not find favour with the District Munsif of Kurnool who dismissed the application as being barred by limitation. On appeal against that order (A. S. No. 21 of 1938) the Subordinate Judge of Kurnool found the decree-holder to have been taking all necessary steps diligently for the execution of his decree and to have filed the present execution application within a few days after the appellate Court's decision in A. S. No. 70 of 1935 clarifying the rights of the parties, was pronounced and since he held that the acceptance of the claim petition and the consequent dismissal of the execution application were only subject to the result of the suit instituted for challenging the order passed by the executing Court on the claim petition, E. P. No. 338 of 1936 was declared by him to have been presented in time. The order of the first Court was thus reversed. The garnishee appeals and the short question for decision, indicated in the beginning

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1. ('09) 31 All 443 : 3 I C 497 : 6 A L J 645, Moti Lal v. Bhagwan Das.
2. ('35) 22 A I R 1935 Mad 872 : 158 I C 940 : 59 Mad 1 : 69 M L J 678, Veerappa Thevar v. Venkatarama Aiyar.
3. ('17) 4 A I R 1917 Mad 393: 36 I C 445: 40 Mad 733: 31 M L J 394, Basivireddi v. Rammayya.

of this judgment turns on the character of the orders passed by the executing Court on 8th September 1931 allowing the appellant's claim and dismissing the execution petition and on the effect of the suit brought under O. 21, R. 63, Civil P. C.

Rule 60 of the same order provides that where, upon an investigation, the Court is satisfied that the property when attached, was not in the possession of the judgment-debtor or of some person on his behalf or under him or that even being in the possession of the judgment-debtor was not in his possession on his own account or as his own property, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit from attachment. Since the only application before the Court was in respect of the property claimed by the respondent and the executing Court found that the whole of the property had been sold to him and did not belong to the judgment-debtor, the property had to be released from attachment. There was no other prayer in the application for execution presented on behalf of the decree-holder and the Court was in view of the order passed by it in favour of the claimant, unable to proceed further and unless it was prepared to adjourn the proceedings to a further date for any sufficient reason, the application had to be dismissed. The Court did, in fact, dismiss the application on 8th September 1931. Order 21, R. 63 reads as follows :

> Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

In order to determine the character of the order passed by the executing Court, the last words of the section should be borne in mind. The section, as we read it, lays down in unmistakable terms that the order of the executing Court passed on a claim or an objection is conclusive, the only exception being as to the result of the suit which the decree-holder or the third party, against whom the objections may have been decided, may bring to establish his respective contentions in regard to the property in dispute. The words, "subject to the result of such suit" were, in our opinion, meant to come into operation only when the result of such suit was different from the result arrived at by the executing Court. The order of the executing Court is otherwise declared to be conclusive, that is to say, according to our reading it was final and conclusive when it was passed and continued to be so. It would have been different if the contingency, that is, of a different conclusion having been arrived at in such suit, had arisen. Since the final result of the suit brought by the decree-holder in O. S. No. 774 of 1931 was against him, the order passed by the executing Court accepting the respondent's objections and the consequential dismissal of the application for execution remained undisturbed, and, to use the language of the section, conclusive.

The Oudh Chief Court has, however, taken a different view in 6 Luck 234[4] and held that an order cancelling or maintaining an attachment by the executing Court becomes final only on the date of the decision of the suit authorized by this rule and the order passed by the executing Court dismissing or filing the application on the adjudication of the claim petition cannot be construed as a final decision. With great respect to the learned Judges who decided that case, we are unable to concur in this opinion. The order was, as we have already observed, conclusive and, in view of the fact that the decision of the civil Court was not in any way different, it continued to be so. Had no suit been brought under the provisions of this rule, the order would not have remained in a state of suspended animation until the period of limitation provided for the institution of such a suit expired. Why should a different result be held to follow if a suit such as permitted by this rule is instituted after the expiry of say 11 months unless there is something in the words of this rule or any other provision of law which may compel us to employ the fiction of a relation back and unsettle its finality or effectiveness that existed before that date? If a claim by a third party were disallowed, the execution would have proceeded and the property attached by the decree-holder would have been brought to sale. The mere institution of the suit would not have had the effect of stopping the course of execution.

It is true that a decree or an order against which an appeal has been preferred continues to remain executable in spite of the appeal; but this is so on account of the provisions contained in O. 41, R. 5 (1), Civil P. C. There is no corresponding provision in regard to the orders passed in execution and the person who wants the execution of the order passed by the executing Court stayed will have to move the Court, hearing

4. ('30) 17 A I R 1930 Oudh 468: 128 I C 728: 7 O W N 887: 6 Luck 234, S. Hasan Shah v. Mohammad Amir Mirza.

the suit brought under R. 63, for an injunction. It may also be remembered in this connexion that two orders were passed by the execution Court on 8th September 1931. The objections of the appellant were allowed by one and the execution petition of the respondent was dismissed by the other. One may have followed the other both in point of time and consequence, but the appellant-objector was not a party to the latter order dismissing the application for execution and could not get it set aside by any process of law. This would have been open to the decree-holder alone against whom the third party's objections were accepted and that only when and if the civil Court had been of a different opinion. In that case, not only the order passed by the civil Court would have been substituted for the order passed by the executing Court but the consequential order of dismissal would have been, in order to give effect to the judgment of the civil Court, as contemplated by the words "subject to the result of such suit," vacated.

Let us now examine the decision in 6 Luck 234[4] in order to elicit any further reasons which may have been given by the learned Judges to come to a different finding. This matter, we find, has been very briefly dealt with towards the end and the only reason given to differ from the view taken in 17 Cal 268[5] is that the learned Judges in the latter case failed to consider the effect of the declaratory suit brought under the provisions of O. 21, R. 63, Civil P. C. Had the learned Judges of the Oudh Chief Court, and we speak with deference, borne in mind that the attachment in regard to 1/3rd share in the Calcutta case was never set aside by the executing Court and "that the decree-holders could, notwithstanding the order in the claim case, have prosecuted their application for execution against the 1/3rd share which was not released then" and the suit in respect of this 1/3rd share even if brought was superfluous, they would not have said what they did in regard to the declaratory suit brought under R. 63. No other reason has been given for the opinion that "if the suit succeeds, proceedings continue. If the suit fails, the proceedings fail simultaneously." It is not quite correct to say first of all that if the suit succeeds, proceedings continue in all cases. They would not, if the suit succeeded was brought by a third party. In that case, proceedings in execution would, at least as far as the third party's claim was concerned, come to an end. Moreover, if they had stopped on account of the decision of the executing Court being against the decree-holder, they would be, in the event of his success, capable of being revived; but to say that they would continue in that case may create a little ambiguity and give rise to an impression that they had never stopped in fact, which is far from being correct. The latter statement, however, that if the suit fails, the proceedings fail simultaneously cannot be, for the reasons that we have already given, accepted by us. The order by the executing Court cancelling or maintaining an attachment is liable to be affected by the result of the suit, if the result is different and not otherwise.

In support of his contention that the proceedings in a suit under O. 21, R. 63, Civil P. C., are a continuation of the proceedings in execution, reliance was placed by Mr. Sampath Iyengar on the line of cases represented by the decisions in 38 Mad 535[6] and 17 Pat 588,[7] where the alienations of the property attached by a decree-holder were held to be hit by the rule of lis pendens even if they were effected after the acceptance of objections raised to the attachments by third parties and before suits to test the correctness of these orders were brought by decree-holders. The other decision cited in support of his contention by learned counsel for the respondent was 52 Mad 465[8] where a suit under R. 63 was held to be in continuation of the execution proceedings when the question relating to the want of a separate notice before a suit was brought against a body like the Court of Wards was raised in defence.

In order to appreciate these decisions it is well to remember that an enquiry into the objections raised to the attachment of a property in execution of a decree under O. 21, R. 58, Civil P. C., is, as the terms of that rule indicate, a limited one; but, inasmuch as they can be raised by a third party only and an appeal is, therefore, incompetent in law, some machinery had to be devised for a further examination of the question whether the property was either wholly or par-

5. ('90) 17 Cal 268, Raghunandan Prasad v. Bhugoo Lali.

6. ('15) 2 A I R 1915 Mad 495: 25 I C 11 : 38 Mad 535 : 26 M L J 449, Krishnappa Chetti v. Abdur Khader Sahib.

7. ('39) 26 A I R 1939 Pat 138 : 180 I C 983 : 17 Pat 588 : 20 P L T 76, Mt. Bas Kuar v. Gaya Municipality.

8. ('28) 15 A I R 1928 Mad 1201 : 116 I C 827 : 52 Mad 465, Raja of Ramnad v. Subramanian Chettiar.

tially liable to be sold for the debt due under the decree. This was provided by giving a remedy to the aggrieved party in the form of a separate suit. What had to be done therefore by the executing Court itself under S. 47, Civil P. C., in case any objection to the liability of the property for being sold in execution was raised by the judgment-debtors or their legal representatives, and the appellate tribunal from that Court, had to be done on the intervention of a third party by a civil Court in an independent action. The appeal, therefore, as against the decision of the executing Court had, instead of being taken to the Court which had appellate jurisdiction over it, to be made to an independent tribunal which may be even inferior in status, and in practice it very often is so, to that of the Court executing the decree. Since the real point to be decided in both these proceedings relates to the liability of the property to be sold, either wholly or partly, for the debt due under the decree (although the grounds for that decision may be either put more elaborately or stated more extensively in the subsequent action) and the *lis* is necessarily the same, the application of the rule of lis pendens to any alienation made after the decision of the executing Court and before that of the civil Court or Courts, is understandable. In fact, the very words, "subject to the result of such suit" used in R. 63, make it clear that the Legislature did not, after the decision of the executing Court, intend to set the attached property at large, so that it could be alienated or otherwise disposed of without being affected by a contrary result, if any, arrived at in the civil Court. If the result happens to be the same, as that of the executing Court, the alienation by the claimant or the sale in execution of the decree remains unaffected. If, on the contrary, the result is different, the foundation of title on the basis of which the claimant in the one case and the decree-holder in the other were acting disappears, with the result that any alienation or sale must be, in view of the words "subject to the result of such suit" regarded to have been made as dependent on the adjudication of the title in favour of the alienor or in that of the judgment-debtor as the case may be.

We must for the above reasons dissent from the view taken by the Oudh Chief Court in 6 Luck 234[4] and hold that the finality or conclusiveness of the order passed in execution was not disturbed by the decision of the civil Court particularly when the result of the adjudication by both the tribunals was the same. Nor is it possible to accept the contention that the execution application in spite of the order of dismissal passed on 8th September 1931 could be deemed to remain pending either from that date upto the time when the civil suit under R. 63 was instituted or between the date of its institution and of its final disposal. As observed before, two orders were passed on 8th September 1931. The objections by the third party were accepted by one and since by reason of the decree-holder's default in not asking for any further relief in those proceedings, the Court was unable to proceed further with the application for execution, it was dismissed. The last words of O. 21, R. 57 lay down the effect of such a dismissal. By virtue of those words the attachment ceased to exist. It may have been revived if the civil Court came to a conclusion different from that arrived at by the executing Court. But in the absence of that event, the orders of the executing Court passed on 8th September 1931 were conclusive. The execution application E. P. No. 610 of 1930 cannot, therefore, be regarded to have remained pending until the decision of the Subordinate Judge in Appeal No. 70 of 1935.

This brings us to the contention advanced on behalf of the respondent that the institution of the civil suit O. S. No. 774 of 1931 should be regarded to be a step in execution of the decree within the meaning of Art. 182, sub-cl. (5), Limitation Act, and limitation should be held to start from the date of the final order passed in appeal by the Subordinate Judge of Kurnool in A. S. No. 70 of 1935. This article of the Limitation Act gives a period of three years for the execution of a decree or order of any civil Court (not provided by Article 183 or S. 48, Civil P. C.), starting from the date of the final order passed on an application made in accordance with law, where such an application has been made, to the proper Court for execution or to take some step-in-aid of execution of the decree or order. Explanation 2 to this article defines the expression "proper Court" to mean the Court whose duty is to execute the decree or order. In order to attract the provisions of this article, it is contended on behalf of the decree-holder that the plaint filed by him in O. S. No. 774 of 1931 should be regarded to be in the nature of an application as used in Art. 182 (5) and as that was presented by him to the Court which was bound to execute the decree with the object of taking a step-in-aid of execu-

tion of his decree, it should be held to fall within the ambit of that clause of the Limitation Act and limitation should be held to start from the date of the final order passed thereon. There is no doubt that if the plaint can be, for the purpose of Art. 182 (5), Limitation Act, regarded to be an application made in accordance with law, the Court receiving the plaint as the Court whose duty it was to execute the decree, and the act of filing the plaint as a step-in-aid of the execution of his decree, this contention ought to prevail.

It may be conceded that the plaint was filed by the decree-holder with the object of getting rid of the finding of the executing Court which was to the effect that the property was not liable to be proceeded against in execution of his decree and that this may be therefore regarded as a step-in-aid of execution. The next question is whether it was filed in the proper Court, i. e., the Court whose duty it was to execute the decree. It may be that the Court executing the decree and the Court receiving the plaint and trying the suit was, by accident and not by design, the same; but, we are of opinion that this accidental coincidence is immaterial and does not make the Court entertaining the civil suit as the proper Court whose duty it was to execute the decree. But assuming our opinion to be incorrect in that respect, and admitting that the Court trying the suit was bound by law to execute the decree, the main point to consider is whether the plaint can be regarded to be an application for the purposes of this article of the Limitation Act and made in accordance with law. Learned counsel for the respondent contends that it should be so and relies again on the decision in 6 Luck 234[4] to which we had occasion to refer in another connexion. This decision is undoubtedly in favour of his contention but the question is if it is correct. The reasons given by the learned Judges for their opinion are: firstly, that as long as the Court receiving the plaint happens to be the Court whose duty it is to execute the decree, the requirements of the article that the application must be made to the proper Court must be deemed to have been complied with. We have referred to this aspect of the matter already although very briefly and in view of what was said by the learned Judges of the Bombay High Court in 37 Bom 559[9] it is unnecessary to discuss the matter at any length.

9. ('13) 37 Bom 559: 20 I C 252: 15 Bom L R 557, Murugappa Mudiwallappa Kotanhalli v. Baswantrao Khalilappa Desai.

The reasons given by the learned Judges of the Oudh Court are not, in our opinion, sufficient or convincing. What is it but an accident that there happened to be only one Court in existence in the place in which the suit could be, with reference to the value and the territorial situation of the property involved, instituted? Why should a reference to the question involved in the two proceedings be considered to be relevant to determine whether the Court is proper or otherwise? Broadly speaking, it is improper for a Court to sit in judgment on its own decision, and an attempt is usually made by the person who is aggrieved by the order of the executing Court to institute his suit in another Court. This is proper. Even if there may be no technical objection in some cases to the hearing of the suit by the executing Court, the opinion may have been formed after such an elaborate enquiry that it may not be easy for the Judge trying the civil suit to hear and determine the suit without being affected to some extent at least by his previous conclusions. The learned Judges of the Bombay Court were not considering the case of a plaint at all but that of an application under the Succession Certificate Act and had therefore no occasion to say anything about the plaint being treated as an application within the meaning of Art. 182.

The second reason given by the learned Judges for holding that a plaint may be, in certain cases, treated as an application for the purposes of the article was that unless there was anything to indicate that the term "application" has been used in the article in any narrow or restricted sense or by way of an antithesis to a "plaint" or to any other document such as a memorandum of appeal, it may be held to cover a plaint as well. As a reason for this decision they referred to S. 47 (2), Civil P. C., and observed that in proper cases, a plaint in a suit could be treated as an application. They attached great importance to the fact that in such cases the article of limitation held in various Courts to be applicable is one that would apply to applications and not to suits thereby implying that the plaints have been held in certain cases to have lost their individuality altogether and were to be regarded as mere applications. But in converting a plaint into an application for the purposes of Art. 182, Limitation Act, we are afraid the learned Judges happened to overlook the provisions of Ss. 2 (10) and 3, Limitation Act. There is no definition of suit in the Act but S. 2 provides that unless there is something re-

a pugnant in the subject or context, "suit" does not include an appeal or an application. Section 3 of the Act also makes a distinction between the institution of a "suit" and the making of an "application." It was unnecessary to rest the distinction on what the learned Judges called "ordinary parlance." Since a suit is, according to the explanation in S. 3, instituted when the plaint is presented to the proper Court, the Act clearly draws a line between the presentation of a plaint and making an application and it cannot be obliterated unless there was something repugnant in the subject or context. There is nothing in Art. 182 which may call b for that treatment (54 ALL 1067[10] at p. 1074).

The reason given by the learned Judges that the Court may in certain cases treat a proceeding under S. 47, Civil P. C., as a suit and a suit as a proceeding seems to be however beside the point. Even if a suit is to be treated as a proceeding under S. 47 (2) of the Code, it nonetheless remains a suit and this in spite of the fact that the Courts have, in treating the suit started on the institution of a plaint as an execution proceeding, applied Article 182 (5), Limitation Act, which would be applicable to applications only and not to suits. It must be remembered that a c suit could only be treated under this section as an application when it was found that a suit could not otherwise be competent. It was an indulgence granted to a party at the option of the Court to treat the suit as a proceeding in execution and once the suit was treated as such a proceeding, the limitation under Art. 182 (5) was held to be applicable. It must, however, be remembered that the suit did not become an application for all purposes, but it was at the option of the Court treated as a proceeding for a certain purpose and that is about all. The provision in sub-cl. (2) of S. 47, Civil P. C., does not convert the suit into an application for d all purposes. On the contrary the very fact that a clear provision was made in Sec. 47 leaves it beyond any doubt that the suit was not for any other purpose to be treated as a proceeding.

In view of the provisions contained in Ss. 2 and 3, Limitation Act, it was incorrect, if we may say so with respect, to rely on the interpretation put on the rules of the Supreme Court and it is not, for that reason, safe to look to the English decisions for guidance in this respect. Nothing else was contained in this judgment or was said at the e bar which may lead us to construe the plaint presented in O. S. No. 774 of 1931 to be an application within the meaning of that term as used in Art. 182 (5), Limitation Act. Nor can it be said to have been made in accordance with law. Applications to constitute a step-in-aid of execution have to be filed in the execution proceedings themselves and not in any other suit or proceeding however intimately connected the latter might be with the proceedings of the former. A feeble attempt was made by learned counsel for the respondent in the end to show that the order passed by the Subordinate Judge of f Kurnool dismissing the appeal (A. S. No. 70 of 1935) was, in view of his finding that a sum of Rs. 600 had, out of the price, remained unpaid, wrong and that he should have granted a declaration that the abovementioned sum of Rs. 600 along with the vendor's lien on the property, if not the property itself, were liable to attachment. But this point was considered by the learned Subordinate Judge in the above quoted paras. 9 to 11 of his judgment and decided against the respondent rightly or wrongly, it is unnecessary to say now, with the result that the decree-holder's suit was ordered to be dismig sed. This became final and it is impossible for us while hearing a second appeal on the question whether the application for execution presented in 1936 was within time, to hold that O. S. No. 774 of 1931 should not have been dismissed but decreed in the manner suggested by learned counsel for the respondent. The result of the civil suit was, as contemplated by O. 21, R. 63 that of a dismissal and this is enough to decide the fate of the respondent's contention and of the appeal. For the foregoing reasons, the decision of the Subordinate Judge must be reversed and E. P. No. 338 of 1936 held to be barred by limitation. The appellant will h have his costs of the appeal in this Court.

C.R.K./G.N. *Appeal allowed.*

10. ('33) 20 A I R 1933 P C 63 : 142 I C 7 : 54 All 1067 : 60 I A 13 (P C), Hansraj Gupta v. Dehra Dun Mussoorie Electric Tramway Co.

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(29) A. I. R. 1942 Madras 12

WADSWORTH J.

Paleru Papaiah and others — *Petitioners*

v.

Chebrolu Ramapunniah and another — *Respondents.*

Civil Revn. Petns. Nos. 439 and 440 of 1939, Decided on 12th February 1941, to revise order of Sub-Judge, Bapatla, D/- 5th September 1938.

Madras Agriculturists' Relief Act (4 of 1938), S. 8 — Debt due by *A* to *B* cancelled and debt due by *A* to *C* substituted — *B's* separate obligation to *C* also discharged — *A's* debt to *C* is not renewal of debt to *B* within S. 8.

Where a debt due by *A* to *B* is cancelled and for it is substituted a debt due by *A* to *C*, there being also a discharge of *B's* separate obligation to *C*, *A* cannot claim under S. 8 that his debt to *C* is a renewal of the debt to *B*, *C* not being same creditor as *B* nor an assign of *B* in respect of *A's* original debt. [P 13*b*]

V. Subramaniam — for Petitioners.

K. Kotayya — for Respondents.

Order. — It seems to me quite clear that when, by the tripartite arrangement known as "havala," a debt due by A to B is cancelled and for it is substituted a debt due by A to C, there being also a discharge of B's separate obligation to C, this cannot enable A to claim under S. 8 of Act 4 of 1938, that his debt to C is a renewal of the debt to B. C is not the same creditor as B nor is he an assign of B in respect of A's original debt. The revision petitions are dismissed with costs, one set in C. R. P. No. 439 of 1939.

C.R.K./G.N. *Petitions dismissed.*

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* (29) A. I. R. 1942 Madras 13

PATANJALI SASTRI J.

Sepulchre Brothers, Proprietors, Belgium East India Trading and Engineering Co., Bombay — Petitioner

v.

Sait Khushal Das Jagjivan Das Mehta, trading in the name of Messrs. J. Khushal Das & Co., Bezwada — Respondent.

Civil Revn. Petn. No. 2271 of 1939, Decided on 8th August 1941, to revise order of Dist. Munsif, Bezwada, D/- 17th August 1939.

*** Civil P. C. (1908), S. 20 (c) — Contract — Offer made and accepted through post—Part of cause of action arises where letter accepting offer is posted and part where it is delivered.**

Although an acceptance of an offer is complete as against the proposer as soon as the letter containing it is posted, it is a continuing act until it reaches the person to whom it is communicated and thus can be taken to be made also at the place where it is received. Consequently where an offer is made and accepted through post, a part of the cause of action arises where the letter accepting the offer is posted and a part where it is delivered: (1875) 32 L T (N S) 778, *Rel. on*; (1888) 20 Q B D 640; ('33) 20 A I R 1933 Mad 764 and ('40) 27 A I R 1940 Mad 49, *Expl.*; (1902) 1 K B 867, *Disting.*; ('24) 11 A I R 1924 Mad 789, *Ref.* [P 14*e*,*f*; P 15*c*,*d*]

N. Rajagopala Ayyangar — for Petitioner.

Kasturi Seshagiri Rao — for Respondent.

Order. — The only question argued in this civil revision petition relates to the jurisdiction of the Court below to entertain the suit. The issue has been found for the plaintiff and the defendant has preferred this revision petition. The suit was for damages for breach of contract for delivery of certain perforated steel sheets according to specification to the plaintiff who is a merchant trading at Bezwada. The defendants who are carrying on business at Bombay are the representatives of a Belgium firm of steel manufacturers. The plaintiff averred that the defendants broke the contract by failing to deliver the goods and they sued in the District Munsif's Court at Bezwada alleging that their cause of action arose in part at Bezwada. The defendants pleaded inter alia that the Court had no jurisdiction to entertain the suit as no part of the cause of action arose at Bezwada. The issue was tried by consent of parties as a preliminary issue and the letters by means of which the contract was concluded have been included in the record. The lower Court took the view that the indent form which the defendants finally sent to the plaintiff to be duly completed and returned after the specifications and quotations had been exchanged must be taken to be the offer and the plaintiff's posting it duly signed and completed was the acceptance and that, therefore, the contract was concluded at Bezwada. The learned District Munsif was further of opinion that the Court had jurisdiction as the goods were to be received finally at Bezwada via Madras.

Mr. Rajagopala Ayyangar, the learned counsel for the petitioner, urged that the view taken by the learned District Munsif was unsustainable. He contended that the plaintiff's return of the indent form duly completed and signed was merely a customary formality which the defendants required their customers to observe in such cases, and that the contract was really concluded by the defendants' telegram from Bombay accepting the plaintiff's order for the goods at the price quoted by the defendants. Mr. Rajagopala Ayyangar further submitted that the correspondence showed that the contract was on C. I. F. terms and that the shipping documents were to be delivered against payment at Bombay, while the harbour at which the goods were to be unloaded was Madras. The place of delivery, he therefore argued, must be taken to be either Bombay or Madras and not Bezwada. The respondent's learned counsel, Mr. Seshagiri Rao did not attempt to repel these contentions but sought to support the decision of

the Court below on the ground that if the telegram was to be treated as the acceptance its receipt by the plaintiff was a part of the cause of action and as this was admittedly at Bezwada, the Court below had jurisdiction to entertain the suit under S. 20, cl. (c), Civil P. C. The decision of Ramesam J. in 46 M L J 371[1] was cited in support of this contention. After referring to the decisions holding that in suits arising out of contracts a part of the cause of action must be deemed to arise where the letter containing the offer was received, the learned Judge held that the receipt of acceptance when the contract was complete was a part of the contract "there being no reason why acceptance should be in a worse position than offer." The learned Judge distinguished the case in (1918) 1 K B 128,[2] by pointing out that it did not appear from the affidavit on which the application was based that any letter of acceptance was received at West Hartlepool and the case in 27 Mad 355,[3] by observing that no attempt was made there to support the judgment under appeal on the ground that the letter of acceptance was received in Kurnool.

Mr. Rajagopala Ayyangar urged that this decision should not be accepted as sound because it was opposed to the two later cases decided by Divisional Benches of this Court and reported in 65 M L J 455[4] and I L R (1940) Mad 195[5] in both of which the decision should have been the other way if 46 M L J 371[1] were to be regarded as good law. In both these cases which arose out of suits filed on the original side of this Court, it appears no doubt from the statement of facts that the communication of acceptance was received at Madras. But it is to be observed that no point was made of such receipt as being part of the cause of action and the decision of Ramesam J. referred to above does not appear to have been brought to the notice of the learned Judges who held that the cause of action in each case did not arise in part within the original civil jurisdiction of this Court. It was also argued that there was no real analogy between the receipt of an offer and the receipt of an acceptance; for, while the former was an essential step in the making of a contract as there could be no acceptance unless the offer was received, the receipt of acceptance was not necessary to complete the contract which was concluded as soon as the letter of acceptance was posted as settled by a long course of decisions. The argument is not without force, and I should have hesitated to follow the decision of Ramesam J., if there was nothing more to support it than the analogy of the receipt of an offer on which, apparently, it was based. But there is authority for the view that although an acceptance is complete as against the proposer as soon as the letter containing it is posted, it is a continuing act until it reaches the person to whom it is communicated and may thus be taken to be made also at the place where it is received. This was the view taken in (1875) 32 L T (N S) 778[6] which arose out of a motion for a writ of prohibition to the Mayor's Court on the ground that it had no jurisdiction to entertain an action for money due on an account stated as the whole cause of action did not arise within the city of London. The defendant in that case received out of the city some goods which he had ordered from the plaintiff and in answer to a letter requesting payment of the price wrote that he would remit the amount as requested as soon as possible. This letter was posted at the defendant's place of residence out of the city and was received by the plaintiff at his place of business in the city. It was argued on the analogy of cases relating to acceptance of an offer that the account must be deemed to have been stated out of the city where the defendant's letter was posted but the Court held that although a statement of an account was analogous to the acceptance of a contract and it was settled law that a contract was concluded as soon as the acceptance was posted, the statement, like the acceptance, was a continuous act until it reached the person to whom it was communicated and that, therefore, the defendant's letter was an account stated to the plaintiff at the place where the letter received it, i.e., the city of London. Lord Coleridge C. J., observed at p. 780 :

> It has been pointed out, indeed, and with perfect truth that the cases referred to have stopped at this point with laying down as law that a contract is complete when its terms are accepted, and that the acceptor need not wait till the other party

1. ('24) 11 A I R 1924 Mad 789 : 84 I C 691 : 46 M L J 371, Venkata Reddi v. Nataraja Setti.
2. (1918) 1 K B 128 : 87 L J K B 189 : 118 L T 253, Clarke v. Knowles.
3. ('04) 27 Mad 355, Kamisetti Subbiah v. Katha Venkatasami.
4. ('33) 20 A I R 1933 Mad 764 : 145 I C 998 : 65 M L J 455, National Insurance Co. Ltd., Calcutta v. Seethammal.
5. ('40) 27 A I R 1940 Mad 49 : 190 I C 154 : I L R (1940) Mad 195 : (1940) 1 M L J 677, Ahmed Bux v. Fazal Karim.
6. (1875) 32 L T (N S) 778, Evans v. Nicholson.

receives his letter notifying his acceptance. But then that was all that it was necessary to decide in all those cases, (1818) 1 B & Ald 681;[7] (1849) 8 C B 225[8] and (1872) 7 Ch A 587,[9] and the Courts there needed not to go on and say whether the acceptance was a continuous act; still, all the reasoning in the cases upon which the judgments are founded, though the judgments themselves are confined to the points necessary to be decided, is applicable to the further proposition which we are now considering, viz., that the acceptance continues to be an act done by the person accepting in a uniform and unbroken course of dealing until it reaches the other person to whom it is notified. And, in my opinion, although when he sends it off by post it is made then as against him, it is nonetheless made also when it reaches the mind of the offerer by reason of its having also been made before. This leads me to be unable to distinguish an acceptance so explained from a statement of an account; and so, to apply the proposition to the facts in this case, I should say that, although an account was undoubtedly stated at Copthorne, wherever that may be, it was nonetheless stated again when the letter containing the admission was received in the city.

Lindley and Archibald JJ. expressed a similar opinion. Denman J. while agreeing that an account must be deemed to be stated where the person to whom it was addressed received the statement, doubted the applicability of the analogy of the posting of the letter of acceptance concluding a contract, to the case of an account stated. He added however :

But, I do agree, that, if the letter speaks at the moment it is posted, it is in the nature of a continuous statement, and speaks also at the moment when it is received.

It will thus be seen that though the point actually decided related to an account stated, the decision was based on general principles applicable to all contracts and this has been recognized in Hals. Vol. 8 p. 191 where this decision among others is cited as an authority for the proposition that where an offer is made and accepted through post, a part of the cause of action arises where the letter accepting the offer is posted and a part where it is delivered. In this view, a part of the cause of action in the present case must be taken to have arisen at Bezwada where the defendants' telegram accepting the plaintiff's order was received by the plaintiff. Mr. Rajagopala Ayyangar cited two English cases, viz., (1888) 20 Q B D 640[10] and (1902) 1 K B 867[11] as being in conflict with (1875) 32 L T (N S) 778[6] referred to above. In the former an order to make certain bets was transmitted by postal telegraph by the plaintiff residing outside the City of London to the defendant within the city, who telegraphed that the order had been carried out, and it was held that the contract of agency was made in the city and that the action was properly laid in the Lord Mayor's Court as the whole cause of action arose within the jurisdiction of the city. This, however, does not conflict with the view adumbrated in (1875) 32 L T (N S) 778[6] for, as already observed, all that was held in the latter case was that an acceptance must also be deemed to have been made where the offerer has received it. The fact, therefore, that the contract of agency could also be deemed to have been made at the plaintiff's place of residence without the City of London did not militate against the exercise of jurisdiction by the Lord Mayor's Court within whose jurisdiction the contract was concluded by the despatch of the defendant's telegram notifying the carrying out of the plaintiff's order.

The case in (1902) 1 K B 867[11] related to an alleged wrongful dismissal of the plaintiff who was employed in England by a letter posted by his employer, the defendant, who was residing abroad. It was held that there was a complete breach of the contract when the letter giving notice of dismissal was posted abroad and that the English Court had no jurisdiction to entertain the action under O. 11, R. 1 (e) of the Rules of the Supreme Court which authorized service out of the jurisdiction of a writ of summons in cases, inter alia, where the action was "in respect of a breach committed within the jurisdiction of a contract wherever made." The facts were entirely different and the provision under which the case was decided did not make the exercise of jurisdiction by the Court depend upon the arising of the cause of action wholly or in part within the jurisdiction. I cannot therefore regard the case as being in conflict with (1875) 32 L T (N S) 778.[6] For the reasons indicated, I hold that the Court below is competent to try the suit and accordingly I dismiss the civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

7. (1818) 1 B & Ald 681 : 19 R R 415, Adams v. Lindsel.

8. (1849) 8 C B 225 : 18 L J C P 310 : 79 R R 470, Duncan v. Topham.

9. (1872) 7 Ch A 587 : 41 L J Ch 621 : 26 L T 781 : 20 W R 690, In re Imperial Land Co. of Marseils; Harris's case.

10. (1888) 20 Q B D 640 : 57 L J Q B 401 : 58 L T 857 : 36 W R 895, Cowan v. O'Conner.

11. (1902) 1 K B 867 : 71 L J K B 490 : 86 L T 485 : 50 W R 401 : 18 T L R 510, Holland v. Bennet.

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(29) A. I. R. 1942 Madras 16

GENTLE J.

Nanduri Venkatasubba Row —
Plaintiff — Appellant
v.
Dr. Taylor Stanley Philip and another
— Defendants — Respondents.

Application No. 1563 of 1941 (in Appln. No. 865 of 1941), Decided on 22nd August 1941.

(a) Civil P. C. (1908), O. 33, R. 5 — Application in High Court to sue in forma pauperis —Cause of action arising outside jurisdiction — Defendant not having address nor residing within jurisdiction — Leave to sue not obtained—Application must be dismissed.

b In the absence of leave to sue an application to the High Court to sue in forma pauperis must be rejected when the cause of action has arisen outside the jurisdiction of the High Court and the defendant neither has address nor resides within its jurisdiction. [P 16*g*, *h*]

(b) Tort—Slander — Damages are at large— Until whole evidence is examined damages cannot be said to exceed particular sum so as to entitle Court to refer plaintiff to Court of lower pecuniary jurisdiction.

In a claim for damages for slander, the damages are at large and until there has been an examination of all the evidence, the amount of the damages cannot be ascertained nor can it be said that they cannot in any event exceed any particular sum. Consequently the Court cannot refer the plaintiff to
c a Court of lower pecuniary jurisdiction on the ground that the amount of damages claimed could not exceed a particular sum. [P 16*h*]

Plaintiff in person.

Order. — The appellant before me applied to sue in forma pauperis. His application was summarily dismissed by the learned Master against whose decision this appeal has been preferred. The plaint is drafted by the appellant himself and although it does not set out as concisely and succinctly the matters of the claim which he desires to prefer as would have been the case had a qualified and experienced lawyer been the draftsman, the substance of the
d claim which he makes against the two defendants is as follows: Defendant 1 is a doctor living in Secunderabad in the dominion of Nizam and is employed by the State Railways. Defendant 2 is an advocate of this Court living in Vizagapatam. The appellant appears to allege that defendant 1 in Secunderabad wrote a medical certificate in respect of the plaintiff which contained defamatory matter concerning his mental condition. There is no allegation that the letter was published in Madras and the appellant before me has stated that this was not the case. Defendant 2 is alleged to have made oral statements containing matters to the same effect as were written in the medical certificate of defendant 1. These oral statements, it is alleged, were made in Madras within the jurisdiction of this Court. It is alleged that the statements both in the medical certificate and orally made by defendand 2 are defamatory of the plaintiff. The plaint does not use the language which would have been employed by a professional gentleman and it is not alleged in the form which is adopted in England that in consequence of the defamatory statements, the plaintiff has suffered in his character, credit and reputation and has been brought into public odium, hatred and contempt. But the substance is that by reason of the f written and oral statements, he has been defamed and has suffered damage. The claims preferred are for a declaration that the medical certificate is invalid and for Rs. 12500 damages in respect of the defamatory statements.

The learned master dismissed the application on the following grounds. In so far as defendant 1 is concerned, leave to sue had not been obtained. On the face of the plaint, defendant 1 lives in Secunderabad and the cause of action of which complaint is made against him arose in Secunderabad also. Consequently, the learned Master held that g the plaintiff would have failed in the suit. In regard to defendant 2, the learned Master held that the damages claimed could not in any event exceed Rs. 5000 and consequently the plaintiff should be referred to a Court of lower jurisdiction to agitate his claim. In regard to defendant 1, I agree with the finding of the learned Master and there is no need for me to elaborate the reasons which he expresses. Leave to sue not having been obtained, the cause of action arising outside the jurisdiction of this Court and the defendant not having an address or residing within its jurisdiction, the learned Master's conclusion is correct and in regard to defen- h dant 1, this appeal fails.

In regard to defendant 2, I am satisfied that the appeal should be allowed. Although the claim is not neatly or clearly expressed it is one for damages for slander, a claim in which the damages are at large and until there has been an examination of all the evidence, the amount of the damages cannot be ascertained nor can it be said that they cannot in any event exceed any particular sum. The learned Master examined in some detail whether there would be any damage flowing from some allegations which the plaintiff made in his plaint, such as, he was

caused mental suffering and had lost the benefit of the hospitality of his friends. Those matters, as I see them, were included as grounds to increase the damage in addition to what ordinarily would flow from the establishment of a slanderous statement made by the defendant in regard to the plaintiff. It is not necessary to consider those matters in detail now. This is not an action for wrongful dismissal although the plaintiff says in consequence of the statements of which complaint is made, he was dismissed from his employment by the railway company in Hyderabad. The claim so far as defendant 2 is concerned is one for damages for slander. The grounds upon which the learned Master summarily dismissed the application for leave to sue are wrong. The appeal is allowed and the learned Master is directed to enquire into the application for leave to sue defendant 2 in forma pauperis in the usual way. The appellant appears in person and there will be no order as to costs.

C.R.K./G.N. *Appeal allowed.*

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(29) A. I. R. 1942 Madras 17

GENTLE J.

Madhava Rao alias Chinnakannan, minor by his mother and next friend Sironmoni Ammal — Plaintiff

v.

Administrator-General of Madras and others — Defendants.

C. S. No. 72 of 1940, Decided on 23rd August 1940.

Will—Construction — Demonstrative or specific gift—Intention of testator must be gathered from will as a whole—First gift and subsequent direction of fund out of which it should be paid —Absence of existence of such fund at death of testator — It is payable out of general estate.

In considering the provision of a will one must refer to it as a whole in order to ascertain the intention of the testator. [P 18c]

If there is first a gift and then a subsequent direction of the fund out of which it should be paid, it would be demonstrative and would be payable out of the general estate, in the absence of the existence of the fund at the date of the death of the testator. [P 18c]

A testator who had three sons made provisions for two sons of gift of a large and a small house to each and to the third a small house and a large house to be purchased out of the fixed deposit in a certain bank when it matured. The deposit matured before the death of the testator. The testator had also provided that the balance out of the money collected from bank, mortgages and promissory notes after purchasing a house for the third son should be divided equally among his three sons :

Held that the testator wished to make equal provision for all his sons and that the testator intended to make a gift of a sum of money in favour of the third son which sum was to be spent on the purchase of a house and that this gift was not a specific but a demonstrative gift and the direction that it was to be paid out of a specified fund did not make the gift a specific one. Therefore it was to be provided out of the general estate. [P 18f, g]

V. Sundararajan — for Plaintiff.

S. Rangaswami Iyengar, Administrator-General in person.

S. S. Rajagopalan, T. K. Rajagopalan and M. A. Rajagopalan — for Defendants.

Order. — This originating summons is taken out for the purpose of construing the will of the late C. Manicka Mudaliar who died on 19th January 1936 having made his last will and testament, on 22nd January 1935. He left two widows, by the senior widow one son who is defendant 2, and by the junior widow two sons, defendant 3 and the plaintiff. The Administrator-General of Madras is now administering the estate and is defendant 1. The matter for decision is whether a gift in favour of the plaintiff of a sum of Rs. 12,000 was specific or demonstrative, and if specific, whether it has been adeemed. To help to answer the problems to be considered, one must ascertain as far as one can, what the intention of the testator was, as expressed in his will. In regard to defendants 2 and 3, he gave to each of them a large and a small house in Madras and lands in the mofussil. To the plaintiff he gave specifically a small house in Madras and lands in the mofussil. The will then provides as follows :

> Further there is a sum of Rs. 14,000 in fixed deposit in my name in the Indian Bank, Madras, out of that amount, I have given Rs. 12,000 to this son. With that sum of Rs. 12,000 my executors shall as early as possible purchase a house of the value of about Rs. 12,000 in Madras.

The fixed deposit matured between the date of the will and the death of the testator and it is common ground that after the date of its maturity the testator purchased a house in Madras for the sum of Rs. 10,000. On behalf of defendants 2 and 3, it is contended that the gift of Rs. 12,000 in favour of the plaintiff was specific and that it was to be paid out of the fixed deposit with the Indian Bank; as there was no such fund at the date of the deceased's death, the legacy has been adeemed and must fail. On the other hand, on behalf of the plaintiff it is contended the legacy was demonstrative and whilst the legacy was primarily to be paid out of the fund with the Indian Bank, as that did not exist at the death of the testator, his other estate is responsible for the payment of the legacy.

Later in the will, the testator provides that moneys advanced by him on promissory notes and on mortgages as well as the money in the bank should be collected, and the amount spent for the purchase of a house for the plaintiff being deducted, the balance should be divided into three shares, each of his sons, the plaintiff and defendants 2 and 3, being entitled to a share. Later still, in this will, the testator says that he had appointed his three sons as residuary legatees of all his moveable and immovable properties. It is clear that the testator intended that the money which he had directed should be spent upon the purchase of a house should not be divisible amongst the three sons as he expressly excludes this from the moneys to be divided between the plaintiff and defendants 2 and 3. When considering the general residuary clause in the will, one must give a meaning to the earlier provision. There can be no doubt that the testator wished to make equal provision for all his sons. Having given to defendants 2 and 3 a large and a small house in Madras, he gave only a small house to the plaintiff, and expressly provided for the purchase of a large house.

Emphasis has been placed by learned counsel on behalf of the other two sons that the gift of Rs. 12,000 to the plaintiff was expressed to be out of a sum of Rs. 14,000 in fixed deposit and thus, there has not been a general gift of a legacy. It is conceded that if there had been first a gift and then a subsequent direction of the fund out of which it should be paid, it would have been demonstrative and would be payable out of the general estate, in the absence of the existence of the fixed deposit account in the bank at the date of the death. I think it is laying too much emphasis on the position of words or sentences to make the wish of a testator to be dependent upon such position.

Section 142, Succession Act, provides that where a testator bequeaths to any person a specified part of his property which is distinguished from all other parts of his property, the legacy is specific. Section 150 provides that where a testator bequeaths a certain sum of money and refers to a particular fund or stock so as to constitute the same, the primary fund or stock out of which payment is to be made, the legacy is to be deemed to be demonstrative. The latter part of the explanation provides that where the legacy is directed to be paid out of specified property, it is demonstrative. To these two sections, there are a large number of illustrations. I can find but little, if any help in some of these illustrations, the wording of some of them in both sections being substantially identical. For instance, one of the illustrations to section 142 provides that an annuity of Rs. 500 out of the rents of the zamindari of W is a specific legacy, whereas an illustration under S. 150 provides that Rs. 1000 out of the sum of Rs. 2000 due to the testator is demonstrative legacy. I merely refer to these to show the conflicting nature of the illustrations which are given.

In considering its provision, one must refer to the will as a whole in order to ascertain the intention of the testator. Seeing the provision made for two sons of gifts of a large and a small house to each, the gift of one small house to the plaintiff, and provision for the purchase of a larger house indicates that the testator wished to provide for his three sons in the same way and to the same extent. The direction that out of the moneys at the time of the date of the will which were deposited with the Indian Bank, a sufficient sum was to be paid to purchase the other house together with the later provision in the will that the balance of the bank deposit was to be divided equally between the three sons after they had been deducted from the deposit the moneys to be spent upon the purchase of a house, to my mind, shows that the testator intended to make a gift of a sum of money in favour of the plaintiff, which sum was to be spent on the purchase of a house and that this gift is not a specific but a demonstrative gift and the direction that it was to be paid out of a specified fund does not make the gift a specific one.

There will, therefore, be a direction that defendant 1 will provide out of the assets of the testator in his hands a sum of Rs. 12,000. Learned counsel on behalf of the plaintiff, who is a minor, states that the house which was purchased for Rs. 10,000 can be given to the plaintiff, subject to the approval of the Court, in respect of the legacy of Rs. 12,000. The learned Administrator-General for defendant 1 tells me, and I accept it, that this house, although Rs. 10,000 was paid for it, in fact it is worth Rs. 12,000 and indeed even more than that. Defendant 1 will therefore take the necessary steps to place this house in the name of the plaintiff and the income thereof will be paid to him or to his guardian as the case may be. No other order is necessary save that the costs of all parties will be paid out of the assets. I fix the plaintiff's costs at Rs. 350 including all out fees and

a expenses, defendant 2's at Rs. 175 and for defendant 3 I fix the guardian's fee at Rs. 125 and Rs. 75 to the Administrator-General. Prayer 4 of the originating summons seeks for a direction from the Court regarding the disposal of some jewellery. This jewellery is now the subject-matter of a suit in the City Civil Court, and it is unnecessary to dispose of this matter now. The abandonment by the plaintiff of the relief in respect of this jewellery is in no way to prejudice his rights, if any, in regard to it.

C.R.K./K.S. *Order accordingly.*

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b *** (29) A. I. R. 1942 Madras 19**

LEACH C. J. AND CHANDRASEKHARA AYYAR J.

Nallappa Goundan — Petitioner

v.

Chinnammal — Complainant.

Criminal Revn. Case No. 163 and Criminal Revn. Petn. No. 156 of 1941, Decided on 2nd September 1941, to revise judgment of Sessions Court, Trichinopoly Division, D/- 18th September 1940.

*** Criminal P. C. (1898), S. 195—Complaint of defamation based on evidence in Court — Complaint by Court or its sanction is not necessary — Complaint by defamed lies under Penal Code:** (1939) 1 M L J 412=('39) 26 A I R c 1939 Mad 368=181 I C 86 ; (1939) 1 M L J 614=('39) 26 AIR 1939 Mad 493=183 I C 179 and 1940 M W N 867, *OVERRULED.*

The provisions of S. 195, Criminal P. C., do not apply to defamation. A person who is defamed by a witness when in the witness-box is at liberty to file a complaint against his defamer under the provisions of the Penal Code. When such a right exists it can only be taken away by an express statutory provision to that effect. There is nothing in S. 195, Criminal P. C., or in any other part of that Code, or in any other enactment which takes away this right: ('26) 13 AIR 1926 Mad 906 (FB) and 1 Weir 585, *Rel. on ;* ('36) 23 AIR 1936 Mad 89, *Expl.*; 1933 M W N 1263, *Approved ;* (1939) 1 M L J 412=('39) 26 AIR 1939 Mad 368=181 I C 86; (1939) 1 M L J 614=('39) 26 AIR 1939 Mad 493=183 I C 179 and 1940 M W N 867, *OVER-*
d *RULED; Case law referred.* [P 20*a*]

G. Gopalaswamy — for Petitioner.

Public Prosecutor — for the Crown.

Leach C. J. — The petitioner was convicted by the Joint Magistrate of Karur under S. 500, Penal Code, for the defamation of his wife. He was ordered to pay a fine of Rs. 100 and in default of payment to undergo simple imprisonment for three months. The defamatory words had been uttered by the petitioner when giving evidence in support of a complaint filed by him to the effect that his wife had been guilty of theft. In the course of his evidence in support of the complaint he accused his wife of unchastity. They had quarrelled and she was living separately but in the same building. The e conviction of the petitioner was confirmed by the Sessions Judge of Trichinopoly on appeal. The petitioner now asks this Court to set aside the conviction on the ground that a complaint of defamation which is based on a statement in Court can only be filed by the Court in which the statement was made. There are conflicting decisions of this Court on the question. In three cases Lakshmana Rao J. has expressed the opinion that the complaint must be filed by the Court, while Burn J. has expressed an opinion to the contrary.

The first of the decisions by Lakshmana f Rao J. was given in 1939 M W N 192.[1] In that case the petitioner charged the son-in-law of the respondent with theft of certain documents and records and in an affidavit filed in support of an application for a search warrant stated that some of the articles had been secreted in the house of the respondent. A search warrant was issued and in accordance with this authority the respondent's house was searched. Nothing was however found there and the son-in-law was ultimately discharged. The learned Judge considered that as the complaint of defamation was founded on false evidence the offence g would fall within S. 193, Penal Code, and was only cognizable on a complaint by the Court. In support of his order Lakshmana Rao J. relied on the decision of this Court in 59 Mad 165[2] to which reference will be made presently. The learned Judge expressed a similar opinion in 1939 M W N 320[3] and in 1940 M W N 867.[4] The opinion of Burn J. was stated in 1933 M W N 1263[5] and is to be gathered from the following excerpt from his judgment:

> The mere fact that the defamation is committed in, or in relation to, criminal proceedings in a Court is not a reason for requiring the sanction of that Court or for requiring that Court to prefer a com- h plaint . . . . . The petitioner in this case has complained of the acts which have, according to him, caused harm to his reputation ; he has no concern

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1. ('39) 26 AIR 1939 Mad 368 : 181 I C 86 : 40 Cr L J 542 : (1939) 1 M L J 412 : 1939 M W N 192, Shanmugasundaram Pillai v. Manicka Mudaliar.
2. ('36) 23 AIR 1936 Mad 89 : 159 I C 853 : 37 Cr L J 159 : 59 Mad 165 : 69 M L J 812, In re Appadurai Nainar.
3. ('39) 26 AIR 1939 Mad 493 : 183 I C 179 : 40 Cr L J 757 : (1939) 1 M L J 614 : 1939 M W N 320, Ganapati Asari v. Kuppusami Asari.
4. ('40) 1940 M W N 867 : (1940) 2 M L J 491, Ramaswami Konar v. Nachiar Ammal.
5. ('33) 1933 M W N 1263, Venkataramanjulu Chetti v. Kanniah Chetti.

with the same acts in so far as they may have constituted an offence against public justice.

The provisions of S. 195, Criminal P. C., do not apply to defamation. This Court has held in 49 Mad 728[6] that a person who is defamed by a witness when in the witness-box is at liberty to file a complaint against his defamer under the provisions of the Penal Code. When such a right exists it can only be taken away by an express statutory provision to that effect. There is nothing in S. 195, Criminal P. C., or in any other part of that Code, or in any other enactment which takes away this right.

We consider that an examination of the judgment in 59 Mad 165[2] does not render real support for the opinion that when a person is defamed in evidence given in support of an offence which falls within the purview of S. 195, Criminal P. C., the Court in which the defamation takes place must lay the complaint charging the witness with defamation. In 59 Mad 165[2] the facts were these: A civil Court had held that a promissory note had been fabricated and had dismissed the suit. Thereupon the defendant, without asking the aid of the civil Court, filed a complaint charging the maker, the writer and the attestors of the instrument with forgery, an offence falling in the circumstances within the mischief of S. 195, Criminal P. C. On a preliminary objection being taken to the effect that the maker of the instrument could not, in view of the provisions of S. 195 (1) (c), Criminal P. C., be charged, except on the complaint of the Court, the complaint so far as the maker was concerned was dismissed, but the Magistrate proceeded with the charge against the attesting witnesses. Madhavan Nair and Burn JJ. held this to be wrong, and stated that parties should not be allowed to evade the provisions of S. 195 (1) (b), Criminal P. C., by filing a complaint under another provision of the Penal Code if an offence under S. 193 of that Code or of any other of its sections mentioned in S. 195 (1) (b), Criminal P. C., had been committed. In that case the complaint was based on a forged instrument which had been given in evidence, and we do not read the judgment as placing in the same category a charge of defamation which is an entirely personal matter. That question was not under consideration.

We consider that the opinion expressed by Burn J. in 1933 M W N 1263[5] is preferable and it is to be remembered that Burn J. was a member of the Bench which decided 59 Mad 165.[2] It is also in point to mention that the opinion of Burn J., in 1933 M W N 1263[5] accords with a much earlier decision of this Court and one given by a Bench: *see* 1 Weir 585.[7] There a Magistrate had held that the sanction of the Court was required to a proceeding for defamation in respect of a statement made in Court and as sanction had not been accorded dismissed the complaint filed by the person alleged to have been defamed. The complainant applied to this Court to correct the order in revision and this was done. In fact no attempt was made to support the Magistrate's order which was described by this Court as being untenable. It may be mentioned that opinions which have been expressed by other High Courts support the opinion of Burn J.: *see* 48 Cal 388,[8] I L R (1940) ALL 314,[9] I L R (1937) Nag 338[10] and I L R (1937) Nag 425.[11] The petition will be dismissed.

C.R.K./K.S. *Petition dismissed.*

6. ('26) 13 AIR 1926 Mad 906 : 96 I C 978 : 27 Cr L J 1026 : 49 Mad 728 : 51 M L J 112 (FB), Tiruvengada Mudali v. Tripurasundari Ammal.

7. ('89) 1 Weir 585, Krishna Rao v. Appasami Iyer.

8. ('21) 8 AIR 1921 Cal 1 : 59 I C 143 : 22 Cr L J 31 : 48 Cal 388 : 32 C L J 94 : 24 C W N 982 (SB), Satish Chandra v. Ram Dayal.

9. ('40) 27 AIR 1940 All 246 : 188 I C 699 : I L R (1940) All 314 : 1940 A L J 79 : 41 Cr L J 660, Mohamed Isa v. Nazim Hussain.

10. ('36) 23 AIR 1936 Nag 241 : 166 I C 282 : 38 Cr L J 189 : I L R (1937) Nag 338, Mt. Binia v. Emperor.

11. ('37) 24 AIR 1937 Nag 138 : 169 I C 429 : 38 Cr L J 775 : I L R (1937) Nag 425, Chotelal v. Phulchand.

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(29) A. I. R. 1942 Madras 20

HORWILL J.

Nainamalai Goundan and others — *Petitioners*

v.

Ramaswami Goundan—*Respondent.*

Criminal Revn. Case No. 503 and Petn. No. 474 of 1941, Decided on 13th August 1941, to revise order of Sub-divisional First Class Magistrate, Namakkal, D/- 13th May 1941.

Criminal P. C. (1898), S. 144—Sub-Magistrate refusing to pass order under S. 144 for want of sufficient grounds — Sub-divisional Magistrate in appeal can pass order under S. 144 if he considers it necessary on material before him.

The Sub-divisional Magistrate in an appeal against the order of the Sub-Magistrate refusing to pass order under S. 144 on the ground that there were no sufficient grounds, has ample power by reason of S. 144 (1) to pass the order under S. 144. If on the material available to him he considers an order under S. 144 to be necessary, it is his duty to pass such order whether the material is gathered

by him or by the Sub-Magistrate is immaterial. [P 21 *b*, *c*]

N. Somasundaram — for Petitioners.

K. E. Rajagopalachari — for Respondent.

Public Prosecutor — for the Crown.

FACTS — There was a petition for an order under S. 144, Criminal P. C., before the Stationary Sub-Magistrate who after enquiry as he did not find sufficient grounds refused to pass an order. The matter was taken up to the Sub-divisional Magistrate. Before the Sub-divisional Magistrate it was contended by the respondents there and the petitioners here in the revision petition that after the matter had been enquired into and disposed off by a competent Court the Sub-divisional Magistrate had no jurisdiction to enquire into and pass an order in the same matter. The Sub-divisional Magistrate overruled the objection and proceeded with the enquiry. Against this order the present revision petition is filed.

Order. — The Sub-divisional Magistrate had ample power under cl. (1) of S. 144, Criminal P. C., to pass the order he did. The Sub-divisional Magistrate is responsible for preserving law and order within his jurisdiction, and if on the material available to him he thinks that an order under S. 144, Criminal P. C., is necessary, it is his duty to pass such an order. Whether the material is gathered by himself or by the Sub-Magistrate is irrelevant. The petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

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* (29) A. I. R. 1942 Madras 21

PANDRANG ROW AND KING JJ.

Kangati Mahanandi Reddi — *Appellant*

v.

Panikalapati Venkatappa and another — *Respondents.*

Appeal No. 93 of 1940, Decided on 8th April 1941, against order of District Court, Kurnool, D/- 4th September 1939.

*** (a) Contract — Maintenance and champerty — Suits on promissory note — Pending suits, plaintiff transferring entire amounts due in respect of suits for consideration to be paid within a few days of passing of decrees in suits — Decrees passed — Transaction held completed one and valid.**

Where suits on promissory notes were pending, plaintiff executed a deed of transfer by which he assigned the entire amounts due in respect of the suits for a consideration to be paid within a few days of the passing of the decrees in the suits. Decrees were passed in the suits :

Held that there was a completed transaction and that it was valid : (1912) 3 K B 474, *Rel. on.* [P 22 *e*]

*** (b) Civil P. C. (1908), O. 21, R. 16 and Section 146 — Pending suits transfer of entire amounts due under them for consideration — Decrees passed—Assignee is entitled to execute decrees not under O. 21, R. 16 but under S. 146 — O. 21, R. 16 held did not prohibit execution under Section 146.**

Pending suits on promissory notes, the plaintiff assigned the entire amounts due under the suits for a consideration. Decrees were passed and the assignee sought to execute the decrees :

Held that he could not execute the decrees under O. 21, R. 16 as it did not apply to a case where there is no decree in existence at the time of the assignment : 17 M L J 391, *Foll.* [P 22 *f*]

Held further that he could execute them under S. 146 and that O. 21, R. 16 did not prohibit him. The words "save as otherwise provided by this Code" in S. 146 should be liberally interpreted as permitting application for execution of such decrees : ('21) 8 A I R 1921 Mad 599 (F B), *Expl.*, and *Rel. on.* [P 23 *a*, *c*]

M. Ranganatha Sastri — for Appellant.

K. Krishnaswami Ayyangar and K. S. Jayaram — for Respondents.

King J. — Respondent 1 in this appeal was the plaintiff in two suits which came finally to be numbered as O. S. No. 15 and O. S. No. 24 of 1938 on the file of the Subordinate Judge of Kurnool. These were suits mainly, and in O. S. No. 15 wholly, for the recovery of money due on promissory notes. The claim in O. S. No. 15 was for Rs. 21,788 ; that in O. S. No. 24 for Rs. 4698. While these suits were pending, respondent 1 on 1st November 1937 executed a deed of transfer in favour of the present appellant. By this deed he assigned to the appellant 'the entire amounts due in respect of the two suits' for a consideration of Rs. 8000. The consideration was to be paid within 15 days of the passing of the decrees in the two suits, but in no case before a date in February 1938. It was also provided that if a decree were not granted in the more important suit (O. S. No. 15) payment of the Rs. 8000 would not be due, and any payment which might actually have been made should be refunded. On the same day (1st November 1937) appellant executed in favour of respondent 1 a promissory note for Rs. 8000 which was expressed as payable on demand. Decrees in the two suits were in due course passed, that in O. S. No. 15 on 22nd September and that in O. S. 24 on 25th November 1938. The sum of Rs. 8000 was not paid by the appellant within the 15 days stipulated, and has not yet been paid. On 9th March 1939 respondent 1 sent a lawyer's notice to the appellant repudiating the transfer on the ground of the nonpayment of the consideration within the stipulated time. In April 1939 appellant applied under O. 21, R. 16 and S. 146, Civil P. C., to execute the

decree in O. S. No. 15. The judgment-debtor (respondent 2) remained ex parte but respondent 1 opposed his application. The learned District Judge of Kurnool held that appellant could not execute the decree both because respondent 1 did not in fact transfer the decree to him, and also because O. 21, R. 16 and S. 146 gave him no right to do so. Against this order the present appeal has been filed.

That the decree was in fact transferred by respondent 1 to appellant seems to us beyond all dispute. In the deed respondent 1 says : " I have this day transferred to you the entire amounts due in respect of the two suits." This language is appropriate only to a completed transaction, and the expression "sums due in respect of the suits" can mean only "sums decreed in the suits." That this is so is made clear by a later passage in the deed where respondent 1 says : "The amounts due under the decrees in the said two suits are due to you only." It is difficult to understand what exactly the learned Judge's findings are in this matter but he appears in some way to have convinced himself both that the deed does not mean what it says and that it was not meant to be acted upon. On the former point he refers to discrepancies between the deed and the promissory note, but it is obvious from the references to the promissory note in the deed that it is the deed which embodies the agreement between the parties as to how the promissory note is to be treated so that any discrepancies are of no importance. On the latter point the District Judge emphasizes the fact that after the decrees were passed appellant did not pay and respondent 1 did not demand payment of the Rs. 8000 which was due ; but this proves nothing whatever as to the intentions of the parties in November 1937. This case is merely another example of the all too common practice of the purchaser of property refusing to pay for it even though he enjoys or claims to enjoy it.

The learned Judge has also introduced into his judgment various irrelevant comparisons with the transactions of the betting-ring, and has stigmatized the bargain between respondent 1 and appellant as undesirable speculation in the result of litigation. We can see no justification for this criticism. The situation as disclosed by the documents is a simple one in which when the agreement was made no blame appears to us to attach to anyone. Respondent 1 was prepared to prosecute his suits, and obtain decrees but in view of the trouble and uncertainty involved in realizing his money after the decrees, he sold the right to execute them to the appellant for a sum which both men must have thought to be reasonable and it is also reasonable that payment should be postponed until after the decrees were in fact granted. The case for respondent 1 at the arguments before us was that the deed of 1st November 1937 embodied not a completed transaction but only an agreement to transfer. As we have already pointed out such a case is directly contrary to the plain terms of the document. That such a transaction as is embodied in the transfer deed is perfectly valid is clear on the authority in (1912) 3 K B 474[1] and this position has not been challenged by the learned advocate for respondent 1.

The question then arises whether appellant as transferee of the decree, has a right to execute it. It is contended first on his behalf that he can do so under O. 21, R. 16. Much might perhaps be said for this contention were the matter res integra, but it was decided as long ago as 1906 in 17 M L J 391[2] that the language of S. 232 (the equivalent in the old Code of our present R. 16) cannot be construed so as to apply to a case where there was no decree in existence at the time of the assignment. Appellant's learned advocate has not been able to show us that this interpretation has been overruled or dissented from in the 35 years which have elapsed since it was given, or convince us that the slight modifications in the present R. 16 have any bearing upon it. We are not in these circumstances prepared to hold that the present appellant can execute this decree under R. 16.

We think, however, the appellant can undoubtedly execute the decree under the provisions of S. 146. That section so far as it applies here, provides that "save as otherwise provided by this Code" where an application may be made by any person; that application may be made by a person claiming under him. What then is the meaning of "save as otherwise provided by this Code." According to the learned advocate for respondent 1 where the transferee of a decree desires to execute it definite provisions are laid down by R. 16; and therefore he can do so only if his case conforms to those provisions. The learned advocate for the appellant interprets the phrase more

1. (1912) 3 K B 474: 81 L J K B 1081: 106 L T 825, Glegg v. Bromley.
2. ('06) 17 M L J 391: 2 M L T 197, Basroor Vittal Bhandari v. Ramachandra.

liberally as permitting applications under S. 146 which do not conflict with the provisions of the Code. On these two diverse views we prefer to choose the latter, and indeed are bound to do so by virtue of the decision of a Full Bench of this Court reported in 44 Mad 919.[3] That was a case no doubt where a decree was already in existence at the date of the transfer, but what was transferred was not in the words of R. 16, "the interest" of the decree-holder but a fraction only of that interest. The learned Judges in 44 Mad 919[3] were inclined to hold that R. 16 might apply to the case before them, but they went further and held that even if it did not, the transferee must be permitted to execute it under S. 146 or perhaps even under S. 151 (*vide* the headnote and passages in particular on pp. 923, 924 and 932). It is true that the learned Judges recognise that if R. 16 prohibits a particular application it cannot be made under S. 146 or S. 151. The question then is "does R. 16 prohibit the present application?" We are unable to hold that merely because R. 16 has been interpreted as applying only to decrees in existence at the time of the transfer, it prohibits an application by a transferee who obtained the transfer of a decree, a transfer which is legally valid and is embodied in a written deed (as R. 16 requires) before the decree was actually passed. To permit execution by such a transferee, in our opinion, in no way violates the principles which are embodied in R. 16 or in O. 21 generally. The appellant here is the true owner of the decree, and he has his written title deed, and that is all that the law requires.

The learned District Judge has not, in our opinion, correctly understood the ruling in 44 Mad 919[3] and has relied upon the rulings of other High Courts. Though these were again cited before us, it is unnecessary to examine them in detail, though we may point out that they all deal with the assignment of something more than a future decree. It cannot, therefore, be argued against the present appellant that the terms of his assignment deed would compel him to make an application under O. 22, R. 10. There is no case which lays down the proposition that a transferee to whom a future decree (and nothing else) has been expressly assigned cannot execute it. But whatever the views of other High Courts may be, our own High Court has negatived the proposition that O. 21, R. 16 is all inclusive in this matter and following the principles laid down in 44 Mad 919,[3] we hold that the appellant is entitled to execute the present decree. The appeal is accordingly allowed and E. P. No. 28 of 1939 will be restored to file and disposed of according to law. Respondent 1 must pay the appellant's costs here and in the Court below.

C.R.K./K.S. *Appeal allowed.*

3. ('21) 8 A I R 1921 Mad 599: 69 I C 337: 44 Mad 919: 41 M L J 316 (FB), Muthiah Chettiar v. Govinda Doss.

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(29) A. I. R. 1942 Madras 23

SOMAYYA J.

In re Peeram Chenna Reddi and others — Petitioners.

Civil Misc. Petns. Nos. 3269 and 3901 of 1941, Decided on 19th August 1941, for review of judgment of High Court in A. S. No. 344 of 1938, D/- 20th January 1941.

Practice—Review—Appeal heard by Bench—One of Judges absent at time of review application — Review should be disposed of by other Judge alone and not by another Bench.

According to the invariable practice of the Madras High Court, even in first appeals, the application for review is heard and decided only by the Judges who heard the appeal or where one of them is absent by the other Judge sitting alone. It cannot be heard by another Bench : 16 Cal 788 ; 9 I C 532 (Cal) and C. M. P. No. 516 of 1934, *Rel. on.* [P 23*h* ; P 24*a*]

V. Kachapeswara Iyer, P. V. Rajamannar and K. Subba Rao — for Petitioners.

Order. — It is argued that this application for review can be heard only by a Bench as it relates to a decree in a first appeal. The point is directly covered by the decisions of the Calcutta High Court in 16 Cal 788[1] and 9 I C 532.[2] Both cases related to second appeals which were heard by two Judges as they used to be even in this Court till a few years ago. In the former case the Judges say this at pp. 792 and 793 :

> As I said just now, at the time this rule was returned Wilson J. had gone away on furlough and another gentleman had been appointed to perform his duties, and consequently, he had ceased to have any jurisdiction as a Judge of this Court for the time. He was not at the time attached to the Court, and consequently, Beverley J. was the only one of the Judges who heard the appeal who remained attached to the Court, and was, in my opinion, the only Judge who could be appointed to hear this application. So that, in our opinion, Beverley J. was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails.

This is in accordance with the invariable practice of this Court. Even, in first appeals

1. ('89) 16 Cal 788, Aubhoy Churn Mohunt v. Shamont Lochun Mohunt.
2. ('11) 9 I C 532 (Cal), Maksud Mahi v. Secretary of State.

the application for review is heard and decided only by the Judges who heard the appeal or where one of them is absent by the other Judge sitting alone. Appeal No. 196 of 1928 was decided by Reilly and Burn JJ. C. M. P. No. 516 of 1934 was filed for review of that decree. Burn J. ordered notice and directed that the review application should be posted before a Bench. It was accordingly posted before Burn and Mockett JJ. Apparently, it was then discovered that even after notice, the review petition should be disposed of by Burn J. alone. Then this order was passed on 7th December 1939 :

. . . . . Adjourn this to some day next year when I have time to deal with it myself. This is not yet a matter for a Bench.

Thereafter it was heard by Burn J. alone and disposed of finally on 30th January 1940. The application was dismissed on the merits. I hold that this application can be heard by me. On the merits, I hold that there are no grounds for granting the review asked for. The petition is accordingly dismissed.

C.R.K./K.S. *Petition dismissed.*

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* (29) A. I. R. 1942 Madras 24

SOMAYYA J.

Narayana Venkatachalamiah — *Appellant*

v.

Putika Venkatiah and others — *Respondents.*

Second Appeal No. 1156 of 1938, Decided on 14th August 1941, against decree of District Court, Cuddapah, in A. S. No. 55 of 1937.

*** Madras Co-operative Societies Act (6 of 1932), S. 51 (1) (b) — Registrar or Arbitrator appointed by him is "Court" within S. 52, T. P. Act—Registrar's or arbitrator's decision is "order" within S. 52, T. P. Act—Reference to Registrar in respect of immovable property under S. 51 (1) (b) — Mortgage pending reference — S. 52, T. P. Act, applies.**

The word "Court" in S. 52, T. P. Act, is comprehensive enough to include the Registrar or the arbitrator appointed by him under the Madras Act, 6 of 1932 : ('34) 21 A I R 1934 Mad 40 and ('40) 27 A I R 1940 Mad 932, *Rel. on* ; ('30) 17 A I R 1930 Mad 869, *Approved.* [P 25a]

The decision of the Registrar or the arbitrator is an "order" within the meaning of S. 52, T. P. Act. Consequently a mortgage of immovable property subsequent to the reference in respect of the same to the Registrar under S. 51 (1) (b) is affected by the doctrine of lis pendens. [P 24f; P 25c,d]

A. C. Sampath Ayyangar and S. Krishnamachari — for Appellant.

Kasturi Seshagiri Rao — for Respondents.

Judgment. — The plaintiff who is the appellant in this second appeal brought a suit for recovery of a sum of money due on a mortgage deed executed by Venkatayya defendant 1, in his favour on 14th November 1932. Defendant 1 had executed a mortgage of the items covered by the plaintiff's mortgage and of some other items in favour of defendant 2, the Co-operative Society, on 7th September 1927. There being some amount due on the mortgage in favour of defendant 2, proceedings were taken under the Madras Co-operative Societies Act of 1932. In terms of S. 51, cl. 1 (b) there being a dispute between the society and a member, the dispute was referred to the Registrar for decision. The Registrar referred the dispute for disposal to an arbitrator under S. 51, cl. (2) (c). The arbitrator gave his decision, which under S. 51, cl. (6) (b) is final and is not liable to be called in question in any civil or revenue Court. Thereafter the society itself purchased the property in execution and subsequently transferred it to defendant 3. The plaintiff's mortgage was executed after the dispute between defendants 1 and 2 was referred to the Registrar under S. 51, cl. (1) (b). The mortgage in favour of the plaintiff being subsequent to the reference to the Registrar under S. 51 (1) (b), the question is whether such a transfer is affected by the doctrine of lis pendens. Section 52, T. P. Act, provides that :

During the pendency in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court, and on such terms as it may impose.

It has been held in a number of decisions of this Court that the Registrar is a Court. This position is not seriously challenged. In A I R 1930 Mad 869[1] it was held that the Registrar was a Court for the purposes of S. 195, Criminal P. C. In A I R 1934 Mad 40[2] it was held that for the purpose of S. 52, T. P. Act, he is a Court. So likewise in (1940) 2 M L J 388.[3] It is argued by Mr. Sampath Iyengar, learned advocate for the

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1. ('30) 17 A I R 1930 Mad 869 : 129 I C 72 : 32 Cr L J 219 : 59 M L J 229, Subbi Reddi v. Emperor.
2. ('34) 21 A I R 1934 Mad 40 : 148 I C 1098 : 57 Mad 426 : 66 M L J 90, Velayuda Mudali v. Co-operative Rural Credit Society.
3. ('40) 27 A I R 1940 Mad 932 : 193 I C 555 : (1940) 2 M L J 388, Govinda Balabharathi Co-operative Society v. Alapati Venkatakrishnayya.

appellant, that the word "Court" in S. 52, T. P. Act, does not include a Registrar or an arbitrator appointed by the Registrar under the provisions of the Madras Co-operative Societies Act, 1932. The word "Court" as mentioned in S. 52 appears to me to be comprehensive enough to include the Registrar or the arbitrator appointed by him under the Act. Reference was made to S. 57B of the Act (6 of 1932), but that section has no application because it enacts that for certain purposes the Registrar or any person empowered by him in that behalf shall be a civil Court for the purpose of Art. 182 of Sch. 1, Limitation Act, 1908, which provides for execution of decrees of civil Courts. The amendment itself was rendered necessary by a decision of Cornish J. in 70 M L J 31,[1] which held that the Registrar was not a civil Court for the purposes of Art. 182, Limitation Act. We are not now concerned with the question whether the Registrar is a civil Court, but whether he is a Court under S. 52, T. P. Act. The decision of Walsh J. in A I R 1934 Mad 40[2] is a decision directly in point. That was a decision that the Registrar or the authority appointed by him was a Court for the purpose of S. 52, T. P. Act. I entirely agree with that decision.

Then it is said that S. 52 refers to a decree or order and that the decision of the Registrar or the arbitrator is not a decree or order. Here the word "order" is used in general terms. In this case we have an order passed in a proceeding in a Court and, therefore, this argument has no force. A reference to the Registrar under S. 51, cl. (1) (b), Madras Act, 6 of 1932, and the proceedings taken thereafter are all substitutes for a suit in a civil Court. A more speedy and effective remedy is given by S. 51, cl. (1) and the sections following. But for S. 51 of the Act (6 of 1932) a suit would have been filed in the civil Court and clearly the doctrine of lis pendens would have applied. Any person who takes a mortgage or other alienation subsequent to the institution of a suit or other proceeding cannot say that he is not bound by the decree or order passed in it. In this case, the proceedings under S. 51, Madras Act, 6 of 1932, being a substitute for a suit in the civil Court, it is obvious that reason requires that the same result would follow. Otherwise, there will be no finality to a decision of the arbitrator or the Registrar even though such decision was in a proceeding in which a right to immovable property was specifically raised and decided. A right to immovable property being directly in question, the alienation made in favour of the plaintiff cannot prevail over the rights obtained under the decision of the Registrar. The property was subsequently sold as the plaintiff did not care to redeem or to pay up the amount adjudged by the Registrar or by the arbitrator appointed by him and the same was purchased by defendant 2 and sold later on to defendant 3. These proceedings are binding on the plaintiff and his suit was, therefore, rightly dismissed. The second appeal is dismissed with costs. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

4. ('36) 23 A I R 1936 Mad 150 : 160 I C 520 : 59 Mad 257 : 70 M L J 31, Abdul Razak Sahib v. Kilpatti Co-operative Society.

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(29) A. I. R. 1942 Madras 25

LAKSHMANA RAO J.

In re Vallabhareddi Ramireddy and another — Petitioners.

Criminal Revn. Case No. 416 and Criminal Revn. Petn. No. 402 of 1940, Decided on 4th October 1940, to revise order of Sub-Divisional Magistrate, Narasaraopet, in C. A. No. 22 of 1940.

Madras Forest Act (5 of 1882), S. 56 — Presumption under.

The presumption under S. 56 is expressly restricted to proceedings taken under the Act or in consequence of anything done under the Act. Consequently, in the absence of evidence that the timber was stolen from any reserve forest no presumption under S. 56 can be drawn. [P 25*h*]

P. Basi Reddi — for Petitioners.

Public Prosecutor — for the Crown.

FACTS.—The offence the petitioners were charged with is that four Yepi pillars alleged to have been stolen from the reserve forest were found in the cattle shed of accused 1. The defence was that the said pillars were purchased by accused 2's father about ten years back. It was also urged that there was no evidence to prove that the said pillars were stolen property. The lower Court relying on the presumption to be drawn in Sec. 56, Forest Act, held that the burden of proving the contrary rested on the petitioners and finding the defence evidence unreliable confirmed the conviction of the petitioners under S. 411, Penal Code. Against this conviction the present revision is filed.

Order. — The presumption under S. 56, Madras Forest Act, (Act 5 of 1882), is expressly restricted to proceedings taken under that Act or in consequence of anything done under that Act, and there is no evidence in this case that the timber in question was stolen from any reserve forest. The convic-

tion of the petitioners under S. 411, Penal Code, is therefore set aside and the fines if levied will be refunded.

C.R.K./G.N. *Conviction set aside.*

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(29) A. I. R. 1942 Madras 26

LEACH C. J. AND CHANDRASEKHARA AYYAR J.

Subbaraya Chettiar — Petitioner

v.

Debt Conciliation Board, Cuddalore, South Arcot District and others — Respondents.

Civil Misc. Petn. No. 1548 of 1941, Decided on 21st August 1941, to issue a writ of certiorari.

Madras Debt Conciliation Act (11 of 1936), Ss. 7, 17—Application in compliance with Ss. 5 and 6 — Board has no power to dismiss it under S. 7 — If no settlement has been reached within 12 months it must be dismissed under S. 17.

Where a petition has complied with the provisions of Ss. 5 and 6, the Board has no power to reject it under S. 7. It must dismiss the petition under S. 17 if no settlement has been arrived at before the expiration of 12 months contemplated in S. 17. [P 26*h* ; P 27*a*,*b*]

T. M. Krishnaswami Ayyar and A. Balasubramania Iyer — for Petitioner.

Government Pleader, S. Panchapagesa Sastri and T. E. Ramabhadra Chariar — for Respondents.

Leach C. J. — This is an application for the issue of a writ of certiorari for the purposes of quashing an order of the Debt Conciliation Board, Cuddalore. The record shows that the order complained of has been passed without jurisdiction and the application will be granted. On 18th September 1939 the debtor-respondents filed a petition under S. 4, Madras Debt Conciliation Act, 1936, asking for the settlement of their debts. Section 5 of the Act states that every application shall be in writing and shall be signed and verified in the manner prescribed by the Civil Procedure Code for signing and verifying plaints. Section 6 sets out the particulars which a debtor must give in his application. If the application does not comply with the requirements of S. 5 or S. 6, S. 7 requires the Board to reject it.

When an application has been accepted as complying with the provisions of Ss. 5 and 6 the Board must by reason of S. 8 pass an order fixing a date and place for the hearing of the application, and notice of this order must be sent by registered post to the applicant and his creditors. Section 9 gives the Board power to dismiss an application at any stage of the proceedings if the Board does not consider it desirable or practicable to effect a settlement of debts or if in its opinion the applicant fails to pursue his application with due diligence or if it includes a claim which the Board considers is collusive and intended to defraud a creditor. Section 17 states that if no amicable settlement is arrived at under sub-s. (1) of S. 14 within 12 months from the date of the application under S. 4 the Board shall dismiss the application. There is no power to extend the proceedings beyond 12 months.

In this case the Board dismissed the petition, which the debtor-respondents filed on 18th September 1939 because of non-compliance with the provisions of S. 6. The order dismissing the petition was passed on 11th November 1939. A dismissal under S. 7 does not preclude a debtor from filing a fresh application and this course being open the debtor-respondents adopted it five days later. The new petition was found to be in order and the Board took the steps which it was bound to take in view of the provisions of S. 8. The debtor-respondents obviously did not proceed to serve their creditors or the legal representatives of deceased creditors with due diligence. The creditor who has instituted the present proceedings alleges that the debtor respondents did not do so because they intended to delay the proceedings as far as they possibly could with the object of being allowed to file a fresh petition at the end of the 12 months. The petitioner is a secured creditor and has obtained a mortgage decree against the debtor-respondents. Whether there is some excuse to be found for their failure to serve the creditors or whether they deliberately neglected to do so as the result of a deep laid plot on their part matters not for the purpose of deciding the application now before the Court.

What is important here is that on 12th November 1940 four days before the expiration of the 12 months contemplated by S. 17 the debtor respondents filed an application asking the Board to dismiss their petition by an order purporting to be passed under the provisions of S. 7 of the Act and this the Board did. There is no doubt that in taking this action the Board acted contrary to the spirit and the letter of the Act. The second petition having complied with the provisions of Ss. 5 and 6, the Board had no power to reject it under S. 7 and its action in purporting to do so can only be regarded as an evasion of its statutory duty under S. 17. That section leaves no option to the Board. If before the expiration of the 12 months no settlement has been arrived at the debtor's

petition must, as already stated, be dismissed. It is common ground that a dismissal under S. 17 would have prevented another petition being filed. It may be that in some cases, especially where there is a large number of creditors and some of them die after the application has been filed, it is not possible to comply within the 12 months with all the Act contemplates, but that is a defect in the Act which the Court cannot remedy. The remedy lies with the legislative authority. On other occasions this Court has had to point out defects in this Act. The omission to give a Board power to extend the proceedings beyond 12 months if it considers it right and proper to do so, perhaps, adds another to the list of defects. The fact that the Board considered it to be equitable to give the debtor-respondents an opportunity of filing still another petition is, however, a matter which the Court cannot take into consideration. What the Court has to decide is whether the Board had jurisdiction to dismiss the petition under S. 7 of the Act in the circumstances of this case. Obviously it had not the jurisdiction. Consequently the Board's order will be quashed.

The result is that the petition will still be regarded as being on the file and it will be the duty of the Board to pass an order of dismissal under S. 17. The petitioner is entitled to his costs which will be paid by the debtor-respondents.

C.R.K./K.S. *Petition allowed.*

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(29) A. I. R. 1942 Madras 27

KRISHNASWAMI AYYANGAR J.

In re P. D. Curtis, an insolvent — Applicant — Petitioner.

Application No. 202 of 1941, in I. P. No. 159 of 1938, Decided on 4th August 1941.

Presidency Towns Insolvency Act (1909), S. 60 — S. 60, Civil P. C., cannot be invoked to get rid of appropriation of salary under S. 60, Presidency Towns Insolvency Act.

Section 60, Presidency Towns Insolvency Act, is not at all concerned with attachments. When a Court makes an order under S. 60, Presidency Towns Insolvency Act, appropriating the salary it does neither in fact nor in form direct the attachment of the property of the insolvent ; and consequently S. 60, Civil P. C., cannot be invoked for the purpose of enabling the insolvent to get rid of an order for the appropriation of his salary under S. 60, Presidency Towns Insolvency Act.

[P 27*g*, *h*]

S. J. S. Fernandez — for Petitioner.

Official Assignee in person.

Order. — This is an application taken out by the insolvent for an order for the following reliefs : (i) for an order to revoke the order attaching the insolvent's salary ; (ii) for the refund of the amounts of allocation recovered beyond a total period of two years ; and (iii) for the suspension of the allocation ordered for a month pending disposal of the present application. The insolvent in this case was by an order made by this Court in July 1938 directed to pay an allocation of Rs. 25 which was subsequently increased by an order dated 9th April 1940 to Rs. 125. On 22nd October 1940 the allocation was reduced to Rs. 100. These orders were duly communicated to the insolvent who has in all paid allocation for 31 months. The insolvent now applies for a revocation of the allocation order not by virtue of any provision contained in the Presidency Towns Insolvency Act, but under the provisions of S. 60, Civil P. C., relating to attachments. The applicant's learned counsel relies on S. 60(1)(i) which fixes the limit for the portion of the salary of a public officer or a servant of a railway company or local authority, liable to be attached. There is a proviso to this clause which says that :

> Where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of 24 months, such portion shall be exempt from attachment until the expiry of a further period of 12 months and where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree.

It is on this clause that the applicant relies in support of his contention. It is not however suggested that S. 60, Civil P. C., applies in terms to the present case. But it is argued that S. 60, Civil P. C., and S. 60, Presidency Towns Insolvency Act, must be read together ; even doing so, I do not see how it helps. For S. 60, Presidency Towns Insolvency Act, is not at all concerned with attachments. Sub-section (2) under which the orders against the insolvent were made is concerned with the jurisdiction of the Court to make an order for the appropriation of an insolvent's salary and income to the extent to which it is liable to attachment in execution of a decree or of any portion thereof. When a Court makes an order under S. 60, it does neither in fact nor in form direct the attachment of the property of the insolvent ; and I am unable to see how S. 60, Civil P. C., can be invoked for the purpose of enabling the applicant to get rid of a liability placed upon him by an order under S. 60, Presidency Towns Insolvency Act. There is no justification for either prayer No. 1 or No. 2. Nor can I see any merit in prayer No. 3. The insolvent has had all his

salary except the portion appropriated. I am not, therefore, satisfied that there should be any suspension of the order of allocation. The application is dismissed. Leave refused.

C.R.K./G.N. *Application dismissed.*

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(29) A. I. R. 1942 Madras 28

LEACH C. J. AND CHANDRASEKHARA AYYAR J.

Swaminatha Pillai — *Appellant*

v.

Krishna Padayachi and others — *Respondents.*

Letters Patent Appeal No. 36 of 1940, Decided on 20th August 1941, against judgment and order of King J., in C. M. S. A. No. 251 of 1938, D/- 17th September 1940.

(a) Civil P. C. (1908), O. 21, R. 16—Transfer of decree to benamidar of one of judgment-debtors — Decree cannot be executed against other judgment-debtor.

A judgment-debtor is not entitled to do something in the name of a dummy which the law does not allow him to do in his own name. Therefore a judgment-debtor cannot get the decree transferred in his benamidar's name and seek to execute it against other judgment-debtor. [P 28*f*, *g*]

(b) Second appeal—Finding of fact.

A decision of the first appellate Court on a question of fact is binding in second appeal. [P 28*g*]

(c) Transfer of Property Act (1882), S. 41 — One of judgment-debtors paying off decree but getting it transferred to his benamidar—Decree bought from such benamidar for valuable consideration and in good faith—Principle of S. 41 held applied and judgment-debtor held liable.

One of the judgment-debtors paid the decree-holder and got the decree transferred in his benamidar's name. The decree was bought from such benamidar by another for valuable consideration and in good faith and he took out execution against the judgment-debtor :

Held that the principle of S. 41 applied and the judgment-debtor was liable : (1839) 113 E R 35, *Rel. on.* [P 29*b*]

Held further that even assuming that the judgment-debtor's action in obtaining a transfer of the decree in the name of benamidar was justifiable and that he could be regarded as an innocent party this would not help him because wherever one of two innocent persons has to suffer by the act of a third person the person who has enabled the third person to occasion the loss must sustain it. The judgment-debtor certainly allowed the benamidar to hold himself out as the holder of this decree and having done so he cannot be preferred to the purchaser who bought the decree for valuable consideration and in full good faith: (1787-94) 2 T R 63, *Rel. on.* [P 29*c*]

T. V. Muthukrishna Iyer — for Appellant.

A. C. Sampath Ayyangar—for Respondents.

Leach C. J. — The question involved in this appeal is whether the appellant shall be allowed to profit by a scheme (for which he himself was responsible) to defeat the provisions of R. 16 of O. 21, Civil P. C. One Srinivasa Iyengar obtained a money decree against the appellant and one Idumban Chettiar. The appellant had become the surety for money owing by Idumban Chettiar and the decree was obtained in a suit filed to enforce repayment of the loan. In order to avoid execution proceedings being instituted against him, the appellant paid the decree-holder and naturally he desired to recover the amount from the principal debtor. Instead of adopting the proper course, which was to file a suit against Idumban Chettiar the appellant arranged with the decree-holder to transfer the decree to one Murugesa Padayachi. The decree-holder, having been paid, raised no objection to this course. It has been established that Murugesa was acting as the benamidar for the appellant, who hoped that with the decree standing in the name of a stranger to the suit he would be able to execute it against Idumban Chettiar. Proviso 2 to R. 16 of O. 21, Civil P. C., states that where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others. As Murugesa was actually the appellant's benamidar the transfer of the decree meant the transfer to the appellant himself. The appellant was not entitled to do something in the name of a dummy which the law does not allow him to do in his own name.

While Murugesa was the ostensible owner of the decree he sold it to Krishna Padayachi, the respondent. The respondent paid Rs. 1000 as the consideration. He had no inkling of the appellant's claim and throughout acted in good faith. At any rate, that is the effect of the finding of the first appellate Court and its decision on the question of fact is binding upon us. The respondent having become the transferee of the decree he wished to execute it against the appellant and accordingly instituted execution proceedings in the Court of the District Munsif of Kumbakonam. The District Munsif held that he was not entitled to an order in execution, but on appeal to the Subordinate Judge of Kumbakonam this decision was reversed. The appellant then appealed to this Court, but King J. agreed with the Subordinate Judge and dismissed the appeal. The present appeal has been filed under the provisions of Cl. 15 of the Letters Patent, the learned Judge having given the necessary certificate.

a Mr. T. V. Muthukrishna Iyer conceded that in obtaining a transfer of the decree in the name of Murugesa the appellant was guilty of what in law amounts to a fraud. His object was no doubt to escape the payment of the court-fee which a suit to recover from the principal debtor would involve, but in view of the very emphatic provision contained in proviso 2 to R. 16 of O. 21 the appellant was clearly not entitled to do what he endeavoured to do. The reason given by King J. for dismissing the appellant's appeal was that he had allowed Murugesa to appear as the owner of the decree and consequently the principle embodied b in S. 41, T. P. Act, applied. That section only relates to immovable property, but the principle has been applied where moveable property has been sold to a bona fide purchaser for value by the ostensible owner. The learned Judge in the course of his judgment drew attention to the judgment in (1839) 10 A & E 90=113 E R 35 = 8 L J (NS) Q B 193.[1] That the principle can be applied to moveable property as well as to immovable property cannot be doubted. In fact the principle is embodied in S. 27, Sale of Goods Act.

Even if it were to be assumed that the c appellant's action in obtaining a transfer of the decree in the name of Murugesa was justifiable and that he can be regarded as an innocent party this would not help the appellant. The principle stated in (1787-94) 2 T R 63[2] at p. 70 would then apply. Wherever one of two innocent persons has to suffer by the act of a third person the person who has enabled the third person to occasion the loss must sustain it. The appellant certainly allowed Murugesa to hold himself out as the holder of this decree and having done so he cannot be preferred to the respondent who bought the decree for valuable consideration d and in full good faith. The appellant has only himself to blame for the position in which he finds himself. He could have avoided having to pay the decretal amount twice over, as he now has got to do, if he had not attempted to get round the provisions of O. 21, R. 16. We consider that the decision of King J. is in accordance with law and consequently this appeal must be dismissed with costs in favour of respondent 1.

C.R.K./K.S. *Appeal dismissed.*

1. (1839) 10 A & E 90 : 2 P & D 296 : 8 L J (NS) Q B 193 : 50 R R 347 : 113 ER 35, Greg v. Wells.
2. (1787-94) 2 T R 63 : 1 H Bk 357 : 6 East 21: 1 R R 425, Lickbarrow v. Mason.

(29) A. I. R. 1942 Madras 29

HAPPELL J.

Rangaswami Nadar — Petitioner

v.

Minor Pitchaimani Nadar by next friend, A. K. P. Chinna Nadar — Respondent.

Civil Revn. Petn. No. 1511 of 1938 (Second Appeal No. 746 of 1938 converted into), Decided on 24th January 1941, to revise order of Dist. Court, Madura, D/- 11th December 1937.

Civil P. C. (1908), O. 41, R. 10—Order directing security to be furnished in specified time—Security tendered within time — Order is complied with — Security tested after time fixed — It must be held to have been furnished in time unless it is found insufficient. f

An order directing security for costs to be furnished within a specified time is complied with if the security is tendered before the period expired. Even if the security tendered is tested after the time fixed and is found to be sufficient it must be held to have been furnished in time. If, however, the security is not found sufficient the order directing security to be furnished within a specified time must be regarded as not complied with : 52 M L J (S N) 53, *Rel. on.* [P 30*a*, *b*]

R. Desikan — for Petitioner.

P. N. Appuswami Ayyar — for Respondent.

Order. — The petitioner was the defendant in O. S. No. 20 of 1936 on the file of the District Munsif of Tirumangalam. The suit was decreed against him and he filed an appeal in the Court of the District Judge of Madura. The respondent (plaintiff), however, filed an application asking that he should be directed to furnish security for costs of the appeal and on this application the District Judge made an order by which he directed the petitioner to furnish security for costs and giving him four weeks, which expired on 3rd December, in which to furnish the security adjourned the appeal for orders to 4th December 1937. On 3rd December 1937 the petitioner did tender security and it appears that the District Munsif of Tirumangalam adjourned the question of testing the security until 15th December. On 11th December, h however, the District Judge rejected the appeal on the ground that the security had not been furnished within the time prescribed.

The contention advanced by the learned counsel for the petitioner is that the order of the lower Court was complied with by tendering security on 3rd December, namely the last day of the time allowed for furnishing security. The learned District Judge did not take this view but said that what is contemplated by an order granting time to furnish security is that the security should be furnished within the period allowed by the Court, and that the party should not have

the time automatically extended by offering security on the last day and then saying that it should be tested later on. The only authority to which I have been referred which directly bears on the point is a case decided by Jackson J., reported in 52 M L J (S N) 53. In that case Jackson J. held that an order granting time for furnishing security was complied with if the security was tendered before the period expired. In my opinion this is the correct view. There must be a specific date by which the security has to be furnished, and there will be no specific date if the person ordered to furnish security has to furnish it some unspecified time before the expiration of the period fixed in order that it may be tested. I am of opinion therefore that the order of the learned District Judge rejecting the appeal must be set aside. The security tendered will be tested and if it is found to be sufficient it must be held to have been furnished in time. If however the security is not found sufficient, it would follow that the order of the District Judge had not been complied with, and it will then be open to the District Court to reject the appeal. The costs of this revision petition will abide the result of the appeal.

C.R.K./G.N. *Petition allowed.*

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(29) A. I. R. 1942 Madras 30

WADSWORTH J.

Compalla China Ramamurti — Petitioner

v.

Pala Nukayya and another —

Respondents.

Civil Revn. Petn. No. 1051 of 1937, Decided on 9th August 1940, to revise decree of Dist. Munsif, Coconada, D/- 30th March 1937.

Banker and Customer — Practice of bank when making claims against customer to allow credit for amount due by itself is no bar to suit by bank on its claim — Transferee of bank of pronote by customer is not bound to allow set off of amount due from bank in absence of rule or agreement between parties.

The practice of a bank to give credit for the amounts due by itself when making claims against its customers cannot be a bar to a suit by the bank on its claim, leaving the client to plead a set off, when there is a dispute as to the amounts due from each party. In the absence of any rule binding the parties and of any agreement between the parties the transferee of a pronote in favour of the bank by its customer is not bound to allow a set off of an amount due from his transferor : (1847-56) 156 E R 566, *Rel. on.* [P 31*b*]

C. Rama Rao — for Petitioner.

N. Vasudeva Rao — for Respondents.

Order.—The petitioner was the plaintiff in a suit for the balance due on a promissory note executed by defendant 1 as principal and by defendant 2 as surety in favour of a bank which transferred the note to the plaintiff. The bank in question carried on chit funds and the liability arose out of the purchase of the pool of a chit by defendant 1. As security for the payment of the balance of his instalments he executed the promissory note with defendant 2 as the surety. The bank stopped business before defendant 1 had completed the payment of the instalments and he admittedly did not pay the instalments which fell due after the closure of the bank, which is now in the hands of a liquidator. Defendant 2, surety for defendant 1, had a claim against the bank for an amount similar to the balance due on the suit promissory note. An attempt was made to adjust the bank's claim under the suit promissory note against defendant 2's claim against the bank. But there was trouble owing to the fact that the defendants were claiming to take into consideration as against the amount due under the promissory notes, bonuses which they expected to get on each instalment but did not get because of the closure of the business. It is found as a fact that there was no adjustment of the conflicting claims and that defendant 2 refused to take a transfer of the promissory note. The promissory note was, therefore, transferred to the plaintiff who according to the evidence was fully aware of all the facts concerning these attempts to set off the two claims. Now, the lower Court has rejected the defence of a discharge by adjustment and has rejected the plea that the transfer was unsupported by consideration. The learned District Munsif has however dismissed the suit on the ground that there was a practice of the bank whereby when there were amounts due from the bank to the customers and from the customers to the bank, the bank usually recovered only the balance after adjusting the sum due from it to them. He goes on to say that the plaintiff knew of this practice and must therefore be deemed to have taken the transfer subject to the practice.

It seems to me that this decision cannot be supported. The case in (1847-56) 156 E R 566[1] is authority for the position that the endorsee of an overdue bill does not take it subject to claims arising out of collateral matters such as a set off and that the endorsement of an overdue bill in order to defeat a prospective claim on a set off would

1. (1847-56) 156 E R 566, Oulds v. Harrison.

not amount to a fraud. It was pointed out, that the only circumstances in which the transferee of an overdue bill would be fixed with liability to allow a set off in respect of a claim due from the transferor, would be circumstances which would justify an inference of an agreement to set off by both parties, of which the transferee had notice. Now, quite clearly in the present case there was no agreement to set off. The parties were quarrelling as to the figures and in consequence of this quarrel, an attempt to set off failed. Though the learned Judge talks of this practice of which the plaintiff had notice as one arising out of the rules of the bank, no such rule is discoverable in the copy exhibited in the case. All that appears to have been established is that it is usual for the bank to give credit for the amounts due by itself when making claims against its customers. But such a vague practice would surely not be a bar to a suit by the bank on its claim, leaving the client to plead a set off, when there is a dispute as to the amounts due from each party. In the absence of any rule binding the parties and of any agreement between the parties, it is difficult to see how the transferee can be held bound to allow a set off of an amount due from his transferor. If there had been a genuine desire on the part of the defendants to get all the rights of the parties adjusted in this suit, it would to my mind obviously have been desirable to ask that the liquidator of the bank be impleaded. The proper course having regard to the array of parties and the materials available was to give to the plaintiff a decree for the amount claimed in the plaint and subsequent interest at 6 per cent. and to refer the defendants to separate proceedings to enforce their claims, if any, against the company. The revision petition is, therefore, allowed with costs and there will be a decree against both the defendants for the amount claimed in the plaint with interest at the contract rate till today and costs and subsequent interest at 6 per cent. per annum.

C.R.K./G.N. *Petition allowed.*

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(29) A. I. R. 1942 Madras 31

HORWILL J.

In re Perianna Mudali and others — *Petitioners.*

Criminal Revn. Case No. 493 and Petn. No. 464 of 1941, Decided on 6th August 1941, to revise order of Second Class Magistrate, Vellore, D/- 10th March 1941.

Criminal P. C. (1898), S. 530 (p)—Magistrate trying person for offence less serious than actually committed — Effect of—High Court when will interfere—*B*, Deputy Tahsildar, finding that owner had no license for grazing goats in forest taking goats to cattle pound—On way *B* meeting *A* and *C* owners of goats and their friend *D*—*A*, *C* and *D* without disclosing fact of ownership volunteering to assist *B* in taking goats to pound and leading him not to pound but to their own pen—*B* duly driving goats into pen and on subsequently discovering that enclosure into which he had driven goats was not cattle pound but owners' private pen lodging complaint—*A*, *C* and *D* charged under S. 417, Penal Code—Offence held did not fall under S. 420, Penal Code—Magistrate held could not be said to have clutched at jurisdiction.

Where a Magistrate tries a person for an offence less serious than was actually committed, the High Court will interfere only where the Magistrate had deliberately overlooked certain aggravating facts with a view to securing for himself jurisdiction over the offence. If the Magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him, and he had in fact jurisdiction to try the lesser offence his proceedings would be proper and the High Court would not interfere : 24 Mad 675 ; ('27) 14 A I R 1927 Mad 307 ; ('25) 12 AIR 1925 Mad 367 and 2 Weir 21, *Rel. on.* [P 32*g*,*h*]

B, a Deputy Tahsildar, finding that the owner of the goats grazing in the forest had no licence proceeded to drive the goats to the cattle pound. On the way he met *A* and *C* the owners of the goats and their friend *D*. Without disclosing that *A* and *C* were owners of the goats they all told *B* that they would assist him in driving the goats to the pound and led him not to the pound but to their own pen. *B* duly drove the goats into the pen and upon entering the village to inform the village Magistrate, he was told that the enclosure into which he had driven the goats was not a cattle pound but a private pen of the owners of the goats. *B* thereupon filed a complaint against *A*, *C* and *D* and in due course the sub-Magistrate framed a charge against all the three accused under S. 417, Penal Code. It was contended on behalf of the accused that the offence actually committed was one under S. 420, Penal Code, which was punishable only by a First Class Magistrate and therefore the sub-Magistrate clutched at jurisdiction which he did not possess :

Held that the offence did not fall under S. 420, Penal Code, and that there was no ground for believing that the Magistrate clutched at jurisdiction in framing a charge under S. 417, Penal Code. [P 32*h* ; P 33*a*]

V. T. Rangaswami Iyengar — for Petitioners.

Public Prosecutor — for the Crown.

Order.—The prosecution case was that the Deputy Tahsildar saw a number of goats grazing in the forest and that finding that the owner had no license for so grazing them, he proceeded to drive them to the cattle pound. On the way, the Deputy Tahsildar was met by accused 1 and 2, who are brothers and owners of the goats, and by accused 3, their friend. Without disclosing the fact that accused 1 and 2 were the

owners of the goats they told the Deputy Tahsildar that they would assist him in driving the goats to the pound; and they led him not to the pound but to their own pen. The Deputy Tahsildar duly drove the goats into the pen and upon entering the village to inform the village Magistrate, he was told that the enclosure into which he had driven the goats was not a cattle pound but a private pen of the owners of the goats. The Deputy Tahisldar thereupon filed a complaint in the Court of the local Sub-Magistrate, and in due course a charge was framed against all the three accused under Ss. 417 and 379, Penal Code. The case has not yet ended; but this revision petition was admitted because it was contended on behalf of the accused that the offence actually committed was one under Sec. 420, Penal Code, an offence punishable only by a First Class Magistrate. The leading case on the question as to the effect of trying persons for an offence less serious than was actually committed is to be found in 24 Mad 675[1] a decision of a Bench of this Court. The argument of the learned advocate for the petitioners is that the act of the Magistrate, whether the framing of the charge for a lesser offence was deliberate or not, makes his proceedings void; because S. 530 (p), Criminal P. C., says that if any Magistrate, not being empowered by law in this behalf, tries an offender, the proceedings shall be void. What that really means is pointed out in the case above referred to in these words:

> The meaning of this is that if a Magistrate tries an offender for an offence beyond his jurisdiction his proceedings shall be void. In the present case the Deputy Magistrate did not try accused for an offence beyond his jurisdiction. He tried him for an offence punishable under S. 193, Penal Code, i.e., for an offence triable by a First Class Magistrate and therefore within his jurisdiction. His proceedings therefore were not void and the Sessions Judge was wrong in treating them as void. Where the facts disclose an offence within the jurisdiction of the Magistrate it seems to us a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction because the same facts disclose a more serious offence which is beyond his jurisdiction. He is expressly so empowered. Whether in doing so he adopts a proper course is another question. No doubt it is improper on the part of a Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction. . . . . It would also, in our opinion, be open to the revising and appellate authorities to set aside the Magistrate's proceedings and order a fresh trial, if such a course was required in the interests of justice but not otherwise; and the reason for setting them aside would be, not that they were void ab initio, but because they were improper and the interests of justice required them to be set aside.

A similar question came up before Jackson J. in 25 M L W 86.[2] The learned Judge draws from 24 Mad 675[1] the following proposition: if a Magistrate entirely overlooks some fact which would carry the case beyond his jurisdiction and tries the accused for a lesser offence, he is not held to have acted without jurisdiction. The question whether he has or has not entirely overlooked the circumstances would be one of fact. If, on the other hand, he does not overlook the circumstance, but after his attention has been drawn to it he deliberately ignores it, his proceedings would be improper, though not void. Venkatasubba Rao J. in 20 M L W 919[3] does not refer to 24 Mad 675,[1] but his attention was drawn to 2 Weir 21[4] which was a case where the Magistrate had charged an accused under S. 417, Penal Code, although the offence committed was one punishable under S. 420, Penal Code. In this case it was laid down that as the accused had committed an offence under S. 417 as well as under S. 420 he could be legally convicted of both and therefore the conviction of the minor offence was not absolutely illegal. But the learned Judges added:

> But the doctrine that no tribunal can properly clutch jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher tribunal still holds good, and where the accused has himself objected to the jurisdiction, it is possible that the High Court would feel itself bound to interfere.

Venkatasubba Rao J. who was dealing with a very similar question, followed that authority. It will therefore appear from the above decisions that whether or not the High Court should interfere would depend upon whether the Magistrate had deliberately overlooked certain aggravating facts with a view to securing for himself jurisdiction over the offence. If the Sub-Magistrate really believed that the whole body of facts revealed to him constituted an offence triable by him, and he had in fact jurisdiction to try the lesser offence, his proceedings would be proper and the High Court would not interfere. On the facts of the present case, I am inclined to think that the accused would not have been guilty of an offence punishable under S. 420, Penal Code; for, even after the

1. ('01) 24 Mad 675 : 2 Weir 699, Emperor v. Ayyan.

2. ('27) 14 A I R 1927 Mad 307 : 99 I C 596 : 28 Cr L J 164 : 25 M L W 86, Kattuva Rowther v. Suppan Asari.

3. ('25) 12 AIR 1925 Mad 367: 82 I C 57: 25 Cr L J 1193 : 20 M L W 919, Rangayya v. Somappa.

4. 2 Weir 21, High Court proceedings 26th October 1885, No. 517.

tahsildar had driven the goats into the pen of the accused, he still retained control over them; and he would lose that control only if the accused did some act which would have prevented the tahsildar from removing them again if he had so wished. Whether that view is correct or not, I do not think that there is any ground here for believing that the Sub-Magistrate clutched at jurisdiction.

The learned advocate for the petitioners points out that the fact that the accused were also charged with theft indicates that both the prosecution and the Sub-Magistrate seemed to have realized that there was a constituent in the offence which was rather more than was required for a charge under S. 417—a constituent which showed that the tahsildar had parted with possession in favour of the accused because of the deceit that had been practised on him. On the facts as narrated to me by the learned advocate for the petitioners, it is difficult to see how there was an offence of theft. There might have been, if the accused afterwards took the goats away to some other place without the tahsildar's permission — or perhaps if they had prevented the tahsildar from having access to the goats. The evidence however is not before me; and so I do not wish to express any opinion as to whether the offence of theft was committed or not. If there was, it was probably not a part of the same transaction which led to the offence of cheating. On the facts before me, I am not prepared to say that the Magistrate is wrong or that any interference is called for from this Court. The petition is accordingly dismissed.

C.R.K./G.N. *Petition dismissed.*

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(29) A. I. R. 1942 Madras 33

BURN J.

In re Dabbala Koricha Nagadu and another — Appellants.

Criminal Appeal No. 353 of 1941, Decided on 28th August 1941, against order of Court of Session, Anantapur Division, in C. C. No. 10 of 1941.

Criminal Tribes Act (1924), S. 23 (1) — Accused out of jail for 7 years after previous conviction — It is reason to contrary within Section 23 (1).

The fact that the accused has been out of jail for at least seven years after his last conviction may very well be considered to be a reason to the contrary under S. 23 (1) and hence the minimum sentence of seven years is not called for : ('29) 16 A I R 1929 Mad 841, *Rel. on.* [P 33*g*]

Public Prosecutor — for the Crown.

Judgment. — These two appellants have been convicted of offences under Ss. 457 and 380, Penal Code. They were tried by jury and the verdict of the jury was unanimous. So far as appellant 2 is concerned his appeal was dismissed summarily under S. 421, Criminal P. C. The case of appellant 1 alone comes up for consideration because of the sentence of seven years' rigorous imprisonment passed upon him.

There is no allegation of misdirection and the charge to the jury shows no signs of misdirection. There is therefore no appeal on the facts. The sentence of seven years' rigorous imprisonment has been passed by the learned Sessions Judge, because appellant 1 was a member of a criminal tribe who had been previously convicted of one of the offences specified in Sch. 1 appended to the Criminal Tribes Act. It was therefore obligatory upon the learned Sessions Judge under S. 23 (1) (a), Criminal Tribes Act, to pass a sentence of imprisonment for a term of not less than seven years. The learned Judge, however, has apparently overlooked the provision in S. 23 (1) that these minimum sentences are to be imposed "in the absence of special reasons to the contrary which shall be stated in the judgment of the Court." The learned Sessions Judge has not stated that there were no special reasons to the contrary in this case. Now we find that the last conviction of appellant 1 was in C. C. No. 148 of 1933 on the file of the Stationary Sub-Magistrate, Tadpatri, when he was convicted of house breaking and theft and sentenced to rigorous imprisonment for six months. From that it is clear that appellant 1 had been out of jail for at least seven years after his last conviction and that may very well be considered to be a reason to the contrary under S. 23 (1) : *vide* the decision in 53 Mad 80.[1] Taking this view I set aside the sentence of seven years' rigorous imprisonment passed upon appellant 1 and sentence him instead to rigorous imprisonment for two years. The amount of property stolen was not worth more than Rs. 17 and no serious injury was inflicted by appellant 1 though it is said that he used a stick and therefore he deserves a severer punishment than appellant 2.

C.R.K./K.S. *Sentence reduced.*

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1. ('29) 16 A I R 1929 Mad 841 : 122 I C 655 : 31 Cr L J 454 : 53 Mad 80 : 57 M L J 743, In re Karuppa Tevan.

(29) A. I. R. 1942 Madras 34

WADSWORTH AND PATANJALI SASTRI JJ.

A. R. M. T. T. Muthukaruppan Chettiar — Appellant

v.

S. P. L. Subbiah Chettiar and another — Respondents.

Appeal No. 22 of 1939, Decided on 29th August 1941, against decree of Sub-Judge, Devakottai, D/- 19th October 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 4 (d), 8 and 9 — Mortgage debt on security of municipal house alone existing on 1st October 1937 — Preliminary mortgage decree to enforce aforesaid debt also existing when Act came into force — Addition of security of agricultural lands after Act cannot create retrospectively debt contracted on security of property other than municipal house property so as to exclude Section 4 (d).

When on 1st October 1937 there was a mortgage debt contracted on the security of municipal house property alone and also a preliminary mortgage decree for enforcing that debt on 22nd March 1938 when the Act came into force, any addition of security of agricultural lands at a date after the Act came into force cannot have the effect of retrospectively creating a debt contracted on the security of property other than municipal house property so as to bring into force Ss. 7 and 8 of the Act and to exclude S. 4 (d). [P 34*h*]

K. Rajah Ayyar and N. G. Krishna Ayyangar — for Appellant.

R. Gopalaswamy Ayyangar — for Respondents.

Wadsworth J. — This appeal arises out of an application by the appellant to scale down a preliminary decree on a mortgage. The mortgage in question was originally contracted on 5th January 1931 on the security of house property situated within a municipality. The suit was filed on the mortgage in 1937, resulting in a preliminary decree dated 26th February 1938 and it is that preliminary decree which the appellant sought to scale down under S. 19 of the Act. In 1938 the decree-holder, not being satisfied with the security given under the mortgage, filed two applications: one for the appointment of a receiver and the other for the attachment of certain agricultural lands belonging to the judgment-debtor. By way of defence to these applications the judgment-debtor came forward with an offer to give the agricultural lands, of which attachment was claimed, as additional security for the amount of the debt. This offer was accepted and on the execution of a bond (EX. D) dated 23rd July 1938, both the receiver application and the attachment application were dismissed. The contention upon which the application under S. 19 is based is that by reason of the terms of EX. D the mortgage debt, in respect of which the preliminary decree has been passed, becomes a debt contracted not only on house property within a municipality but also on the security of agricultural property so as to rule out the exception in S. 4 (d) of the Act. The security bond (EX. D) provides that

> the mortgagor has agreed to give the said property as security along with the property originally mortgaged for the amount of the said decree. The mortgagor hereby mortgages to the mortgagee the undermentioned property as additional security for the debt under the said decree.

There is also a clause empowering the mortgagee to realize the entire debt not only out of the original hypotheca but also out of the additional security and prescribing that the additional security is liable to be sold in execution of the decree through Court in the same manner as the property mentioned in the decree. No doubt the effect of this bond is to give to the decree-holder a right to execute his decree against both sets of property in any order he pleases in respect of the whole amount of the decree. But we cannot see in this bond any contract whereby the parties agree that the mortgage debt shall be deemed to have been secured on both sets of properties with effect from the date of the original contract. Nor do we see in the bond any agreement whereby the additional security shall be deemed to be part of the hypotheca covered by the preliminary decree. The truth is that when Act 4 of 1938 came into force on 22nd March 1938, there was in existence a preliminary decree for the enforcement of a mortgage secured on a municipal house property alone. On 1st October 1937 the date on which under S. 8 the outstanding interest is to be cancelled, there was also a debt contracted on the security of house property alone. By the terms of S. 4 (d) of the Act such a debt is excluded from the operation of the Act. It is difficult to see how any addition of security at a date after the Act came into force can have retrospectively created a debt contracted on the security of property other than municipal house property so as to bring into force Ss. 7 and 8 of the Act and to exclude S. 4 (d). In the result, therefore, we agree with the conclusion taken by the lower Court and dismiss the appeal with costs of respondent 1.

C.R.K./G.N. *Appeal dismissed.*

(29) A. I. R. 1942 Madras 35

SOMAYYA J.

K. P. Kesavalu Naidu — *Petitioner*

v.

A. R. Venkatarama Chettiar and another — *Respondents.*

Civil Revn. Petn. No. 567 of 1939, Decided on 4th February 1941, to revise decree of Sub-Judge, Kumbakonam, in S. C. S. No. 218 of 1937.

Civil P. C. (1908), O. 7, R. 10 and S. 35— Court directing plaint to be presented to proper Court can order plaintiff to pay costs of other side—But it cannot make payment of costs condition precedent to filing of suit in proper Court —Court directing payment of costs of other side before suit was presented in proper Court— Without paying costs as directed plaintiff presenting plaint in proper Court — Costs paid subsequently while suit was well within time— Suit must be deemed to be properly filed even if it be regarded as filed on date when costs were tendered.

By reason of S. 35 the Court directing a plaint to be presented to the proper Court, can order the plaintiff to pay the costs of the other side; but it has no power to add a further rider that the payment of costs should be condition precedent to the filing of the suit in the proper Court. [P 35*e*, *g*]

In violation of the Court's direction that the costs of the other side should be paid before the plaint was presented in the proper Court the plaintiff presented the plaint in proper Court without paying the costs which were tendered subsequently while the suit was well within time :

Held that the plaint must be deemed to have been properly presented as it must be taken to have been filed on the date on which the costs were tendered : ('36) 23 A I R 1936 Mad 24, *Rel. on.* [P 35*e*]

K. S. Rajagopala Ayyangar and K. S. Ramaratnam — for Petitioner.

N. Rajagopala Ayyangar — for Respondents.

Order.—This is a civil revision petition filed against the decree of the Subordinate Judge of Kumbakonam passed in S. C. S. No. 218 of 1937. The plaintiff whose suit was dismissed in the lower Court is the petitioner before me. The suit is for the recovery of a sum of Rs. 941-11-4 against the defendants. The suit was originally filed in the Presidency Town Small Cause Court, Madras. That Court held that it had no jurisdiction to try the suit and passed an order returning the plaint to be presented to the proper Court. When making that order, it is admitted that there was a condition attached to it, namely, that the costs of the defendants should be paid before the suit was presented in the proper Court. Without paying the costs so directed, the plaintiff presented the plaint in the Court of the Subordinate Judge of Kumbakonam. Objection was taken that such institution is improper and the amount was tendered in December 1937. The cause of action is said to have arisen in the beginning of 1935. So even taking it that the suit itself was represented in the Kumbakonam Court on the day when the amount was tendered, the suit would be within time and the Court might well have treated the suit as having been presented on that day. In this view, the dismissal of the suit appears to me to be improper.

But that apart, I do not see what jurisdiction the Court has in passing an order under O. 7, R. 10 to impose a condition that the plaintiff whose plaint is returned for presentation to the proper Court shall, before presenting it to that Court, pay the costs as a condition precedent. Order 7, R. 10 imposes the duty on every Court that it shall at any stage of the suit return a plaint to be presented to the proper Court. If O. 7, R. 10 had stood alone, it would be open to argument that the Court making such an order would have no jurisdiction even to direct that the plaintiff should pay the costs to the defendants. But S. 35 which provides for the jurisdiction of a Court to award costs says that the fact that the Court had no jurisdiction to try the suit shall be no bar to the exercise of the power. This only means that when directing a plaint to be presented to the proper Court, the Court making that order may also direct the plaintiff to pay the costs of the other side. It has no power to add a further rider that the payment of costs should be condition precedent to the filing of the suit in the proper Court. When the Legislature wants to give such power to the Court it has made express provision. In O. 23 where the Court allows the plaintiff to withdraw the whole or any part of his claim with liberty to file a fresh suit, there is the rule that the Court may allow the suit to be withdrawn with liberty to institute a fresh suit on such terms as it thinks fit and it has been held under that rule that the Court may impose a condition that the payment of costs ordered should be a condition precedent for the filing of a fresh suit in respect of the same subject-matter. Order 33, R. 15 provides that where an application for leave to sue in forma pauperis is rejected, it shall be a bar to any subsequent application of the like nature and that the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs, if any, incurred by the Government and by the opposite party in opposing his application for leave

to sue as a pauper. In considering this provision (O. 33, R. 15) a Bench of this Court has held in 69 M L J 791,[1] that the suit must be taken to have been instituted the next moment after the payment of the costs. The suit was instituted without paying the costs but the costs were paid afterwards. Then they say :

> We think it will be sufficient to say that the suit must be treated as one instituted on 2nd March 1932 and dealt with on that basis.

In this case on the date when the amount was tendered the suit was well within time. The decree of the lower Court is set aside and the suit is remanded to be disposed of on the merits. The respondents will pay the costs of the petitioner in this Court. The amount of costs that was tendered by the plaintiff and was refused to be accepted by the defendants will be paid to the respondents' learned counsel here within a fortnight. The other costs will abide the result.

C.R.K./G.N. *Application allowed.*

1. ('36) 23 A I R 1936 Mad 24: 159 I C 1029: 69 M L J 791, Ramakrishna Nadar v. Ponnayya Thirumalai Vandaya Thevar.

(29) A. I. R. 1942 Madras 36

ABDUR RAHMAN J.

Valur Krishna Menon and others — *Appellants*

v.

Puthan Veettil Kurungara Kunhu alias Devu Amma and others—*Respondents.*

Second Appeal No. 162 of 1938, Decided on 8th April 1941, against decree of District Court, North Malabar, in A. S. No. 216 of 1936.

(a) Malabar law — Will — Construction — Bequest of his property by testator to wife and children — Bequest to operate in favour of daughter already born at time of will and all progeny that might be yet born to testator by his wife — No person other than wife and children given right or claim to property bequeathed — Wife to act as guardian of children during their minority — Testator held did not intend to bequeath his property to tavazhi but to his wife and own children as tenants in common — Decree against mother held therefore could not bind children.

The testator bequeathed his property to his wife and children, one of whom had been born at the time when the will was executed and the other was born later. The bequest was to operate in favour of the daughter who was already born and all the progeny that might yet be born to him by his wife. The testator made it clear that his wife and children should remain in joint possession and enjoyment of all moveable and immovable properties holding them directly themselves and causing them to be held as his legal representatives and heirs and further added that his wife shall "effect the collections of outstandings due to him in her own capacity and in her capacity as guardian of the children who had not come of age," and further provided that "no persons other than my wife and children have any right or claims to any of the moveable and immovable properties or any of my future acquisitions, that I have hereby bequeathed to them" :

Held that since a tavazhi must be understood as consisting of a mother and of her children and descendants in the female line the provision of the will restricting the bequest to the wife and children only conflicted with the underlying idea of the tavazhi and indicated that the intention of the testator was not to bequeath the property to the tavazhi but to his own wife and his own offspring as tenants in common. The mother consequently could not represent the children in a litigation and a decree passed against her could not bind the children : ('28) 15 A I R 1928 Mad 870, *Ref.* [P 38*d*]

Held further that since the manager of the tarwad alone and not each karnavan or karnavathi of the various tavazhis inside the tarwad that would be the guardian of all the minors in the various groups or tavazhis existing in the tarwad the appointment of the wife as guardian could not be regarded as having been made in pursuance of the ordinary law prevailing amongst the Malabar families but was apparently done as the property was bequeathed by the testator to his own wife and his own children as tenants in common : 35 Mad 648, *Approved.* [P 38*b*, *c*]

(b) Malabar law — Bequest by father to wife and children — Whether wife and children constitute tenancy in common or become joint tenants forming group of tavazhi and continue to remain so even after wife marries another after her husband's death and has fresh offspring *(Quære).*

Whether a bequest by a father in favour of his wife and children constitutes a tenancy in common or whether they become joint tenants forming a group of tavazhi with the incidents of a maru makattayam tarwad and continue to remain so even after the wife is married to another person subsequent to her first husband's death as a result of which there are fresh offspring. [P 37*a*,*b*]

P. Govinda Menon — for Appellants.

O. T. G. Nambiar and A. Atchuthan Nambiar — for Respondents.

Judgment. — This appeal arises out of a suit for partition and recovery of possession of 2/3rds share in the property bequeathed by the plaintiff's father Narayanan under a will dated 21st January 1921, EX. A, to his wife and children, one of whom had been born at the time when the will was executed and the other was born later. The suit was brought as the property was alleged to have been owned by the plaintiffs as tenants in common with their mother who had no right to represent them as a karnavathi in the suit (O. S. NO. 203 of 1932) instituted on the basis of a mortgage executed in favour of defendant 2 by their father. To this suit the plaintiffs' mother alone was made a party and the plaintiffs were not impleaded. It was decreed but it was contended in the present suit that the decree was not binding on the plaintiffs and their shares which were

2/3rds in the property bequeathed by their father remained unaffected by the decree and the purchase of the same by the decree-holder was invalid. The decree-holder assigned the property after his purchase to the three persons who were also made parties to the present action. This was decreed by both the Courts below and defendants 2, 5 and 6 have preferred the present appeal.

The interesting question, whether a bequest by a father in favour of his wife and children constitutes a tenancy in common or whether they become joint tenants forming a group of tavazhi with the incidents of a marumakattayam tarwad, and continue to remain so even after the wife is married to another person subsequent to her first husband's death as a result of which there are fresh offspring, has been debated before me in this appeal. Relying on the natural presumption that the bequest or gift must have been intended to be made by the father to his own children and not to the offspring of another marriage, the answer was given in two decisions of this Court that the latter could not partake of any share or interest in the properties given by a person who was not their own father. But in arriving at this result two methods were adopted by the two Division Benches of this Court who decided those cases. Since the decision of the Full Bench in 39 Mad 317[1] was to the effect that if the father gave a property to his wife and children they would take it or would in any case be presumed to do so as members of a tavazhi unless a contrary intention had been expressed by the donor or the testator, and Sadasiva Iyer J., who had considerable experience of Malabar law and customs had observed in the Full Bench decision referred to above that in such cases two small tavazhis or groups might be taken to have come into existence the members of one group not sharing with the members of the other—their mother being the common factor to both of them or perhaps even more, if she had married more than twice and had children by each marriage. A Division Bench of this Court, 42 Mad 869,[2] of whom Phillips J., at least, had large judicial experience in this presidency, took the same view as was expressed by Sadasiva Ayyar J., in the above stated Full Bench case. Inasmuch as a tavazhi consists of a woman and all her children and the effect of holding that the tavazhi had come into existence would be to confer a share of the property given by a father to his wife and his offspring, on the offspring of another marriage, another Division Bench of this Court consisting of Krishnan and Venkatasubba Rao JJ., held on the other hand that a tavazhi should be found not to have come into existence at all in these circumstances and the wife and children who took the property should be presumed to have taken it merely as tenants in common. But, in both these decisions, the property was given by the second husband of the woman and not by the first one. This to my mind makes a considerable difference as, by remarrying, a woman cannot be found to have forfeited her right to the tavazhi—if one is held to have come into existence on the death of her first husband — and is not held to have been disjointed on account of a second marriage of the wife, in the absence of any authority which had not been, in spite of my asking for it shown to me. As the idea of a tavazhi was that the property would devolve on a woman and all her children, Mr. Pocker, learned counsel for the appellants, was prepared to put the extreme contention that the children of the second marriage would enter into the group of the tavazhi that was already in existence and tried to steer clear of the decision in 51 Mad 574[3] by distinguishing it on the ground that the property in that case was left by the second husband to his own children.

The decision of this interesting question would have been essential only if I found that there was nothing in EX. A which would lead me to hold that the property was not given by Narayanan to his wife and his own children as tenants in common or that in other words, there was nothing in the will to rebut the presumption as to the property having been given to a tavazhi raised in 39 Mad 317.[1] A perusal of the deed would, however, show that the property in this case was undoubtedly given by Narayanan to his own wife and his children as tenants in common and he made it clear that it would devolve on nobody else. Had the property been given to the tavazhi as suggested by the learned counsel for the appellants, one should not have found the will to be in favour of the daughter Devu who was already born and "to all the progeny that may yet be born to me of her." This is not all. In the next paragraph of the will the testator

1. ('16) 3 A I R 1916 Mad 391 : 30 I C 755 : 39 Mad 317 : 29 M L J 481 (FB), Chakkra Kanna v. Kunhi Pocker.
2. ('19) 6 A I R 1919 Mad 28 : 53 I C 249 : 42 Mad 869 : 37 M L J 220, Imbichi Beevi Umma v. Raman Nair.
3. ('28) 15 A I R 1928 Mad 870 : 110 I C 480 : 51 Mad 574 : 55 MLJ 208, Moithiyan Kutti v. Ayissa.

makes it clear that his wife and children should remain in joint possession and enjoyment of all moveable and immovable properties holding them directly themselves and causing them to be held as his legal representatives and heirs. What is more, the testator adds that his wife shall

> effect the collections of outstandings due to me in her own capacity and in her capacity as guardian of the children who have not come of age.

It was suggested by Mr. Pocker that every mother is the guardian of her children in every tavazhi and the mention of that fact by the testator did not alter the position in any way. This appears to be incorrect. It is the manager of the tarwad alone and not each karnavan or karnavathi of the various tavazhis inside the tarwad that would be the guardian of all the minors in the various groups or tavazhis existing in the tarwad (35 Mad 648[4] at p. 654) and the appointment by Narayanan of his wife as guardian could not therefore be regarded as having been made in pursuance of the ordinary law prevailing amongst the Malabar families but on account of a special direction that he was giving as opposed to the custom. This was apparently done as the property was bequeathed by him to his own wife and his own children as tenants in common and as he wanted his wife to act as a guardian on behalf of the children irrespective of the fact that someone else would have been their legal guardian if one was not appointed by him. The succeeding sentence of the will makes it clearer still. It reads as follows :

> No persons other than my wife and children have any right or claims to any of the moveable and immovable properties or any of my future acquisitions, that I have hereby bequeathed to them.

If a tavazhi has to be understood as consisting of a mother and of her children and descendants in the female line as observed in 51 Mad 574,[3] the abovementioned provision of the will would come into conflict with the underlying idea of the tavazhi and indicate that the intention of the testator was not to bequeath the property to the tavazhi but to his own wife and his own offspring as tenants in common. That being my construction of the document the mother could not have represented the plaintiffs in the previous litigation and the suits were rightly decreed. For the above reasons this appeal must fail and is dismissed with costs of respondents 1 and 2. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

4. ('11) 35 Mad 648 : 12 I C 492 : 22 M L J 23 : (1911) 2 M W N 487, Kalianni Amma v. Govinda Menon.

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(29) A. I. R. 1942 Madras 38

LAKSHMANA RAO J.

In re Soundararaja Ayyangar and another — Petitioners.

Criminal Revn. Cases Nos. 750 and 751 and Criminal Revn. Petn. Nos. 707 and 708 of 1940, Decided on 13th September 1940, to revise orders of Second Class Magistrate, Polur, D/- 26th August 1940.

Criminal trial — Evidence — Head constable examined as prosecution witness producing general diary containing entry regarding occurrence in question as reported by complainant — In cross-examination omission of material and relevant facts and injuries sustained by complainant elicited — Accused's prayer to have aforesaid portion in diary marked as exhibit refused—At Magistrate's suggestion complainant applying for and getting expunged evidence of head constable from record—Head constable's evidence held could not be expunged from record — Accused held entitled to prove through him documents admissible in evidence.

The head constable examined as a prosecution witness also produced his general diary containing the entry relevant to the occurrence in question as reported by the complainant. In the course of the cross-examination omission in the general diary of material and relevant facts and the injuries sustained by the complainant was elicited and the portion of the general diary in regard to this was sought to be marked by the accused. The Magistrate refused permission to do so. After charge in the course of further cross-examination of the head constable the accused applied for the production of the general diary and for permission to mark the relevant portions as exhibit. This application was opposed by the complainant. At the suggestion of the Magistrate the complainant applied for and had the head constable's evidence expunged from the record and the application filed by the accused was dismissed with the observation that the accused may summon the head constable as a defence witness :

Held that the evidence of the head constable could not be deleted from the record and the accused was entitled to prove through him documents which were admissible in evidence. [P 39c]

P. C. Parthasarathy Ayyangar — for Petitioners.

Public Prosecutor — for the Crown.

FACTS. — The respondent-complainant was the consignee of Diesel oil at Polur Railway Station and he dug a pit at the edge of a sleeper about 3 feet in diameter and 4 feet deep for drawing the oil from the van into the barrels. This was objected to by the accused who was the Permanent Way Sub-Inspector of the railway company as the sinking of a pit adjoining to the railway line was dangerous to the track. When the serious consequences of his act were told to

the complainant he lost his temper and abused the railway staff and the accused in particular by using indecent language and the accused complained to the Railway Police and his superiors. The complainant with a view to forestall the accused and coerce the accused from taking any action complained against him under Ss. 323 and 504, Penal Code. During the trial of the case, the prosecution examined the head constable who was in charge of the police station on that day as witness 8 and he also produced the general diary containing the entry relevant to the occurrence in question as reported by the complainant. In the course of the cross-examination omission in the general diary of material and relevant facts as to the person or persons who committed the offence and as regards the injuries sustained by the complainant was elicited and the portion of the general diary in regard to this was sought to be marked by the accused. The Magistrate refused permission to do so. After charge was framed in the course of further cross-examination of P. W. 8 the accused applied for the production of the general diary and for permission to mark the relevant portions as exhibit. This application was opposed by the complainant. At the suggestion of the Magistrate the complainant applied for and had the evidence of P. W. 8 expunged from the record and the application filed by the accused was dismissed with the observation that the accused may summon P. W. 8 as a defence witness. Against this order the present revision is filed.

Order. — The evidence of P. W. 8 cannot be deleted from the record and the accused are entitled to prove through him documents which are admissible in evidence. The orders of the Sub-Magistrate are therefore set aside and he is directed to proceed with the case in accordance with law.

C.R.K./G.N. *Orders set aside.*

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(29) A. I. R. 1942 Madras 39

SOMAYYA J.

Uppinangadi Sri Sahasralingeshwara Devara Bhandaram, represented by its Adalthe Moktessor, Arai Rai — *Appellant*

v.

Tholadara Nagappa alias Ramakrishna Shanbhogue and others — *Respondents.*

Second Appeal No. 1212 of 1938, Decided on 19th August 1941, against decree of Sub-Judge, South Kanara, in A. S. No. 109 of 1937.

(a) Hindu law — Religious endowment — Agreement to perform ceremony of feeding Brahmins in temple executed in favour of temple represented by its trustee—Construction — Consideration — Certain property charged for performance of aforesaid ceremony—Failure of executants of agreement to perform ceremony—Trustee held could perform same out of temple funds and recover cost from executants and properties charged.

The material part of the agreement addressed to and executed by *N* and *K*, in favour of the temple represented by its trustee ran as follows: "Our paternal uncle *V* has this day conveyed to us through Moktyarname, the immovable property valued at about Rs. 600 and moveable properties of the value of about Rs. 400 executed by him. As mentioned therein, we have to maintain him properly in future and in accordance with his direction, we shall, for the welfare of our family, perform Brahmanesantarpane for Brahmins (feeding of Brahmins) at an expense of Rs. 60 on the day following Poornima Makha of every year, in the temple." The properties mentioned in the document were charged with the performance of the feeding of Brahmins in the temple and of payment of a small sum as a present to the Brahmins who gathered at the feeding ceremony. On the failure of the special trustees *N* and *K* to perform the feeding ceremony at the temple, the general trustee got the same performed out of the temple funds and sued to recover the cost from *N* and *K*. It was contended that there was no consideration for the settlement of his property by the uncle:

Held that the undertaking by *N* and *K* to perform the feeding was part consideration for the settlement by the uncle and no further evidence was necessary to show that the uncle conveyed his property on the promise of *N* and *K* to perform the feeding. There was no need in the plaint to set out anything further than that the document provided for the performance of the feeding by the two brothers. [P 40*f*,*g*]

Held further that the creation of the charge amounted to a partial dedication and the general trustee of the temple was sufficiently interested in the performance of the charities and in fact it was his duty to see that all festivals and charities were properly performed. It would be a breach of his duty if he did not do so. Consequently when the special trustees in possession of the properties charged with the performance of the charities failed to perform the ceremony of feeding the Brahmins which they were bound to do, the general trustee could perform it out of the funds of the temple and recover it from the special trustees and from the properties charged: 17 Mad 199, *Rel. on*; 34 Mad 375, *Disting.* [P 40*g*,*h*; P 41*a*]

(b) Hindu law — Religious endowment — Feeding of devotees in temple is religious charity.

The feeding of devotees in the temples is a religious charity under the Hindu law: 17 Mad 199, *Rel. on.* [P 41*d*]

K. Y. Adiga and K. P. Adiga — for Appellant.

K. Vittal Rao — for Respondents.

Judgment.—The trustee of Sri Sahasralingeshwara temple filed the suit out of which this appeal arises for recovery of a sum of Rs. 288-1-6 under the following cir-

cumstances. Two brothers Narayana Bhat and Keshava Bhat executed a karar (EX. A) in favour of the plaint institution on 18th July 1899 undertaking to perform certain charities or viniyogams as they are called in the suit temple every year. Some properties of the brothers were charged with the performance of these viniyogams at a cost of Rs. 60 every year. These viniyogams were not performed during the years 1932, 1933, 1934 and 1935 by the defendants and thereupon the temple performed them and seeks to recover the sum of Rs. 288-1-6 and to enforce the charge over the properties mentioned in the plaint schedule. The trial Court granted a decree but the appellate Court reversed it holding that EX. A was not valid either as a trust or a contract and that the plaint institution has no right to sue. The plaintiff appeals and the only question that arises for decision is whether the plaintiff is entitled to perform the viniyogam and recover the amount from the plaint properties. Exhibit A is a registered agreement executed by two persons Narayana Bhat and Keshava Bhat in favour of the plaint institution. It recites that it was executed and delivered to the Bhandara of Upragandy Sri Sahasralingheswara Devaru in Kerikar village. Bhandara, it is agreed, means a trustee. The material portion of it runs as follows :

> Our senior paternal uncle Venkappa Bhatta, son of Hennal Puttanna Bhatta, residing at Ulamogra of Adethela village, Bandadi Magane, has this day conveyed to us through Moktyarname, the immovable property of the beriz of Rs. 2-8-0 and valued at about Rs. 600, out of the warg entered in the name of Hennal Subbayya, bearing Muli No. 12 of the said Hirebandadhi village and moveable properties of the value of about Rs. 400 executed by him and executed Moktyarname. As mentioned therein, we have to maintain him properly in future and in accordance with his direction, we shall for the welfare of our family perform Brahmanesantarpane for Brahmins (feeding of Brahmins) at an expense of Rs. 60 on the day following Poornima Makha of every year, in the said temple, on the liability of the property lying within the undermentioned boundaries of beriz of Rupees 15-8-5, warg of which is entered in the name of Kesa alias Thinnayya, bearing Muli No. 5 of Illantile village, Upragandy Magane, Upragandy subdistrict, South Kanara District. Further, we shall also give gangamrita (water) to the persons gathering on the occasion of three Makha festivals every year in the said temple, we shall also give dakshina (present) according to (our) mite to the Brahmins who gather at the santarpane (feeding) at not less than one pie for each (Brahmin).

The properties mentioned in the schedule attached to this document are clearly charged with the performance of the feeding of Brahmins in the temple and of payment of a small sum as a present to the Brahmins who gather at that feeding ceremony at not less than one pie per Brahmin. The agreement is addressed to and is executed in favour of the plaint institution represented by its trustee. The lower appellate Court is clearly in error in holding that there was no consideration for the undertaking in this agreement to feed the Brahmins in the temple. The Subordinate Judge says :

> There is no legal connexion established between the transaction of conveyance by the uncle to the nephews and the undertaking in Ex. A. There is nothing to show that the uncle conveyed his property on the promise of Narayana Bhat and Keshava Bhat to perform the ceremonies.

This is a clear misreading of EX. A. After referring to the settlement made by the paternal uncle of his properties on the executants, the document says :

> As mentioned therein, we have to maintain him properly in future and in accordance with his direction, we shall, for the welfare of our family, perform Brahmanasantarpane for Brahmins (feeding of Brahmins) at an expense of Rs. 60.

This clearly means that the undertaking to perform the feeding was part consideration for the settlement by the uncle. That is the plain and obvious inference of the sentence just set out and no further evidence is necessary to show that the uncle conveyed his property on the promise of Narayana Bhat and Keshava Bhat to perform the feeding. There was no need in the plaint to set out anything further than that EX. A provides for the performance of this feeding by the two brothers. The property mentioned in the schedule attached to EX. A is not wholly dedicated to the trust but the performance of the feeding in the temple was made a charge on those properties. There may be a partial dedication as pointed out in Ganapati Iyer's Religious Endowments, p. 76. In such a case the general trustee of the institution is sufficiently interested in the performance of these charities and in fact it is his duty to see that all these festivals and charities are properly performed. It would be a breach of his duty if he did not do so. In 21 Mad 406,[1] Subramania Iyer and Benson JJ. say this on p. 408 :

> In our opinion the Subordinate Judge has overlooked the circumstances that the plaintiff in this case was the general trustee of the temple and as such held a special position in regard to the protection of its interests. In that character it was not only his right, but his duty to see that the temple funds in the hands of special trustees were duly appropriated.

It cannot be said that where the special trustee in possession of the properties charg-

1. ('98) 21 Mad 406: 8 M L J 119, Nellaiyappa Pillai v. Thanganna Nachiar.

ed with the performance of the charities does not perform a particular festival which he is bound to do, the general trustee cannot perform it out of the funds of the temple and recover it from the special trustee and from the properties over which there is the charge. In 17 Mad 199,[2] the general trustees carried out certain repairs for which there was a special endowment in charge of a special trustee. The general trustee was held entitled to sue the special trustee for recovery of the sum spent from the general funds. On p. 202 they say :

> There is also no doubt that as dharmakartas respondents are bound to see that the temple is kept in proper repair by those who are bound to do so according to usage.

The decision in 34 Mad 375[3] relied on by the lower appellate Court has no application to this case. There the only question was whether the provision in a will that buttermilk, betel and nuts, fans and sugar should be given to people attending a festival in a temple was a religious trust or merely a charitable trust. There was no feeding to be done in the temple itself. It was held that the trust was not religious in character. This decision has no application to the present case. Feeding of devotees in the temples is a well-known thing as pointed out by Muthuswami Ayyar J. in 17 Mad 199[2] at p. 200. The point is when there is such a trust performable in a temple is the general trustee entitled to perform it if the persons who are primarily to do it do not do so and recover the cost from the properties? On the authority of the decision in 17 Mad 199,[2] I hold that the general trustee can recover the sum in question and I reverse the decree of the lower appellate Court and restore that of the first Court with costs here and in the lower appellate Court.

C.R.K./G.N. *Appeal allowed.*

2. ('94) 17 Mad 199, Vithilinga Pandara Sannadhi v. Somasundara Mudaliar.
3. ('11) 34 Mad 375: 10 I C 301: 21 M L J 305: (1911) 1 M W N 304, Venkatachala Pillai v. Taluk Board, Saidapet.

**** (29) A. I. R. 1942 Madras 41**
FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND HAPPELL JJ.

Cannanore Bank Ltd.

v.

Pattarkandy Arayanveettil Madhavi.

Appeal No. 112 of 1938, Decided on 3rd October 1941, against decree of Sub-Judge, Tellicherry, in O. S. No. 27 of 1936.

**** Civil P. C. (1908), O. 21, R. 63 — "Party against whom an order is made"—R. 63 applies to all orders which are against claims preferred under R. 58 irrespective of whether they have been passed on merits or not—Order "Petition not pressed. It is dismissed" is adverse order :** 48 M L J 616 = ('25) 12 A I R 1925 Mad 1113 = 87 I C 635 ; ('25) 12 A I R 1925 Mad 265 = 80 I C 233 ; 110 I C 511 (Mad) and (1940) 2 M L J 402 = ('41) 28 A I R 1941 Mad 77, *OVERRULED.*

Order 21, R. 63 applies to all orders which are against claims preferred under R. 58. The test to see whether an order is under R. 63 is whether the order is *against* the claimant or the decree-holder, but that does not mean that the order must involve an adjudication on the merits after investigation. If the petitioner has in fact asked to be allowed to withdraw the petition and the Court has acquiesced in the course, it may very well be that the order would not be an adverse order within the meaning of the rule, but it cannot be said that because a claimant says to the Court that he does not press the petition and consents to an order of dismissal it is not an adverse order. [P 42*h*; P 43*d*,*e*,*h*]

Therefore where the order "Petition not pressed. It is dismissed" is passed on a petition which falls within R. 58 and the petitioner has not sought permission to withdraw it without prejudice to his rights it is obviously an order which is against him and requires him to file a suit within a year from the date of the order if he wishes to re-open the matter: 48 M L J 616=('25) 12 A I R 1925 Mad 1113 = 87 I C 635; ('25) 12 A I R 1925 Mad 265=80 I C 233 ; 110 I C 511 (Mad) and (1940) 2 M L J 402=('41) 28 A I R 1941 Mad 77, *OVERRULED* ; ('19) 6 A I R 1919 Mad 738 (F B), *Rel. on.* [Instances of what constitutes an order 'against' a claim or objection discussed.] [P 44*b*]

M. C. Sridharan — for Appellant.

K. Kuttikrishna Menon — for Respondents.

ORDER OF REFERENCE BY LEACH C. J. AND VENKATARAMANA RAO J.

Leach C. J.—This appeal arises out of a suit filed by respondents 1 to 5 in the Court of the Subordinate Judge of Tellicherry for the following reliefs : (1) a declaration that certain immovable property was tarwad property and therefore could not be brought to sale as the result of an attachment in execution proceedings instituted by the appellant bank in respect of a decree obtained against defendants 2 to 4, and (2) the setting aside of an order passed on a claim petition. Defendants 2 to 4, who are respondents 6 to 8, borrowed money from the appellant bank and, as the loan was not repaid, the bank sued for its recovery and obtained the decree which led to the attachment of the property in execution proceedings. On 12th July 1932 the plaintiffs-respondents applied for the removal of the attachment, but did not press their application. The result was that on 12th July 1932 the following order was passed by consent in respect of their application for removal of the attachment: "Petition not pressed. It is dismissed." Notwithstanding this order the plaintiffs-respondents on 5th September 1935 filed another application for the removal of the attachment. This was

dismissed on the 14th of the following month. On 12th October 1936, that is two days short of 12 months, the plaintiffs-respondents filed the suit out of which this appeal arises. The appellant bank contended that it was barred by the law of limitation and that in any event the suit could not be maintained because the property attached was in fact the private property of the judgment-debtors. The Subordinate Judge held that the suit was in time and that the property was tarwad property. Both these questions are raised in the appeal.

The first question involves the consideration of authorities which are in conflict and we propose to refer the question to a Full Bench, but before making the reference we will deal with the appellant bank's objection to the finding of the Subordinate Judge that the property was tarwad property. It is common ground that the property was bought by the mother and her five sons and daughters, all of whom were majors. The mother and the eldest son having died, the surviving sons, Kunhunni and Kunhiraman, and their sister, Mathu, conveyed the property to their sister Parvathi who has married defendant 4. The deed of conveyance set out the circumstances under which the property was purchased and that it was purchased as their joint property. The mother and her sons and daughters constituted a tavazhi and the father had given the money for the purchase. There can be no doubt that the Subordinate Judge was fully justified in holding that the property belonged to the tarwad. The question which we refer to a Full Bench is this: "When an order is passed on a claim petition in these words 'Petition not pressed It is dismissed,' does the order require the petitioner to file a suit under O. 21, R. 63 within a year from the date of the order if he wishes to re-open the matter?" We do not propose to discuss the authorities which have been referred to us in the course of the argument. It is sufficient to say that they appear to disclose a need for an authoritative decision of the Court on this question.

Opinion of the Full Bench

Leach C. J.—In order to give an answer to the question referred it is necessary to decide what is meant by an adverse order under O. 21, R. 63, Civil P. C. That rule states that where a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of a suit the order shall be conclusive. The order referred to in the rule is an order passed on an application which falls within the purview of R. 58. That rule provides that where a claim is preferred to, or an objection is made to the attachment of, property attached in execution of a decree on the ground that it is not liable to attachment, the Court shall proceed to investigate the claim or objection, provided that it may refuse to investigate when it considers that the claim or objection was designedly or unnecessarily delayed.

In 41 Mad 985[1] Wallis C. J. and Oldfield and Seshagiri Iyer JJ. held that an order refusing to investigate a claim to attached property on the ground that there was delay in the filing of it was an order passed against the claimant within the meaning of R. 63 and by reason of Art. 11, Limitation Act, the order became final unless a suit was filed within twelve months to set it aside. In that case an application for the removal of an attachment was made, but it was filed at a late stage and the District Munsif refused to enter into an investigation. His order was couched in these words: "As this petition was filed late, this claim is ordered to be notified to the intending bidders." This did not satisfy the petitioner and a fresh application was filed for the removal of the attachment. The order on this occasion was:

> The allegations of the zamindarini will be notified to the bidders with the remark that the zamindarini did not take steps for her claim being enquired into during the last ten months.

The Full Bench held that this order amounted to a rejection of the claim on the ground that it had been filed too late and therefore was an adverse order within R. 63, though there was no investigation and consequently no decision on the merits. It is admitted that the judgments in that case have received the approval of all the High Courts in India, but there are numerous decisions of this Court where a distinction has been drawn, in some cases, wrongly. The test is whether the order is "against" the claimant or the decree-holder, but that does not mean that the order must involve an adjudication on the merits after investigation. Even an order of dismissal for default will fall within the rule; so long as it remains in force it is obviously adverse to the claimant. But if the person objecting to the attachment does not ask for his claim to be investigated and the order on the petition is merely that it be recorded, it cannot be said

1. ('19) 6 AIR 1919 Mad 738 : 48 I C 270 : 41 Mad 985: 35 M L J 335 (F B), Venkataratnam v. Ranganayakamma.

that this is an order "against" him. In such a case the application will not fall within R. 58: *see* 1919 M W N 805.[2] Again the petition may contain a prayer not contemplated by R. 58, or it may have been presented after the Court has sold the attached property and therefore the Court has no longer jurisdiction to entertain it. The dismissal of such a petition can scarcely be regarded as an adverse order : *see* 45 Mad 827.[3] The position is not different if the claim is for an inquiry which is not contemplated by the rule, or the Court while dismissing a petition expressly states that the rights of the petitioner are not prejudiced by the order : *see* 58 Mad 936.[4] It is not an adverse order if the petition is dismissed because the power to investigate is in another Court: *see* 41 M L J 198.[5] But the position is very different where the application clearly falls under R. 58, the Court has jurisdiction and it passes an order dismissing the petition.

We will now refer to the cases which in our opinion have been wrongly decided. The first is that in 48 M L J 616,[6] where the order passed on the claim petition was in these words:

> The contest is practically between the two claimants and the suit is inevitable. On the ground that the claims have been preferred too late and the delay is not satisfactorily explained, I disallow the claim.

Ramesam and Venkatasubba Rao JJ. held that this was not an order falling within R. 63, but we consider that they erred in so doing. This case clearly fell within the decision in 41 Mad 985.[1] In A I R 1925 Mad 265,[7] Coutts-Trotter C. J. and Ramesam J. held that where the order on a claim petition was, "not pressed, dismissed," it was not an order against the claimant within the meaning of R. 63. The basis of this decision was apparently the assumption that the claimant wished to abandon his claim and to have it treated as if it never had been made. If the petitioner had in fact asked to be allowed to withdraw the petition and the Court had acquiesced in the course, it might very well be that the order would not be an adverse order within the meaning of the rule, but we do not agree that because a claimant says to the Court that he does not press the petition and consents to an order of dismissal it is not an adverse order. In such circumstances it would, in our opinion, clearly be an order against him within the meaning of R. 63, provided, of course, that the application was one which fell within R. 58. Coutts-Trotter C. J., stated that he had always been of the opinion that in the case of the withdrawal of a petition it was a mistake for the Judge to endorse on it "dismissed," and that it was quite sufficient to record on it "withdrawn." With great respect, the Code of Civil Procedure does not contemplate such an order. It only contemplates the allowing or the refusal of a petition, and strictly speaking the order should be one of dismissal. Where the petitioner informs the Court that he wishes to withdraw his petition the Court may allow him to do so and by the use of appropriate language in the dismissal order make it quite clear that it is not intended to be an adverse order. We can see no reason why the claim petition should not be withdrawn if the claimant wishes to withdraw it, but the order passed in such circumstances should be worded so as not to attract the operation of Art. 11, Limitation Act.

In 110 I C 511,[8] a claim petition had been filed by the appellant who subsequently applied to be allowed to withdraw it, stating that he would file a regular suit. Thereupon the District Munsif passed an order dismissing the petition. Kumaraswami Sastriar and Devadoss JJ. held that this order did not fall within R. 63 and they expressed the opinion that the decision of the Full Bench in 41 Mad 985[1]

> should be confined to cases where the disposal has been either on investigation or refusal to investigate on the ground that the claim is filed too late.

We consider that this opinion of the effect of the decision of the Full Bench is erroneous. Moreover the views expressed by the learned Judges are in conflict with the wording of the rule. The rule applies to all orders which are "against" claims preferred under R. 58. The last case to which our attention has been drawn is that in (1940) 2 M L J 402,[9] which was decided by a Division Bench consisting of my learned brother

2. ('20) 7 A I R 1920 Mad 822 : 52 I C 938 : 1919 M W N 805, P. R. Ayya Pattar v. Manakkal Karnavan.
3. ('23) 10 AIR 1923 Mad 76 : 70 I C 648 : 45 Mad 827 : 43 M L J 467, Abdul Kadir Sahib v. Somasundaram Chettiar.
4. ('35) 22 A I R 1935 Mad 547 : 157 I C 173 : 58 Mad 936: 68 M L J 518, Seetaramayya v. Subrahmanyam.
5. ('21) 8 AIR 1921 Mad 488: 63 I C 431: 41 M L J 198, Lakshmi Ammal v. Kadiresan Chettiar.
6. ('25) 12 A I R 1925 Mad 1113 : 87 I C 635 : 48 M L J 616, Kumara Goundan v. Thevaraya Reddi.
7. ('25) 12 A I R 1925 Mad 265 : 80 I C 233, Lakshminarasamma v. N. Pydanna.
8. ('28) 110 I C 511 (Mad), Lingama Naidu v. Official Receiver, Madura.
9. ('41) 28 A I R 1941 Mad 77: (1940) 2 M L J 402, President, Co-operative Credit Society, Kaikaran v. Narasimharao.

Krishnaswami Ayyangar and myself. Although the principle underlying R. 63 was correctly stated on further consideration my learned brother and I are of the opinion that the order passed thereon is open to objection and our learned brother Happell shares this opinion. A mortgagee presented a petition asking that properties which had been attached should be sold subject to his mortgage. According to the petition it was filed under R. 58. The order passed on it was this :

The mortgage is said to be collusive. Its existence and decree-holder's allegation about it will be notified at the time of the sale which comes on 27th February 1933.

The decision was that this order did not fall within R. 63, but in the light of the further arguments which we have heard today we consider that the case fell within 41 Mad 985[1] and, therefore, was wrongly decided. The order amounted in effect to a refusal of the claim, as the petitioner's prayer which was in terms of R. 62 was not granted. The order which has given rise to this reference is in these words: "Petition not pressed. It is dismissed." If the petition is a petition which falls within R. 58 and the petitioner has not sought permission to withdraw it without prejudice to his rights it is obviously an order which is against him. The Court is not, however, able to answer the question because the facts are not before it. But assuming that the facts are that the petitioner personally or through his advocate merely stated that he did not press the petition the order dismissing it would be an adverse order, and we answer the question referred in this sense. The costs of the reference will be made costs in the appeal.

C.R.K./K.S. *Reference answered.*

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(29) A. I. R. 1942 Madras 44

PANDRANG ROW AND ABDUR RAHMAN JJ.

R. Arunagiri Mudaliar — Appellant

v.

T. R. Radhakrishna Ayyar and others — Respondents.

Appeal No. 254 of 1937, Decided on 8th October 1940, against decree of Dist. Court, North Arcot, at Vellore, D/- 31st March 1937.

(a) Transfer of Property Act (1882 before amendment of 1929), S. 82 — Contribution — Meaning — Right exists between mortgagors inter se and does not affect mortgagee's power to proceed against any of mortgaged properties.

The contribution referred to in S. 82 refers to the right, in case of mortgage of several properties to secure one debt, of the person who satisfies the mortgage debt in its entirety to be indemnified by the purchasers of the other mortgaged properties according to the value of the properties purchased by them. This, however, is a right which exists between the owners of the mortgaged properties and does not affect the mortgagee's power to enforce his mortgage against all or any of the properties mortgaged to him. [P 46*c*]

(b) Transfer of Property Act (1882 before amendment of 1929), Ss. 60 and 82—Mortgagee of several properties purchasing share of equity of redemption — His right to recover money under mortgage is extinguished pro tanto unless keeping his mortgagee rights alive is found to mortgagee's benefit or mortgagee intended to keep subsequently acquired rights distinct—For determining extent to which right is extinguished value of mortgaged properties at date of mortgage should be considered.

The words "remaining due" in S. 60 are, to some extent, misleading and must not be taken too literally. The right of a mortgagee of several properties to recover his money under the mortgage, is, on his purchasing the equity of redemption in one of the properties mortgaged with him, extinguished pro tanto, i.e., he can recover only a proportionate part of the amount due on the mortgage, that is to say, the portion of the debt which bears the same relation to the whole amount of the debt as the value of the property not purchased bears to the value of the whole of the properties comprised in the mortgage, unless it is found that it was to the benefit of the mortgagee to keep his mortgagee rights alive or that he declared his intention either expressly or by necessary implication that he would keep his subsequently acquired rights distinct from his prior mortgagee rights. Although S. 82 does not in terms apply to a mortgagee who happens to acquire a share of the equity of redemption the general rule laid down therein applies and therefore for the purpose of determining the extent to which the mortgagee's right to recover the money under his mortgage has been extinguished by his purchasing the equity of redemption in some of the properties mortgaged to him, the value of the mortgaged properties as they existed on the date of the mortgage should be considered and not the value as it existed on the date on which some of the mortgaged properties were purchased by the mortgagee, the date of the institution of the suit being entirely immaterial : ('28) 15 A I R 1928 Rang 266, *Approved*; ('20) 7 A I R 1920 Mad 375 (F B), *Expl.*; 26 Bom 88, *Held obiter and not approved.* [P 46*h*; P 47*a*,*b*,*c*,*d*,*g*]

(c) Transfer of Property Act (1882), S. 70 — Applicability — S. 70 does not apply to mortgagee purchasing share of equity of redemption and suing to enforce his mortgage.

Under S. 70 the mortgagee is entitled to the benefit of accession to the mortgaged property, "for purpose of the security" only and therefore S. 70 cannot apply to the case of a mortgagee who has purchased a share of the equity of redemption and sues to enforce his mortgage. [P 47*e*]

C. Padmanabha Ayyangar — for Appellant.

P. Viswanatha Aiyar, V. N. Srinivasa Rao and T. E. Ramabhadrachariar — for Respondents.

Abdur Rahman J. — This appeal arises out of a suit for the recovery of Rs. 5100, being the principal and interest due under a mortgage deed Ex. A dated 12th February 1916 executed by defendant 1 (who died dur-

ing the pendency of the suit) in favour of the plaintiff. Twenty-two items of property were covered by the mortgage out of which items 1 to 3 belonged to defendant 1 originally and items 4 to 22 belonged to another person—one Ramachandra Iyer. Out of these nineteen items of property, seven items (i.e., items 4 to 10) were mortgaged with a Venkateswara Iyer. Ramachandra Iyer sold all the items that he owned (i.e., items 4 to 22) to defendant 1 in 1912 subject to Venkateswara Iyer's mortgage and defendant 1 mortgaged all the properties which he owned (i.e., items 1 to 22) for Rs. 5000 with the plaintiff under Ex. A. A second mortgage for Rs. 2500 in respect of items 4 to 22 was created by defendant 1 in favour of the plaintiff in 1918. This was not discharged and the plaintiff instituted a suit (O. S. No. 11 of 1922) in the Court of the Subordinate Judge of Vellore for the recovery of the amount due to him under the latter mortgage. It was decreed and equity of redemption of items 11 to 22 was sold in execution and purchased by defendant 3 for Rs. 104 on 31st August 1925 subject to the first mortgage Ex. A. It has been found by the Court below and the finding has not been challenged before us, that defendant 3 was merely a benamidar and that the property was really purchased in auction by the plaintiff himself. At about this time items 4 to 10 which were mortgaged with Venkateswara Iyer were brought to sale in execution of the decree obtained by him on his mortgage and were purchased before 1925 by him. Since he was a prior mortgagee, these items of property passed out of the story.

Defendant 1 filed an insolvency application later (I. P. No. 32 of 1926) and was adjudicated on 6th September 1927. The Official Receiver of Vellore sold items 1 to 3 of the property in 1932 without disclosing the plaintiff's incumbrance. Out of these three items, two (i.e., items 1 and 3) were purchased by defendant 6 and the remaining item 2 by defendant 7 in the name of defendant 8. The present suit was instituted by the plaintiff for the recovery of the amount due under his mortgage dated 12th February 1916 (Ex. A). This was decreed but to a very small extent. The learned District Judge of North Arcot, who passed this decree, held that inasmuch as the plaintiff had purchased items 11 to 22 of the property benami in the name of defendant 3, he was liable to contribute, under S. 82, T. P. Act, to defendants 6 to 8. Since it was admitted by the parties before the trial Court that the value of items 4 to 10 as compared to items 11 to 22 be taken in the proportion of 2 : 11 and the value of these 19 items of property was at the time of the second mortgage in 1918 found to be Rs. 12,000 and that of items 1 to 3 at the time of the first mortgage in 1916 to be Rs. 500 only, the claim was decreed for Rs. 203-15-2 for principal and for Rs. 44-5-0 in respect of interest against these defendants. The rest of the claim was dismissed. Not being satisfied with the decree the plaintiff has preferred the present appeal.

It appears that defendant 6 made certain improvements on the property purchased by him and one of the grounds urged on behalf of the appellant before us is that the lower Court was wrong in ignoring the subsequent accession to the mortgaged property and depriving the plaintiff of the advantage which he would get under S. 70, T. P. Act, which entitled him to such accession for the purpose of his security. This is, however, a minor complaint, as it deals only with the value of security and not with the amount which is recoverable by the plaintiff. The main point which has been urged by the learned counsel for the appellant before us is that in so far as the suit was not by a mortgagor for contribution but by a mortgagee for the recovery of his money by the sale of the mortgaged property, the lower Court was wrong in applying S. 82, T. P. Act, and in assessing the value of the various mortgaged properties as it prevailed at the time when they were mortgaged with the plaintiff in 1916 and in 1918. The appellant's contention is that he could not have been debited for anything more than the proportionate value of the items of property (11 to 22) purchased by him as found to be prevailing either on the date on which he instituted the present suit or on the date when he purchased these items of property but in no case on the date on which these properties were mortgaged with him. Learned counsel for the respondent contends, on the other hand, that although the plaintiff was originally a mortgagee, he has, by his subsequent purchase of items 11 to 22 come to occupy the mortgagor's position qua the items that he has purchased and would thus be liable to contribute on the principle contained in S. 82, T. P. Act. Since it has been held that the value of the property in a case of contribution under this section has to be taken with reference to the date on which the mortgage was executed, it has been urged on behalf of the respondent that the value of the property as existing on the date of the

mortgage was correctly taken by the trial
a Court as a basis for its decision. The narrative of facts makes it clear that the law applicable to the facts of this case will be what was in force before the amendment of the Transfer of Property Act in 1929. Section 82, T. P. Act, before the amendment read as follows :

> Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage.

b This section embodied the well recognized principle that a property which is equally liable with the other property to pay a debt shall not escape because the creditor has been paid out of the other property alone and must rateably bear the burden of a mortgage. As the mortgage debt is indivisible and if several properties are hypothecated to a creditor and have passed to different purchasers subsequently, a creditor is, as a rule, entitled to proceed against all the properties that were mortgaged with him, the only way to satisfy the mortgagee would be to tender the whole amount due under the mortgage.
c In such a case, it is only just that the person who satisfies the mortgage debt in its entirety should be indemnified by the purchasers of the other mortgaged properties and no fairer rule can be suggested than that each of the purchasers should contribute according to the value of the property purchased by him. This, however, is a right which exists between the owners of the mortgaged properties and does not affect the mortgagee's power to enforce his mortgage against all or any of the properties mortgaged to him. The contribution referred to in S. 82, T. P. Act, refers to this right and is applicable between the mortgagors inter se.
d If this is correct, strictly speaking, it would have no application to the present case which is not a suit by a mortgagor or a purchaser from a mortgagor in which any relief to contribution is asked for; but is plainly a suit by the plaintiff for the enforcement of the mortgage in his favour. It may be argued and in fact it was suggested by the learned counsel for the respondents that the plaintiff, although primarily a mortgagee, has, on account of his purchase of a part of the mortgaged property, placed himself in the mortgagor's shoes to the extent of the property purchased by him and the present suit must, consequently, be regarded as one not only by a mortgagee but by a representative
e of the mortgagor as well. This, however, is not quite correct, in our opinion. The present suit is for sale and it is impossible for a mortgagor to bring a suit for that purpose. It may be that in these circumstances some other principle of law is attracted and in construing the equities to which the mortgagor may be entitled, the principle of S. 82 may have to be borne in mind, but that is really a different matter. Reliance was placed on the other hand, by the learned counsel for the appellant on the last para of S. 60, T. P. Act, which reads as follows :

> Nothing in this section shall entitle a person interested in a share only of the mortgaged pro- f perty to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one, has or have acquired, in whole or in part, the share of a mortgagor.

This part of the section provides for the only exception in which a portion of the mortgaged property could be redeemed the general rule being, as stated before, that a mortgage was indivisible. This part of the section, as is clear from its language, provides, for redemption of a property by the mortgagor and would have ordinarily no
g bearing on a suit by the mortgagee for sale of the property. But since according to the provisions of this section, a mortgagor or a person interested in a share only of the mortgaged property is entitled, after the integrity of the mortgage is broken up by a mortgagee purchasing a portion of the mortgaged property or the equity of redemption therefor, to redeem his own share on payment of a proportionate part of the amount remaining due on the mortgage, it has a greater bearing on the present case than S. 82. If the mortgagor or a person interested in a share only of the mortgaged property is entitled to redeem his share on payment of a certain
h amount, it may be contended and the contention would be sound in our opinion that the mortgagee who has purchased a share of the equity of redemption can only sue for the recovery of the balance of the amount and not for the entire amount which was due to him under the mortgage. The principle, which is applicable to cases of this character, is that if a mortgagee happens to purchase a portion of the mortgaged property there would be a merger and extinction of liability under the mortgage to that extent unless it is found that it was to the benefit of the mortgagee to keep his mortgagee rights alive or that he declared his intention

either expressly or by necessary implication that he would keep his subsequently acquired rights distinct from his prior rights which he held as a mortgagee. Applying this principle therefore we are of opinion that in the absence of any other circumstances such as we have mentioned above, it must be held that the plaintiff's right to recover his money under the mortgage, was, on his purchasing the equity of redemption in a portion of the property mortgaged with him extinguished pro tanto; or in other words, he remained entitled to recover only a proportionate part of the amount due on the mortgage, that is to say, the portion of the debt which bears the same relation to the whole amount of the debt as the value of the property not purchased bears to the value of the whole of the properties comprised in the mortgage. The words "remaining due" in the section are, to some extent, misleading and must not be taken too literally.

The question then is as to the date on which this value of the property has to be calculated; or in other words, whether we have to take the value of the mortgaged property as it existed on the date of the mortgage into consideration or the value as it existed on the date on which a portion of the mortgaged property was purchased by the plaintiff, the date of the institution of the suit being, in our opinion, entirely immaterial. There is an observation at p. 98 by Candy J., in 26 Bom 88[1] that the value of the property would apparently be the value at the time of the purchase of the equity of redemption in part of the mortgaged property; but this, as pointed out in 6 Rang 417,[2] was obiter and not required for the decision of that case. It is true that in 43 Mad 372[3] the value actually taken into consideration was the value which was found to be existing three years after the date of the purchase; but there is nothing in that case to show that the value was any different either on the date of the mortgage or on the date when the property was purchased and this point was not in any case considered there.

Learned counsel for the appellant contends that since he is entitled to the benefit of any accession to the mortgaged property, the value should be calculated as at the date of his purchase for if that is not done, we would be, according to him, ignoring the principle enunciated in S. 70, T. P. Act. This argument, however, ignores the words used in the section which are to the effect that the mortgagee is entitled to the benefit of accession to the mortgaged property, "for purpose of the security" only. Section 70 cannot therefore render any assistance in the decision of this question. There is nothing in the last clause of S. 60 which would point to the conclusion that the value of the property has got to be taken into consideration as it existed on the date of the plaintiff's purchase although undoubtedly the person interested in a share only of the mortgaged property can redeem his share only on payment of a proportionate part of the amount remaining due on the mortgage. It is not clearly stated in that section, however, as to how this proportionate amount is to be calculated? Nor are we able to discover any reason why two different principles should be adopted in calculating the proportionate amount as between mortgagors inter se or as between a mortgagee who has purchased the equity of redemption of a portion of the mortgaged property and the mortgagor or any other person who may be interested in the other share of the mortgaged property. It seems to us that although S. 82 may not in terms apply, to a case like the present, it lays down a general rule and the last clause of S. 60 is an instance of the application of this rule to a mortgagee who happens to acquire a share of the equity of redemption. The right to contribution (to use the expression in a general sense) comes into being after all when more properties than one are mortgaged although it may not be capable of being enforced until the mortgagee has recovered his dues from one property or until, as in this case, a portion of liability under the mortgage is extinguished by the mortgagee purchasing a share of the equity of redemption. Once such a right becomes capable of being enforced between mortgagors inter se or what may be regarded as an equivalent of the same right as between a mortgagee who has acquired a share of the equity of redemption and the other persons interested in ths equity of redemption of the rest of the property, we should in either case on the principle recognized in S. 82, T. P. Act, look back to the value of the various properties as they existed on the date of the mortgage and abstain from considering the subsequent increase or decrease in their

1. ('02) 26 Bom 88 : 3 Bom L R 628, Fakiraya v. Gadigayya.
2. ('28) 15 A I R 1928 Rang 266 : 114 I C 290 : 6 Rang 417, Nyavunglebin Co-operative Bank v. Maung Ba U.
3. ('20) 7 AIR 1920 Mad 375 : 55 I C 666 : 43 Mad 372 : 38 M L J 239 (FB), Ponnambala Pillai v. Annamalai Chetti.

value. This rule has, in our opinion, the merit of certainty and the persons who are interested in the equity of redemption of one or more of the mortgaged properties, know the extent of their liability at the time of their purchase and have not to depend on the whims or fancies of a subsequent intending purchaser of a share of the equity of redemption in some of the properties mortgaged be it by a mortgagor or by any one else.

We are thus, in the absence of any other specific provision either in S. 60 or anywhere else, constrained for the above stated reasons to hold that the principle underlying S. 82 should be held to apply to cases of this kind and the mortgagee should not by his purchase be permitted to improve his position and should be treated in the same manner as a stranger would have been if he happened to purchase the property. After all by purchasing a share of the equity of redemption, the mortgagee has chosen to stand in his mortgagor's shoes to that extent and it is only to avoid a multiplicity of suits that the exact amount to which he is entitled has to be ascertained in the present suit. The decision in 6 Rang 417[2] is not opposed to the conclusion at which we have arrived. It must be remembered that the provisions of S. 82 were and are to be applied in the absence of a contract to the contrary and from the circumstances existing in the Rangoon case it is apparent that the parties intended that the property which was not actually built but which was going to be built should be covered by the mortgage which was created.

We must, for the foregoing reasons, hold that the method adopted by the lower Court in arriving at the figure to which it did was, in view of the admissions made by the parties before it, correct. The finding in regard to the value of the mortgaged properties in 1916 and 1918 was not contested before us and having regard to the admission by the parties before the lower Court that the value of the properties of items 1 to 10 when compared with the value of items 11 to 22 be calculated in the proportion of 2:11, the conclusion arrived at by the lower Court is inevitable. The lower Court has, however, made a small mistake in calculation. The proportionate liability of items 1 and 3 would be $\frac{400 \times 6120\text{-}1\text{-}0}{10654}$ and similarly the liability for item 2 would be Rs. $\frac{100 \times 6120\text{-}1\text{-}0}{10654}$. Bearing the principle contained in S. 70, T. P. Act, in mind, the plaintiff's security must be held to extend to the whole of the property purchased by defendant 6 along with the improvements effected thereupon but inasmuch as the amount decreed in favour of the plaintiff has been, we understand, deposited in Court, this direction would not confer any advantage on him. The appeal therefore fails and is dismissed. The respondents will have their costs of the appeal.

C.R.K./G.N. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 48

LAKSHMANA RAO J.

In re Ramasami Konar and another — *Petitioners.*

Criminal Revn. Case No. 633 and Petn. No. 594 of 1940, Decided on 27th November 1940, to revise judgment of Court of Joint Magistrate, Kumbakonam, D/- 11th April 1940.

Madras Prevention of Adulteration Act (3 of 1918 as amended by Act 19 of 1935), S. 16 (5)— Sample in fact analyzed by Government Analyst — Magistrate is not bound to send it again to Government Analyst under S. 16 (5).

Where the sample has in fact been analyzed by the Government Analyst it is not incumbent upon the Magistrate to send it again to the Government Analyst under S. 16 (5). [P49*a*]

S. Swaminathan and S. Nagaraja Ayyar — for Petitioners.

N. Somasundaram for Public Prosecutor — for the Crown.

FACTS. — The two appellants were convicted of offences under S. 5 (1) (b) and (4) of the Madras Act, 3 of 1918 and under R. 28 of the rules. The Sanitary Inspector purchased ghee from A-2 who was selling it in the shop of A-1. The ghee was certified by the Government Analyst to contain fat not derived from milk or cream to an extent of at least 15 per cent. It was also contended in the lower appellate Court that that Court did not comply with the request of the accused to send the same to the Government Analyst for analysis. The lower appellate Court held that there is no provision in the Act for the Court to do so and it was for the appellants to take whatever steps were necessary for the conduct of their defence and not for the Court to help it in doing so. There was no right under the proviso to S. 16 (5) available to the appellants for the simple reason that there was no separate public analyst for the municipality inquisition and the proviso only applied when there is a separate public analyst as distinct from the Government Analyst. It was for the appellants to adduce evidence in the lower Court to show that the sample sent by P. W. 1 to the Government

Analyst was not the sample ghee sold by him and this he could have done by sending the sealed part of the purchased ghee given to him by the Sanitary Inspector. Against this decision the present criminal revision petition is filed.

Order. — The sample was in fact analyzed by the Government Analyst, and it was not incumbent on the Magistrate to send it again to the Government Analyst under S. 16, cl. (5), Madras Prevention of Adulteration Act, 1918. There is therefore no ground for interference with the conviction of the petitioners and the sentence of petitioner 1 is not excessive. But petitioner 2 is the servant and his fine is excessive. The fine of petitioner 2 is therefore reduced to Rs. 5 and otherwise this petition is dismissed.

C.R.K./G.N. *Order accordingly.*

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(29) A. I. R. 1942 Madras 49

HORWILL J.

on difference between

WADSWORTH AND SOMAYYA JJ.

In re Boya Chinna Papanna

Prisoner — Accused.

Referred Trial No. 59 and Criminal Appeal No. 233 of 1941, Decided on 23rd July 1941, referred by Court of Session, Kurnool Division, D/- 14th March 1941.

(a) Evidence Act (1872), Ss. 24, 21—Confession is relevant without formal proof of voluntary nature by prosecution.

The wording of S. 24 suggests that unless it appears to a Court that an inducement, threat or promise was held out by a person in authority, a confession would be relevant under S. 21, without any formal proof of the voluntary nature of the statement, and it has certainly not been the practice of the Courts of the Madras Presidency to require from the prosecution formal evidence that the statement was voluntary. There is always cross-examination on this point and the accused is always questioned by the Court about his confession. It is customary for the Court to consider the suggestions made in cross-examination and the statement of the accused and for the Court then to decide whether there is anything in those suggestions or in the evidence which would lead it to suspect that the confession was not voluntary. [P 55b,c]

(On evidence Horwill J. agreeing with Wadsworth J.; Somayya J. dissenting, held that the confession was voluntary and hence it was not incumbent on the prosecution to let in further evidence of the absence of threats, promises or inducements leading to the confession. [P 50g; 55e]

(b) Evidence Act (1872), S. 24 — Person making confession of his guilt—There is no presumption that he had done so under pressure exerted on him (*Per Horwill J.*).

It is frequently assumed that a person would not make a confession of his guilt which would be prejudicial to his interest unless some pressure were exerted on him. But it is not correct. For a man who has committed a grave crime—unless he is a hardened offender—has an overwhelming desire to unburden himself and share with somebody his terrible secret. If he thinks of the consequences of his conviction, fear of them will act in restraint of his natural impulse to confess. At the moment of his arrest, the ordinary accused feels that the game is up and that it is futile to attempt to try to conceal his guilt any longer. [P 55e,f]

(c) Evidence Act (1872), S. 27—S. 27 whether affected by S. 162, Criminal P. C.

(*Per Horwill J.; Somayya J.*, doubting)—Voluntary confessions made to a police officer are admissible if they satisfy the conditions laid down in S. 27, Evidence Act, despite the provisions of S. 162, Criminal P. C. [P 55g]

(*Per Somayya J.*)—The question whether S. 27, Evidence Act, has been altogether abrogated by S. 162, Criminal P. C., ought to be set at rest by the Central Legislature without leaving the matter in a state of confusion. [P 54c]

(d) Criminal trial—Evidence—Disinterested witnesses not coming forward at earliest opportunity and informing police — Merely on this their evidence should not be rejected.

Unfortunately, witnesses are almost always unwilling to speak and thereby risk the enmity of the accused and his friends and put themselves to great inconvenience unless they are personally interested. Hence the mere fact that witnesses who are absolutely disinterested did not inform the police at the earliest opportunity that they had seen something connected with the murder but waited for a day before they told the police is no ground for rejecting their evidence. [P 56b]

N. T. Raghunathan and K. S. Jayaram — for Prisoner.

Public Prosecutor — for the Crown.

Wadsworth J. — The appellant has been sentenced to death for the murder of Papanna on the night of 6th November 1940. As the learned Sessions Judge observes, the case against the appellant depends substantially on his own confessional statement, corroborated by the recovery of incriminating articles as a result of that statement. The main question is whether this statement was rightly admitted and made the basis of his conviction, having regard to the provisions of Ss. 24 and 27, Evidence Act.

Papanna was murdered when he was asleep at night and no one saw it being done. The complaint mentioned seven suspects, including the appellant and his co-accused, but this was evidently mere guesswork. The Sub-Inspector arrived on the 7th, and on the 8th he secured the evidence of P. W. 7 that on the night of the murder as he was coming home from the fields he had seen the two accused sitting on the sluice of the tank (some distance from the place of the murder) and had spoken to them and that the appellant had an axe, while accused 2 had

a a spear. The witness saw nothing suspicious in their appearance or conduct. Apparently as a result of this information, the Sub-Inspector (who appears to have taken no action on the vague suspicions in the complaint) deputed constables to arrest the two accused. Those constables are not witnesses. On the morning of the 9th, when the Sub-Inspector was at the chawadi with the village munsif and others, the appellant was produced by the constables and was formally arrested and questioned by the Sub-Inspector. In response to these questions he is alleged to have at once confessed that he and accused 2 had murdered Papanna and b that he had thrown his axe into the tank and had hidden his bloodstained clothes in a pot in his house. He then produced the bloodstained clothes from their hiding place and the axe from the water of the tank. As was to be expected, the weapon bore no certifiable trace of blood, but the clothes were stained with human blood. After these recoveries, the constables produced accused 2 (who had been given the benefit of the doubt by the lower Court). He was also arrested and questioned and stated that he had hidden his spear in the fodder in his manger. This was produced and was found to be c bloodstained, but the Imperial Serologist could not say whether or not it was stained with human blood.

On the 9th, the Sub-Inspector also secured the evidence of P. W. 8, who has deposed that on the night of the crime he met the two accused at about midnight, coming away from the fields, armed with an axe and a spear. He said nothing about what he had seen till the police examined him. The Sub-Inspector in cross-examination denied that he had told either of the accused that he would be taken as an approver, denied that he told accused 2 that the appellant had confessed and repudiated a suggestion that d the accused were arrested on the 7th along with others and compelled to confess. Before the committing Magistrate, the appellant stated that his nose bled and that his clothes thus became stained, but he denied having produced those clothes from his house. He also asserted that he had been detained since the 7th afternoon and had been beaten by the police in order to make him confess, but that he had made no statement. Accused 2 also denied having produced the spear and asserted that he had been beaten. In the Sessions Court the appellant added that P. Ws. 7 and 8 were false witnesses and that he never had the axe.

On this evidence it is contended that e there is a serious doubt as to the voluntary nature of the appellant's confessional statement, which the prosecution ought to have removed by positive evidence ; and that in any case this confession is retracted and is substantially uncorroborated. The argument is that something must have preceded the confession and that the prosecution have not discharged the duty laid upon them of proving that the confession was not induced in an objectionable manner. It seems to me that this argument overlooks the nature of the appellant's own statements. He has not alleged that he was induced to confess by violence or promises. His case was that f though he was beaten he did not confess at all and did not produce the incriminating articles. It is true that the Sub-Inspector was asked questions which seem to suggest that the confessions were improperly induced, but these suggestions are difficult to reconcile with the appellant's own denial that he made the statements and produced the articles. Two witnesses have corroborated the police evidence that the confessions were voluntary. There is no evidence to support the assertions that the accused were arrested on the 7th, nor does this seem likely. There is no evidence that the accused g were beaten. There can be no doubt that the appellant did produce the bloodstained clothes. There is only his own assertion as to the way in which they came to be stained with blood and this explanation is inconsistent with the fact that they were hidden. There is no explanation of the circumstance that he produced the battle axe from the water of the tank. The appellant having contented himself with a complete denial of the incriminating statements and conduct, I do not think that it was incumbent on the prosecution to let in further evidence of the absence of threats, promises or inducements h leading to the confession. In my opinion the appellant has been rightly convicted and sentenced. But as my learned brother has taken a different view of the evidence, the case will have to go before a third Judge.

Somayya J. — I regret that I have felt compelled to differ. The appellant has been convicted of the offence of murder and sentenced to death by the Sessions Judge of Kurnool. Two persons were charged and tried for the offence; the appellant who was accused 1 was convicted and accused 2 was acquitted. The appellant is said to have murdered one Papanna of Ulindakonda, Kurnool District, on the night of 6th Nov-

ember 1940, when he was sleeping alone in his field which is about 1½ miles from the village. The deceased went to the field to watch over the harvested korra crop and while asleep, he was undoubtedly killed by someone. The question is "Was it the appellant that did so?"

Enmity between the appellant and the deceased was alleged; the Judge finds that no enmity has been proved and the learned Public Prosecutor has not challenged this finding before us. The conviction rests solely on the retracted confession of the appellant which it is said is corroborated by the evidence of two witnesses, P. Ws. 7 and 8 and by the discovery of some property as the result of the confession. P. W. 3, the son of the deceased, discovered his father dead after midnight and informed his mother P. W. 4. Then a complaint EX. B was made to the village munsif at about 2 A. M.; the report of the village munsif was despatched at about 5 A. M. and reached the Kurnool Taluk Police Station at 10-30 A. M. The Sub-Inspector reached the village at 2-30 P. M. the same day. He got some information from P. W. 7 on the 8th and deputed his constables to fetch the two accused. On the 9th he examined P. W. 8 and on the same day, the appellant was brought before the Sub-Inspector and when questioned in the presence of P. W. 9 and P. W. 10, the appellant is said to have straightway confessed his crime. The confessional statement EX. D was written by P. W. 9. Accused 2 was also brought before the Sub-Inspector on the same day; in fact, the constables had been asked on the 8th to secure accused 2 also. When accused 2 appeared he was questioned by the Sub-Inspector and he is also said to have at once confessed and given a statement, EX. E. Exhibit D was recorded at 9 A. M. and EX. E at 12 noon. Exhibit D runs as follows:

> At the instigation of Obigadu, son of Boya Thimmappa, Hanumanthagadu, son of Boya Chinna Mari Yankata and I cut and killed the deceased, Boya Ullam Papanna four days ago now, on the night of Wednesday, while he was sleeping near the korra sheaves in the field. I cut and killed him with the battle axe while Hanumanthagadu cut and killed him with the spear. I threw away my battle axe in the waters of the tank (or lake) at the terminal (last) sluice, on my return trip. It is bloodstained. The white angi and the white dhoti which I had then worn were stained with blood. I have concealed that dhoti and angi in an empty mud pot, in my house, in which water is boiled. I shall get them and deliver to you.

After recording EX. D a search was made of the appellant's house and the appellant is said to have produced from a pot inside the house a white angi (a coat) and a white dhoti (cloth); these were said to contain blood marks. Then they proceeded to the tank mentioned in EX. D; the appellant is said to have produced the battle axe from underneath the water. This was at 11 A. M. (D-2). After the searches and recovery of the articles evidenced by EX. D-1, and EX. D-2, the party returned to the chavadi and all of them remained there till 12 noon when accused 2 was produced. When questioned he gave the statement EX. E which runs as follows:

> At the instigation of Boya Obigadu, Boya Chinna Papigadu and I, together, cut and killed four days ago now, on the night of Wednesday. I cut and killed with my screw spear and Chinna Papigadu cut and killed with a battle axe. (I have concealed my spear amidst (fodder) rubbish in the manger, inside my house. It is bloodstained. I shall produce it.) Chinna Papigadu threw away his battle axe that night, on our return trip, in the water of the pond (tank or lake).

After recording EX. D, a search was made for the spear; accused 2 produced a spear from his house and EX. E-1 was recorded at 1 P. M. evidencing this search. Then both accused 1 and 2 were charged with the offence of murdering Papanna. Before the committing Court, both the accused retracted their confessions. The appellant said that he had no motive to kill the deceased, that the police beat him severely and asked him to confess. He denied that the axe was his. As regards the bloodstained clothes, he said that owing to excessive heat, his nose had bled and the clothes had become bloodstained in consequence. At the trial in the Sessions Court, the accused adhered to the statements which they gave in the committing Court. The Judge acquitted accused 2 on the ground that the admissible portion of EX. E did not amount to a confession. As regards the appellant he held that the confession contained in EX. D was voluntary and that though it is a retracted confession, it is corroborated by the recovery of M. Os. 9, 10 and 11 and by the evidence of P. Ws. 7 and 8. The appellant's explanation for bloodstains on M. Os. 9 and 10 was rejected on the ground that it was inconsistent with EX. D. The Judge then referred to the evidence of P. W. 7 and P. W. 8 that the appellant was seen in the vicinity of the field where the deceased met his death on the night of the sixth and that accused 1 had been armed with a battle axe. On this evidence he convicted the appellant of the offence of murder of Papanna and sentenced him to death.

It is urged in appeal that it is unsafe to convict a person on the basis of a retracted

confession, that in this case there was no motive proved for the appellant to kill the deceased, that P. W. 7 himself stated that there was nothing unusual in villagers going about with a battle axe when going in nights to watch their fields, that even if his evidence is accepted as true, there is nothing suspicious about the appellant's conduct on the previous night, that the evidence of P. W. 7 and P. W. 8 should not be accepted on the ground that their statements were available only on the eighth and ninth, i. e., two and three days after the occurrence. It is also urged that there are enough indications in the evidence to show that the confession was not voluntary.

Taking the evidence of P. W. 7 and P. W. 8 first, the evidence of P. W. 8 was available only on the 9th, i. e., on the day of the confession. Three days had elapsed and it is unsafe to rely upon the evidence which is given so late. The same remarks apply to P. W. 7 whose statement was available only on the 8th. Two days had elapsed. Neither of them had stated to anyone what they had seen on the night of the sixth even though they knew that the deceased was murdered on the night of the 6th. Their conduct is inconsistent with their having seen the appellant armed with a battle axe on the night of the 6th anywhere near the scene of the occurrence. I think it is unsafe to accept the evidence of P. W. 7 or P. W. 8. Before I go to Ex. D, we must see what happened on the 7th and 8th. P. W. 11, the Sub-Inspector of Police, Kurnool Taluk Station, came to the village on the 7th at about 2-30 P. M. In Ex. B, the wife of the deceased gave the names of seven persons as suspects. Among these are accused 1 and 2. After P. W. 11 arrived in the village, he did not take any steps to verify if these men were in the village nor even to visit the house of any of the seven persons mentioned in Ex. B. The village munsif who was examined as P. W. 9 was asked about it and he said :

> Till the arrival of the Sub-Inspector I did not take any steps to verify if these seven men were in the village. The Sub-Inspector was in the village on the 7th and 8th. Neither he nor I visited the houses of any of the seven men named in Ex. B on the 7th or 8th.

The Public Prosecutor conceded that as the Sub-Inspector was not asked in chief examination to deny what the village munsif stated, we must take it that the statement of the village munsif is true. It is said by the learned Public Prosecutor that merely on the ground that the names of these persons were given as suspects in Ex. B, their houses could not be searched. True. But that is no explanation why, as the village munsif says, steps were not taken to see whether these people were even in the village or why their houses were not even visited. According to the prosecution, what put the Sub-Inspector of Police ultimately on to accused 1 and 2 is the statement given by P. W. 7 on the 8th. P. W. 7 stated that he saw accused 1 and 2 on the night of the 6th, accused 1 with a battle axe and the 2nd with a spear. It is this information that evidently led the Sub-Inspector of Police to take action against these accused and to depute two constables to fetch them. It is strange that with the information given by P. W. 7 the Sub-Inspector did not think it worthwhile to search the houses of accused 1 or 2 but contented himself with merely deputing two constables to fetch them. He says :

> Till I deputed the constables on the 8th to arrest accused 1 and 2, I did not take any steps to apprehend any of the seven persons mentioned in Ex. B or to search their houses. I did not attempt to search the houses of accused 1 and 2 even after deputing constables on the 8th to get them. I had no reason to believe that accused 1 and 2 would confess. I thought I had no sufficient grounds to search their houses though I had decided to arrest them.

This is a curious answer. If he had sufficient grounds to arrest them, it is difficult to understand his statement that he had not sufficient grounds to search their houses. The way in which the accused are said to have confessed the moment they appeared before the Sub-Inspector and what went before lead me to suspect that everything was known to the police and that the whole thing was merely a farce of having a confession first and a search immediately thereafter to bring the case within S. 27, Evidence Act. The appellant is first produced at 9 A. M. Immediately he makes a confession, Ex. D. Then the first search is made and that is recorded at 10 o'clock. At 11 o'clock the second search was made which led to the recovery of the battle axe. At 12 noon, accused 2 is produced and he confesses immediately. Then the search of his house is made and the search report was prepared at 1 P. M. to show the recovery of the spear in consequence of information contained in Ex. E. If the prosecution evidence is true, I cannot understand why even after Ex. D in which accused 2 was very clearly implicated, his house was not searched. The searches in connexion with Ex. D were finished at 11 A. M. Then as P. W. 10 states in cross-examination, the party returned and

were simply sitting until 12 noon when accused 2 was brought. P. W. 10 says :

> When we returned from the tank to the chavadi, we did not expect accused 2 to be produced . . Still we stayed on there although we had nothing specific to wait for.

There is another point taken by the appellant. It is said that the confession itself is not admissible under S. 24, Evidence Act. That section runs thus :

> A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the person, proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

The rule in England as stated in Taylor on Evidence is this, p. 872 (Edn. 12) :

> Before any confession can be received in evidence in a criminal case, it must be shown to have been voluntarily made . . . . . The rule which excludes confessions not shown to have been made voluntarily is a rule of policy. It is not that the law presumes such statements to be untrue, but that owing to the danger of receiving such evidence, Judges have thought it better to reject it.

In (1914) A C 599[1] at p. 609, the Judicial Committee observed :

> It has long been established as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

In India, however, the matter is put more elaborately in S. 24. One question that arises under S. 24 is whether it is really on the prosecution to prove that the circumstances mentioned in S. 24 do not exist or whether it is upon the accused to prove that the making of the confession was caused by inducement, threat or promise. It is no doubt true that the burden of proving facts which are specially within the knowledge of a person may be thrown upon him but having regard to the well-known principle of criminal jurisprudence recognized in (1914) A C 599,[1] I have no reason to doubt that what the Indian Legislature attempted to enact more elaborately in S. 24, Evidence Act, is that a Court must be satisfied before admitting a confession that it is free from all taint. The wording of S. 24 is "if it appears to the Court to have been caused by inducement, threat," etc., a confession is irrelevant. It is not "if it is proved to have been caused by inducement, threat or promise." As pointed out in 52 Cal 67[2] at p. 82, the Indian Legislature has deliberately used the expression "if the making of the confession appears to the Court" and not "if it is proved to the satisfaction of the Court." Therefore, if the Court has any reason to doubt the free and voluntary nature of the confession, then it is for the prosecution to prove that it was made without any of the inducements, threats or promises mentioned in this section. It is not as if there is less need for protection to an accused person in India than in England. Yet in England, the burden lies undoubtedly on the prosecution to prove that the confession was voluntary before it is admitted. I have no reason to think that the standard is less strict in India. As I said before, the Legislature seems to have endeavoured to enact the same rule in a more elaborate manner.

It is said that in this case the appellant set up the story that he was beaten by the police and that if it was true, there would have been some marks of violence on the person of the accused. As regards the argument that the accused has not proved that he was beaten, it is as in most of such cases impossible to expect him to be able to prove to the satisfaction of the Court that he was belaboured or that there are any of the infirmative circumstances mentioned in S. 24. Then it is said that what was suggested to the Sub-Inspector during the cross-examination was that some inducements were held out to the appellant in order to induce him to confess and not that he was beaten. P. W. 11 was asked whether he did not tell either of the accused that he would be taken as an approver if he confessed and he was also asked whether it was not true that accused 1 and 2 were arrested even before the ninth and compelled to make a confessional statement. There is enough suggestion in this second sentence that they were compelled and what is mentioned in the accused's statement is only an elaboration of what is taken down as compelled in the cross-examination of P. W. 11. There is nothing in the evidence of P. W. 10 to advance the case of the prosecution. There are enough materials in this case to raise a very serious doubt in my mind about the free and voluntary nature of Ex. D. I apply therefore the rule enunciated in 52 Cal 67[2] and hold

1. ('14) 1 A I R 1914 P C 155 : 23 I C 678 : 15 Cr L J 326 : 1914 A C 599 : 83 L J P C 185 : 111 L T 20 : 30 T L R 383, Ibrahim v. The King.

2. ('25) 12 A I R 1925 Cal 587 : 86 I C 414 : 26 Cr L J 782 : 52 Cal 67 : 29 C W N 300, Emperor v. Panchkari Dutt.

that it was the duty of the prosecution to have satisfied the Court that none of the circumstances mentioned in S. 24 exist in this case and the evidence falls far short of it. On the other hand, all the circumstances point to the conclusion that very much more should have happened than what is admitted by the prosecution.

Lastly there is the fact that the accused retracted the confession and the question is whether it is safe to convict him on the strength of the retracted confession. Necessity of corroboration in a case of this kind, is recognized by all the authorities and was not seriously questioned by the public prosecutor. It is said that in this case the corroboration is to be found in the evidence of P. W. 7 and P. W. 8 and in the discovery of M. Os. 9, 10 and 11. It is unnecessary to go into this question fully in the view that I have taken on the other points. But there seems to be some force in the appellant's contention that what was discovered by reason of the information given in Ex. D ought not to be treated as corroboration of the statement made in Ex. D and that even if as P. W. 7 and P. W. 8 say, accused 1 was carrying a battle-axe which it was very common for every villager to do, then there is nothing suspicious in that act and that again would not be a corroboration of Ex. D. I would reverse the conviction and sentence and direct the appellant to be set at liberty.

Before leaving this case, I should say that the question whether S. 27, Evidence Act, has been altogether abrogated by S. 162, Criminal P. C., ought to be set at rest by the Central Legislature without leaving the matter in a state of confusion. It is enough to point out that the Lahore High Court by a majority held that it was repealed and the Local Legislature interfered in the matter. The Allahabad High Court has also held that S. 162 abrogates S. 27, Evidence Act. I am very strongly in favour of this view. Two decisions of the Madras High Court have been brought to my notice in which it has been held that S. 27 still stands in spite of S. 162, Criminal P. C., and this view has been taken by the Nagpur and Patna High Courts. It is obviously very unsatisfactory to leave the matter in this state. Advantage might be taken of this opportunity to examine the whole law of confessions and amend S. 24 so as to make it clear that before a confession is allowed to go in, the prosecution must prove that it is voluntary.

(On account of the difference in opinion of the two Judges the case was placed before Horwill J. who delivered the following judgment.)

Horwill J.—The appellant was convicted of an offence punishable under S. 302, Penal Code, by the Sessions Judge of Kurnool and sentenced to death. On a difference of opinion between Wadsworth and Somayya JJ. the appeal has been posted before me. The facts of the case have been stated in the judgments of my learned brothers and the main question that I have been asked by the learned advocate for the appellant to consider is whether the confession made by the appellant was made voluntarily. On this point Wadsworth J. held that it was and Somayya J. that it was not.

The wife of the deceased person had no information as to who had committed the murder, but because of past enmity she suspected seven persons, and amongst them were the two persons who were accused in the lower Court. No definite material was forthcoming for a day and a half or so that was sufficient to warrant the arrest of either of them; but on 8th November, the offence having taken place on the night of the 6th, P. W. 7 told the Sub-Inspector that he had seen the two accused together on the night of offence, the appellant armed with a battle axe and the other accused with a spear. As the deceased man seemed to have had his head battered in with blows from an axe and to have been stabbed with a spear, the Sub-Inspector sent two constables on the night of the 7th to arrest the accused; and they were brought to the Sub-Inspector the following morning. He then had with him the Village Magistrate and the President of the Panchayat Board to assist him in his investigation. The Sub-Inspector immediately questioned the appellant, who told him that he and the other accused had committed this offence, and that he had thrown the axe with which the offence was committed into a certain tank, and that the bloodstained clothes which he was wearing on the night of the offence had been placed in a pot inside his house. The learned advocate for the appellant contends that it was not sufficient for the prosecution to let in evidence of the questions put and the answers of the appellant; but that they were bound to show by all evidence possible that the confession was made in circumstances from which it could be conclusively deduced that the statement was voluntary. Particular reliance has been placed on a decision of the Privy Council reported in (1914) A C 599[1] in which it has been said:

a It has been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority.

Our own Evidence Act does not put the matter in the same way. Section 21 makes admissions relevant and says that they may be proved as against the person who makes them. Section 24 deals with an admission which amounts to a confession and adds a proviso to the ordinary rule that an admission can be proved against the person who b makes it by laying down that :

A confession made by an accused person is irrelevant if the making of the confession appears to the Court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient .... to give the accused person grounds .... for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature ....

This wording suggests that unless it appears to a Court that an inducement, threat, or promise was held out by a person in authority, a confession would be relevant under S. 21, Evidence Act, without any formal proof of the voluntary nature of the c statement. It has certainly not been the practice of the Courts of this Presidency to require from the prosecution formal evidence that the statement was voluntary. There is always cross-examination on this point and the accused is always questioned by the Court about his confession. It is customary for the Court to consider the suggestions made in cross-examination and the statement of the accused and for the Court then to decide whether there is anything in those suggestions or in the evidence which would lead it to suspect that the confession was not voluntary. However, this discussion d whether formal proof by the prosecution of the voluntary nature of the confession is necessary is an academic one; because P. W. 9 has set out the circumstances under which the accused was questioned; he says that

a policeman brought accused 1 to the Sub-Inspector about 9 A. M. We had gathered there casually .... After arresting accused 1, the Sub-Inspector asked him 'What do you know of the death of Vullam Papanna.'

The accused's confession seems to have been an answer to that question. This is very much what happened in the Privy Council case above referred to (1914) A C 599,[1] where the officer who was the superior of the soldier charged, said to him, "Why have you done such a senseless act"? to which the accused e replied, "Some three or four days he has been abusing me. Without a doubt I killed him." That statement was held to be a voluntary one; and I see no reason for holding that the statement in the present case was not made voluntarily. It is probably true that the Sub-Inspector preferred obtaining information from the accused rather than by searching his house; but that does not in any way cast any doubt on the voluntary nature of the confession made. It is frequently assumed that a person would not make a confession of his guilt which would be prejudicial to his interest unless some pressure were exerted on him. I do not be- f lieve this to be the case. A man who has committed a grave crime—unless he is a hardened offender—has an overwhelming desire to unburden himself and share with somebody his terrible secret. If he thinks of the consequences of his conviction, fear of them will act in restraint of his natural impulse to confess. At the moment of his arrest, the ordinary accused feels that the game is up and that it is futile to attempt to try to conceal his guilt any longer. Even in cases in which no confession of the accused is tendered in evidence, because it does not lead to any discovery, a perusal of the records frequently shows that some sort of g a confessional statement is made. There is nothing in the evidence in this case which suggests that the appellant was detained and questioned for a considerable time before he made his statement. The evidence is in fact to the contrary.

That voluntary confessions made to a police officer are admissible if they satisfy the conditions laid down in S. 27, Evidence Act, despite the provisions of S. 162, Criminal P. C., has been held consistently by this Court over a long course of years. If the statement made by the appellant was voluntary, as I hold it was, there can be little doubt h of the truth of his confession. As a result of it the axe was found in a tank, and it is unlikely that it would have been found had it not been for the confession. Further, certain clothes stained with human blood were found in the house of the appellant, which he said in his confession were worn by him at the time of the murder. The evidence of P. Ws. 7 and 8 is also corroborative of the confessional statement; for they saw the two accused persons on the night of the offence not far from the scene of offence, armed with instruments similar to those with which the appellant says they committed the murder. The medical evidence shows that

such weapons could have caused all the injuries found on the body of the deceased. P. Ws. 7 and 8 are unconnected either with the appellant or with the deceased; and it is difficult to believe that they would be willing to say that they saw the accused armed with an axe and a spear respectively near the scene of offence on the night when the offence was committed unless they had actually seen them. If it were customary for witnesses to come forward at the very first opportunity and tell the police that they had seen something connected with the murder then the value of the evidence of P. Ws. 7 and 8 would be seriously diminished by their failure to inform the police at the earliest opportunity. P. W. 7 waited a day or so before he told the Sub-Inspector what he knew and then probably spoke only because he was questioned, whilst P. W. 8 probably did not come forward with information until after the appellant had made his confession. Unfortunately, witnesses are almost always unwilling to speak and thereby risk the enmity of the accused and his friends and put themselves to great inconvenience unless they are personally interested. There is nothing improbable in this evidence of these witnesses. They are absolutely disinterested and so there is no reason why their evidence should not be accepted.

I therefore agree with Wadsworth J. that the appellant was properly convicted of the offence with which he was charged. A strong plea has been made for the modification of the sentence; but I do not find any circumstances that extenuate the crime of the appellant. The murder was apparently a deliberate one, committed in cold blood while the deceased was lying in his field. The side of his head was crushed by repeated blows with a weapon such as the axe used by the appellant, which shows that these blows must have been delivered while the deceased was lying on the ground. The conviction and sentence are therefore confirmed and the appeal dismissed.

C.R.K./K.S. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 56

WADSWORTH AND PATANJALI SASTRI JJ.

Sree Rajah Velugoti Navaneetha Krishna Yachendra Bahadur Varu—*Petitioner*

v.

Sirigiri Ramanujulu Chetty—*Respdt.*

Civil Revn. Petn. No. 1329 of 1939, Decided on 12th March 1941, to revise order of Special Deputy Collector, Chandragiri Division, D/- 12-1-1939.

Madras Agriculturists Relief Act (4 of 1938), Ss. 15 and 3 (4)—Scope of S. 15—Agraharam in Kalahasti zamindari—Zamindar must be regarded as "landholder" of agraharam — Fact of proprietor of agraharam also being regarded as landholder by virtue of amending Act 18 of 1936 does not affect zamindar's position as landholder of agraharam—Jodi payable by proprietor of agraharam to zamindar comes within purview of S. 15.

The scope of the relief intended to be afforded by S. 15 must be determined with reference to the wider definition of rent contained in S. 3 (4) and not to the definition in the Madras Estates Land Act. The operation of S. 15 is not confined to cases arising between landlord and tenant under the Madras Estates Land Act. [P 58*d*,*e*]

In the case of an agraharam in Kalahasti zamindari continuing as before the permanent settlement to be held on an under tenure under the zamindar, the zamindar must be regarded as the owner, and therefore the "landholder" of the village. The fact that by virtue of the amending Act, 18 of 1936 the proprietor of the agraharam has also to be regarded as a "landholder" does not affect the position of the zamindar as a landholder in respect of that village. The definition of a landholder clearly contemplates a plurality of landholders. The relation between the zamindar and the proprietor of the agraharam is one of owner and an under tenure holder and there is nothing incongruous in holding that both of them are "landholders" as defined in the Madras Estates Land Act. The jodi payable by the proprietor of the agraharam to the zamindar being payable to a landholder of an estate comes within the purview of S. 15, Madras Agriculturists' Relief Act : C. R. Ps. Nos. 205 to 209 and 246 to 249, 459 and 460 of 1939 and 24 M L J 659, *Disting.*; ('22) 9 A I R 1922 P C 168, *Ref.*; ('40) 27 A I R 1940 Mad 422, *Dissent.* [P 57*g*,*h* P 58*a*]

P. V. Rajamannar and K. Subba Rao — for Petitioner.

N. C. Subbiah — for Respondent.

Patanjali Sastri J.—This civil revision petition arises out of an application filed by the respondent in the Court of the Special Deputy Collector, Chandragiri, under S. 15 (4), Madras Agriculturists' Relief Act. In order to obtain the benefits of the Act, the respondent who is the proprietor of Muddumudi village, an agraharam situated in the Kalahasti zamindari, paid into Court rupees 21-12-2 being the jodi alleged to be due to the petitioner herein, who is the representative in interest of the zamindar, and prayed for a declaration that the "rent" due for fasli 1347 had been fully paid up. The petitioner pleaded that the jodi payable by the respondent was not "rent" as defined by S. 3 (4) of the Act and that therefore the Court had no jurisdiction to entertain the application. This objection was overruled by the Court below and the only question for determination in this civil revision petition is whether the petitioner's contention is correct. The term "rent" is defined for the purposes of the Act as meaning not only

rent as defined by the Madras Estates Land Act, but also
quit rent, jodi, kattubadi, poruppu or the like payable to the landholder of an estate as defined by the Madras Estates Land Act, 1908, whether a decree, or order of a civil or revenue Court has been obtained therefor or not.

The Madras Estates Land Act as amended by the Madras Act, 18 of 1936, contains the following definitions (so far as they are material here) :

Section 3 (2) (d)—Estate means any inam village of which the grant has been made, confirmed or recognized by the British Government, notwithstanding that subsequent to the grant, the village has been partitioned among the grantees or the successors-in-title of the grantee or grantees.

. . . .

(5) "Landholder" means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessors-in-title or of any order of a competent Court or of any provision of law.

The petitioner's contention is that the agraharam in question is an estate and the respondent and not the petitioner is the "landholder" thereof, and that therefore the jodi due from the respondent is not "payable to the landholder of an estate" as there could not be two "landholders" in respect of the same "estate." Now, an agraharam is a village granted to a community of Brahmins by former rulers or zamindars either absolutely rent-free in which case it is called sarva agraharam or on condition of paying annually a fixed sum which is variously called jodi, poruppu or kattubadi. At the time of permanent settlement of zamindaris in this Presidency, such villages were excluded from the assets of the zamindari for the purpose of fixing the peishcush or assessment payable by the zamindar to the Government, the jodi payable to him being alone included. The result of this was that such villages were thereafter regarded as held by the agraharamdars under the Government and subject to its right of resumption on valid grounds, and they were dealt with on that footing at the time of the subsequent inam settlement when they were "enfranchised" by the Government relinquishing its right of reversion in lieu of a fixed annual payment called "quit rent." The jodi, however, continued to be payable to the zamindar as before but it was no longer indicative of the zamindar's ownership and the agraharamdar's undertenure of the village. This was why such a village was held not to fall under cl. (e) of S. 3 (2), Madras Estates Land Act, which included in the definition of estate villages held on a permanent undertenure in permanently settled zamindaris : *see* 21 M L J 659.[1] This is not, however, the position in respect of agraharam villages in the Kalahasti zamindari. As pointed out by the Privy Council in 48 I A 415=44 Mad 864,[2] the permanent settlement of what were known as the four western zamindaris, namely Venkatagiri, Kalahasti, Bomvauzepalam and Karvetnagar, was not made in accordance with the practice described above which was prescribed by the Permanent Settlement Regulation (25 of 1802), but was made on quite different lines independently of the provisions of the regulation; that is to say, the peishcush was not based upon a computation of the assets of these zamindaris after excluding lakhiraj or revenue free lands and other lands paying only small quit rents or jodis but was fixed on the basis of a commutation of the military service subject to which the zamindaris were originally held.

The agraharams and other inam villages were thus not excluded from the zamindaris by the settlement and it was for this reason that their Lordships held in the case referred to above that the Government had no right of reversion in such inams comprised in the Venkatagiri zamindari. The position therefore is that the agraharam here in question which is in Kalahasti zamindari continued as before the permanent settlement to be held on an undertenure under the zamindar whose right has now become vested in the petitioner. In such circumstances, we can see no reason why the petitioner should not still be regarded as the owner, and therefore the "landholder" of the village. The fact that by virtue of the amending Act 18 of 1936 the respondent has also to be regarded as a "landholder" does not affect the position of the petitioner as a landholder in respect of that village. The definition of a landholder clearly contemplates a plurality of landholders by making express provision for settlement of disputes that may arise in such cases. The relation between the petitioner and the respondent is thus one of owner and an under-tenure holder, just as it would be if the zamindar had made a post-settlement grant of the village as an agraharam, and there is nothing incongruous in holding that both of them are "landholders" as defined in the Madras Estates Land Act.

1. ('13) 24 M L J 659 : 20 I C 769 : 1913 M W N 782, Veerabhadrayya v. S. Venkanna.
2. ('22) 9 AIR 1922 P C 168 : 73 I C 741 : 44 Mad 864: 48 I A 415 (P C), Secretary of State v. Rajah of Venkatagiri.

The jodi payable by the respondent to the petitioner being thus payable to a landholder of an estate comes within the purview of S. 15, Madras Agriculturists' Relief Act. Our attention was drawn to the decision of Pandrang Row J. in C. R. Ps. Nos. 205 to 209, 246 to 249, 459 and 460 of 1939 where the learned Judge held that jodi payable by certain inamdars of whole inam villages lying within the Shulagiri zamindari was not "rent" as defined in Madras Act, 4 of 1938 and did not therefore attract the application of S. 15 (1) thereof. The learned Judge observed :

> It being clear that the petitioners themselves are the landholders in respect of these villages, they cannot rely on any payments made by themselves to the zamindar as payments made to the landholder. It follows, therefore, that S. 15 (1) does not apply to the petitioners.

It does not appear how the villages were dealt with at the time of the settlement and if, as in the general case, they were excluded from the assets of the zamindari, the decision would be correct. But, as already pointed out, the position in the present case is entirely different and the decision referred to does not assist the petitioner. A recent decision of Abdur Rahman J. reported in (1940) 1 M L J 369[3] was also brought to our notice. It related to amounts payable to an inamdar of a whole village by holders of minor inams comprised therein for water charges and land cess. The learned Judge referred to the definition of rent in the Madras Estates Land Act and held, in the light of that definition, that

> if the jural relationship between the parties is not that of the landlord and tenant S. 15, Madras Agriculturists Relief Act, or R. 6 (1) would have no application.

This view overlooks the definition of rent in the Madras Agriculturists Relief Act which plainly includes "quit rent, jodi, kattubadi, poruppu or the like payable to the landholder of an estate," which are not included in the definition in the Madras Estates Land Act and it is obvious that the scope of the relief intended to be afforded by S. 15, Agriculturists Relief Act, must be determined with reference to the wider definition contained therein. It was said that the reference to a "holding" in the proviso to S. 15 (1) militated against this view. That term is no doubt defined in the Estates Land Act so as to denote lands held by a ryot under a single patta but there is no warrant for importing that definition into the Agriculturists Relief Act which does not define that expression. If the jodi payable to the landholder of an "estate" is rent, the person liable to pay it is a "tenant," as defined by the proviso, for the purposes of the section, and the property in respect of which such "rent" has accrued must be regarded as his "holding." We are therefore unable to agree with the observations of the learned Judge in the case cited above confining the operation of S. 15 to cases arising between landlord and tenant under the Estates Land Act. In the result, the civil revision petition fails and is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

3. ('40) 27 A I R 1940 Mad 422: (1940) 1 M L J 369, Madura etc. Devasthanam v. Masanam Pillai.

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(29) A. I. R. 1942 Madras 58

BURN AND HORWILL JJ.

In re Nadimpalli Bangaruraju and others — Prisoners — Appellants.

Referred Trial No. 39 of 1941 and Criminal Appeals Nos. 135, 136, 171 of 1941, Decided on 22nd April 1941, referred by Court of Session, East Godavari Division, D/- 12th February 1941.

(a) Evidence Act (1872), S. 155 (3)—Defence seeking to show that witness's statement in Court is contrary to what he told police officer —Proper way of contradicting witness stated— Only way to prove that statement in Court was not made to police officer is to ask police officer himself in witness box — Reference to police diary for that purpose is useless — Witness's statement in case diary—Use of diary to contradict witness how far permissible stated.

Where the defence seek to show that a witness had made a statement in the Court which is contrary to what he had told a police officer, the proper way of contradicting him is to ask the police officer whether that was so and to permit if necessary the filing of such portions of the record in the case diary as will support the police officer's statement. Where it is alleged that the statement made by the witness in Court was not made before the police officer, it is useless to refer to the record in the police diary at all, for what is recorded therein is not intended to be a complete record of what a witness tells the police officer. It is only a resume of the statement, made by the police to facilitate their investigation. The only way to prove that the statement made in Court was not made to the police officer is to ask the police officer himself when he is in the witness box. It is improper to file the whole of the entry in the case diary of the police officer relating to the statement of a witness made in the course of investigation and to make a free use of the whole statement whether it was strictly relevant to the alleged contradiction or not. [P 60*e*,*f*]

(b) Penal Code (1860), Ss. 141 and 97 — Assembly of more than five persons with common object of maintaining possession does not come within S. 141 — Accused having no right of private defence of property in their possession — They are responsible for their individual acts — But if they have that right it not only entitles them to defend land but also such other persons as they can gather to help them.

a An assembly of more than five persons with the common object of maintaining possession does not come within the definition of unlawful assembly in S. 141. If the accused had no right of private defence of the property in their possession they would be responsible for the various acts done by them individually. But if they had a right of private defence but some exceeded it that right not only entitles the accused to defend land, but also such other persons as they might have gathered there to help them to protect their rights. [P 61*b*, *c*]

(c) Penal Code (1860), Ss. 304 and 100 — Accused in exercise of right of private defence of property using dagger and causing death to members of other party not because of necessity but with desire of punishing other party entering upon their land — Accused exceed right of private defence and are guilty under S. 304.

b Where the accused in the exercise of their right of private defence of property use daggers and cause injuries to the members of the other party resulting in death of some of them not because they felt it necessary to use the daggers for the protection of their person or property but were actuated by the desire to punish those who tried to enter upon their land, they must be deemed to have exceeded the right of private defence and must be held to be guilty under S. 304. [P 61*e*, *f*]

(d) Penal Code (1860), Ss. 147 and 148 — Rioter armed with deadly weapon is punishable under S. 148 — He cannot be guilty both under S. 147 and S. 148 *(Per Burn J.)*.

A rioter armed with a deadly weapon is punishc able under S. 148. It is not possible to find him guilty both under Ss. 147 and 148 because, however many the weapons he may be armed with, he commits only one offence of rioting in the course of the same riot. [P 62*c*, *d*]

K. S. Jayarama Ayyar — for Appellants.

Public Prosecutor — for the Crown.

Horwill J.—The eleven appellants have been sentenced to death by the Sessions Judge of Rajahmundry for having committed the murder of six persons by stabbing them to death on 21st May 1940. They have also all been convicted of rioting and sentenced to one year's rigorous imprisonment under S. 148, Penal Code. Appellants 3, 6, 10 and 11 were further found guilty under S. 324, Penal Code, of causing hurt to P. W. 5 with dangerous weapons and sentenced each to six months rigorous imprisonment. The fight between the appellants on the one hand and the deceased persons on the other, arose out of a dispute with regard to the cultivation of a plot of land named Malayya Pampu, which belongs to P. W. 14 and his brother. It seems fairly clear from the evidence of P. Ws. 14, 13 and 5 that accused 2 and 7 had been the tenants of P. W. 14 for many years and that for most of this time they had paid no rent. P. W. 14, unable to collect any rent, adopted the plan, not at all uncommon, of trying to get rid of his tenants by leasing the land to another tenant and leaving him to do the best he could to evict the recalcitrant tenants. The person upon whom the burden fell was the first deceased; and P. W. 14 states that about 8 or 9 days before the offence, he leased the land orally to the first deceased. In his dying declaration the first deceased says that the lease was two days before the offence. However that may be, 21st May was selected as an auspicious day for ploughing this land; and P. Ws. 5 and 13 say that on the previous day the first deceased irrigated the land. The intentions of the first deceased could not be kept secret; and, on the morning of the 21st, when the first deceased took his young son P. W. 13 to Malayya Pampu to plough the land, he found accused 2 and 7 already there ploughing. These two accused were prepared for all eventualities and the other accused were sitting on the bund of that land. Accused 1, 3 to 6 and 8 are brothers of accused 2 and 7. Accused 10 and 11 are the first cousins of accused 1 to 8 and accused 9 is the brother-in-law of accused 3.

The first deceased told accused 2 and 7 that he had obtained a lease of the land from P. W. 14 and asked them to desist from ploughing and to leave the land to him. Accused 2 and 7 refused to do so and said that they had been in possession of this land for a very long time and that they had no intention of giving it up. The first deceased then said, "Don't let us quarrel about this matter. Let us consult P. W. 14." He however realized the futility of appealing to P. W. 14 and went to fetch some of his relatives, who are the other five deceased persons. All the six persons returned to the land together. After some further altercation, four of these deceased persons began to unyoke the ploughs of accused 2 and 7. Accused 1 thereupon jumped down from the bund, rushed at the deceased's party, and immediately stabbed the first and second deceased. A general fight then ensued during the course of which accused 3 stabbed the third and fifth deceased, accused 8 stabbed the fourth deceased, and accused 2 stabbed the sixth deceased. The other accused were armed with stout sticks and they caused a number of stick injuries to the deceased persons. Even after some of the injured men had fallen to the ground, the various accused beat them with sticks. At this juncture, P. W. 5 intervened and received a number of stick injuries. Accused 3 threw his knife at him and it just grazed his finger. Fearing that he too would share the fate of the

other six men who had already been fatally stabbed, he ran away.

What strikes one most forcibly about this story is its reasonableness. P. Ws. 5 and 13 do not say that they were peaceably ploughing the land when they were suddenly attacked by a number of armed men. They admit that the accused persons were already ploughing the land. They admit that the first deceased went away and returned with men armed with sticks, clearly with the intention of enforcing their supposed right. They further admit that it was only after some of the deceased persons had tried to unyoke the bulls of accused 2 and 7 that they were attacked and the fight began. Although P. W. 5 apparently made no attempt to report the matter either to the village munsif, who was a brother of the first deceased, or to any of the police officers, he was examined early the following morning at the inquest, again by the Circle Inspector on the 23rd; and a day after that again he gave a statement to the Magistrate under S. 164, Criminal P. C. P. W.5's evidence is consistent, except that he did not say in his statement under S. 164, that after the deceased persons had fallen to the ground, they were further beaten with sticks. There also seems to be some suggestion here and there that there was some fighting with sticks before the fatal stabbing took place. P. W. 13, a boy of 12 years of age, speaks only to the beginning of the quarrel; for the bulls which the deceased had brought for the purpose of ploughing the land had wandered far from the field and this little boy went after them. P. W. 5 is therefore the only eye-witness of the main incidents of the fight. (After discussing the evidence, his Lordship proceeded). There were therefore undoubtedly a very large number of injuries on the persons of the deceased caused by sharp-edged weapons, and it is clear that several persons in the accused party must have been armed with knives or daggers. The evidence of P. W. 5 which has stood the test of cross-examination well and seems consistent, and which is corroborated to a considerable extent by the dying declarations, can therefore be safely accepted, especially with regard to the stabbing.

During the course of examination of P. W. 5, he was questioned with regard to the statements made by him to the Circle Inspector; and it may be pointed out in passing that the learned Sessions Judge has made improper use of these statements. Where the defence seek to show that a witness has made a statement in Court which is contrary to what he had told a police officer, the proper way of contradicting him is to ask the police officer whether that was so and to permit if necessary the filing of such portions of the record in the case diary as will support the police officer's statement. Where it is alleged that the statement made by the witness in Court was not made before the police officer, it is useless to refer to the record in the case diary at all, for what is recorded in the case diary is not intended to be a complete record of what a witness tells the police officer. It is only a resume of the statement, made by the police to facilitate their investigation. The only way to prove that the statement made in Court was not made to the police officer is to ask the police officer himself when he is in the witness-box. What the learned Sessions Judge seems to have done was to have allowed the Circle Inspector to be asked whether certain copies of the case diary were true copies of statements recorded from P. W. 5. The whole of entry in the case diary relating to the statement of P. W. 5 was thereupon filed and free use has been made of the whole of the statement, whether it was strictly relevant to the alleged contradictions or not. This was clearly an improper use of the case diary.

It remains to consider what offence, if any, was committed by the accused persons. It seems clear from the evidence of P. Ws. 14, 13 and 5 that accused 2 and 7 never lost possession of the field. Although P. W. 14 states that they were present when he orally leased the land to the first deceased he does not say that they acquiesced in it; still less does he say that they voluntarily quitted the land or that he in any way was able to evict them. The conduct of the accused within two days or so of this leasing of the land shows that they did not acquiesce in it and that they did not give up possession. If it was true that the first deceased irrigated the land on the day before the offence, there is no reason to suppose that he did it with the knowledge and consent of the accused. It was a fugitive act that did not disturb their possession. Moreover, even though accused 2 and 7 had not paid their rent for a considerable time, they were entitled to remain in possession; because it does not appear from the evidence of P. W. 14 that he gave them any notice to quit. On the other hand, he says that he did not. It would appear from the evidence of P. W. 14, although the evidence with regard to the nature of the lease

has been left in a great deal of uncertainty, that it was an agricultural lease. Whether there was a cowle in the first instance or not, it continued as a lease from year to year after the period of such cowle was determined. If it was an agricultural lease, the lease could only be determined by giving six months notice in writing to the tenants; and, as this was admittedly not done, accused 2 and 7 were entitled to remain in possession. Even if these two accused had no such right, the accused's party would not have constituted an unlawful assembly. An unlawful assembly is an assembly of five or more persons when, inter alia, the common object is

> by means of criminal force or show of criminal force to any person to take or obtain possession of any property of which he is in possession or enjoyment . . . . . .

It would follow therefore that the six deceased persons were members of an unlawful assembly, because they sought to obtain possession forcibly from accused 2 and 7. On the other hand, the accused's party sought only to maintain possession; and an assembly of more than five persons with this common object would not come within the definition of unlawful assembly given in S. 141, Penal Code. The accused therefore cannot be convicted of any offence by virtue of S. 149, Penal Code. If they had no right of private defence of the property in the possession of accused 2 and 7, the accused would be responsible for the various acts done by them individually. If they had a right of private defence but some exceeded it, that right not only entitled accused 2 and 7 to defend the land, but also such other persons, as they might have gathered there to help them to protect their rights.

It has therefore to be considered what persons, if any, exceeded their right of private defence. As all the deceased persons were armed with sticks, those accused who used only sticks can hardly be said to have exceeded the right of private defence, especially as it has not been shown that any of the stick injuries were fatal—or even caused grievous hurt. Mr. Jayarama Ayyar has pointed out that the accused persons did have a reasonable apprehension that death or grievous hurt might be caused to them and that therefore they were justified in doing such acts as might involve the risk of causing death to those who were seeking to enter on that land; but the progress of the fight does not suggest that those accused who used their daggers did so because they felt it necessary to use them for the protection of their persons and property. It is fairly clear that in wielding their daggers or knives and inflicting so many injuries on the deceased persons, they were actuated not by any desire to defend their persons and property but to punish those who tried to unyoke the bulls and to enter upon the land. The accused were in greater strength, even at the outset, and as one by one the deceased were stabbed, the strength of the accused's party became overwhelming ; and there was certainly no need to cause the injuries to the deceased that they did. We are therefore satisfied that in stabbing the six persons, those accused who were responsible for this had exceeded their right of private defence. As the seriousness of the injuries shows that the persons who caused them intended to kill the deceased, they would be guilty under S. 304 (1), Penal Code.

Although P. W. 5's evidence is not corroborated by the dying declarations with regard to the attacks on all the deceased persons, yet we think his evidence is trustworthy. It is true that P. W. 5 does not say that he joined with the six deceased persons in attempting to enter upon the land in the possession of accused 2 and 7, yet there is reason to think that his evidence that he went there later is true ; for whereas all the other six persons had fatal stab injuries and many of them had a number of incised wounds too, P. W. 5 had only a few stick injuries, with the exception of a slight scratch on the finger which, he said, was caused when accused 3 threw a dagger at him. We are confident therefore that the evidence of P. W. 5 is true and that the accused 1 to 3 and 8 are guilty under S. 304 (1), Penal Code. The accused have all been convicted under S. 302 as well as under other sections including rioting with dangerous weapons. All these convictions are set aside. Accused 4 to 7 and 9 to 11 are acquitted, while accused 1 to 3 and 8 are convicted under S. 304 (1). They are sentenced to ten years rigorous imprisonment. We think that a severe sentence is necessary in view of the brutality and extremity of the measures adopted by these accused in deliberately stabbing to death no less than six persons.

Burn J.—I agree and I have little to add except with regard to the learned Sessions Judge's discussion of the decisions of this High Court. In para. 6 of his judgment, the learned Sessions Judge has said :

> The evidence of the tahsildar and the medical officer about the precautions under which the dying

statements were recorded impressed me favourably and these alone, in the opinion of the Madras High Court, are sufficient to bring the acts home to accused 6 Satyanarayanaraju ,accused 3Venkataraju, accused 2 Ramaraju and accused 1 Bangaruraju.

It is needless to say that the Madras High Court had not expressed any opinion regarding the sufficiency of the dying declaration to bring any acts home to any of the accused in this case. The learned Sessions Judge is misquoting the view of this High Court recently expressed with regard to the sufficiency of dying declarations in cases where the Court upon due consideration find the dying declarations to be true. A little later, the learned Sessions Judge has purported to quote some observations of my own in 1941 M W N Cr 9.[1] It is hardly necessary to say that, in my decision in that case, I said nothing whatever about the possibility of distinguishing the separate intentions of the 11 members of an unlawful assembly when their common intention can be easily inferred by their having caused the death of six separate persons, and so every one of them must be presumed to have anticipated the death of every one of the injured as the result of acts which might be done in furtherance of the common intention.

I made no remarks in that case which could have any possible bearing upon inference to be drawn from the very different facts of the case tried by the learned Sessions Judge. The learned Sessions Judge, I regret to say, has quite failed to understand the decision in 1941 M W N Cr 9,[1] for I find that in this case again he has charged certain persons under S. 148, Penal Code, read with S. 149, Penal Code, although the principal point dealt with in 1941 M W N Cr 9,[1] was that it is not possible for a person to be constructively guilty of an offence under S. 148, Penal Code. The learned Sessions Judge moreover has convicted all the accused under both Ss. 147 and 148, Penal Code. This is clearly impossible. If a rioter is armed with a deadly weapon, he is punishable under S. 148. It is not possible to find him guilty both under S. 147 and S. 148, because however many the weapons he may be armed with, he commits only one offence of rioting in the course of the same riot.

C.R.K./G.N. *Order accordingly.*

1. ('41) 28 AIR 1941 Mad 489 : 196 I C 119 : I L R (1941) Mad 592: (1941) 1 M L J 236: 1941 M W N Cr 9, Subba Rao v. Emperor.

(29) A. I. R. 1942 Madras 62

ABDUR RAHMAN J.

Venkadari Somappa — Appellant

v.

Chippagiri Nagi Reddy — Respondent.

Second Appeal No. 149 of 1938, Decided on 20th February 1941, against decree of District Court, Bellary, in A. S. No. 116 of 1936.

Hindu law — Debts—Manager — Decree obtained in suit on promissory note executed by karta — Decree can be executed against entire family estate even though other members were not parties to suit provided decree-holder proves that debt was for family necessity and that it was incurred as karta — Decree-holder is not debarred from adducing evidence to prove these merely because he did not implead other members to suit.

Even when all the members of a joint Hindu family have not been made parties to a suit, the entire family estate is, when the debt is incurred by a managing member or members, bound by the act of the latter and can pass at the sale in execution of a decree, although he or they may not have been described to be such or stated to have been sued in their representative capacity. It would not be so when the debt is incurred for a purpose not binding on the family. The only thing that the other members or the sons, as the case may be, can insist is that an opportunity may be afforded to them to contest their liability. Therefore in a case where it can be made out that a person against whom the decree was passed occupied a representative capacity at the time and that the debt for which the decree was passed was one for family necessity, the property belonging to the other members should be held liable, although they were not *eo nomine* parties to the suit. The frame of the suit or questions relating to adjectival law or even considerations based on commercial convenience to be found in the Negotiable Instruments Act should not be allowed to prevail against the substantive law or to decide the point finally whether the other members of the family would or would not be liable for debts incurred by the manager. A decree may be passed against a manager or a karta alone who happens to be the maker of the promissory note even in cases where a suit is brought on the basis of a promissory note ; but once a decree has been obtained, the question whether the judgment-debtor was liable individually or was also representing the other members of the family of which he was the karta should be left to be determined in appropriate proceedings and the power of the creditor to get the liability of persons other than the judgment-debtor declared subsequently should not be taken away or held to have been impliedly adjudicated against him simply because he brought the suit against the maker in the first instance : *Case law referred.*

[P 64*a*,*b* ; P 65*d* ; P 66*gh*]

There is no distinction between a debt raised on the security of a promissory note or of a mortgage after the decree is passed. The liability of the other members of the joint Hindu family must be, in both cases, determined by Hindu law and not by the reason that the karta had executed a promissory note in one case and a mortgage deed in the other. [P 66*e*]

C. S. Venkatachariar and D. Ramaswami Ayyangar — for Appellant.

K. Kuppuswami — for Respondent.

Judgment. — This appeal raises a question of some importance. The facts are these: A promissory note was executed on 24th July 1930 by one Linga Reddi for Rs. 400 in favour of D. W. 1, Bhimakka. A suit was brought on the basis of the promissory note by the promisee (O. S. No. 166 of 1932) which resulted in a decree. In execution of that decree, a house and certain lands belonging to the joint family consisting of Linga Reddi and his nephew, the present plaintiff-respondent, were attached and purchased on 22nd September 1933 by the defendant-appellant who is a stranger. A sale certificate was accordingly granted to him on 27th November 1933 (Ex. II). The sale certificate describes that the whole of the property mentioned therein and not merely the share belonging to Linga Reddi was sold in execution of the decree. When the auction purchaser proceeded to recover possession of the property purchased by him, he was obstructed by the other member of the joint family of which Linga Reddi was the kartha. The auction purchaser applied for removal of the obstruction (E. A. No. 1276 of 1935) and it was ordered to be removed on 6th February 1936. The obstructor, that is Linga Reddi's nephew, brought a suit to set aside the order passed in execution on the ground that he was no party to the suit in O. S. No. 166 of 1932 and could not therefore be dispossessed of the share which he owned in the family property. The auction purchaser contended that as Linga Reddi was the manager of the family at the time when the suit was brought against him, as the debt was incurred by him for joint family necessity and as he was entitled to alienate the whole of the property for that debt, the entire family property sold in execution of the decree, and not merely Linga Reddi's share, must be held to have been purchased by the auction purchaser. Relying on the decision in 68 M L J 104[1] the lower Courts held that the question of necessity could not be gone into in this suit and inasmuch as the decree was passsed against Linga Reddi alone on the basis of the promissory note, his nephew, i. e., the present plaintiff, could not be held bound by that decree with the result that his share of the property could not be held to have passed to the defendant-appellant in execution of the decree. The auction purchaser was thus prevented from establishing that the debt incurred by Linga Reddi was for family necessity and that the entire family property had passed to him in the auction sale. The question to decide in this appeal is whether the decision of the Subordinate Judge is correct. It is well settled that a sale in execution conveys the entire family property

> if a decree is passed against the kartha or manager of a joint Hindu family in respect of a liability properly contracted for the necessities of the family

and that

> the binding character of the decree upon the interests of the other members depends not upon their having or not having been parties to the suit, but on the authority of the manager to contract the liability.

See 6 C L J 362[2] at page 368, 14 Bom 597,[3] 23 Bom 372,[4] 29 Cal 583[5] and Mayne's Hindu Law, p. 450 para. 348, cl. 2. Can Linga Reddi be held then to have been sued as a kartha and represented the other member of the family although he was not described in the plaint as such? The answer to this question is furnished by several decisions of the Privy Council which have been subsequently followed in a well discussed judgment of a Division Bench of the Lahore High Court and in a Full Bench decision of this Court. The first decision of the Privy Council to which reference may be made was in 13 Cal 21,[6] where their Lordships observed as follows:

> Their Lordships do not think that the authority of *Deenadayal's case*,[7] bound the Court to hold that nothing but Giridhari's coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might have legally sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale.

This was undoubtedly a case where the debt was incurred by a father, but the principle of that decision was subsequently applied by their Lordships to the case in 15 Cal 70[8] where the debt was incurred by a managing member of the family who did not happen to be the father. As this case was

1. ('35) 22 A I R 1935 Mad 145 : 155 I C 574 : 68 M L J 104, Lakshmana Chettiar v. Muthu Chelliah Goundan.

2. ('07) 6 C L J 362, Kunj Behari Lal v. Kandh Parshad Narain Singh.
3. ('90) 14 Bom 597, Hari Vital v. Jairam Vital.
4. ('99) 23 Bom 372, Sakharam v. Devji.
5. ('02) 29 Cal 583 : 6 C W N 370, Baldeo Sonar v. Mobarak Ali Khan.
6. ('86) 13 Cal 21 : 13 I A 1 : 4 Sar 682 (P C), Nanomi Babuasin v. Modhun Mohun.
7. ('77) 3 Cal 198 : 4 I A 247 : 1 C L R 49 : 3 Sar 730 : 3 Suther 468 (P C), Deendayal Lal v. Jugdeep Narain Singh.
8. ('88) 15 Cal 70 : 14 I A 187 : 1 P R 1888 : 5 Sar 84 (P C), Daulat Ram v. Mehr Chand.

attempted to be distinguished on the ground that it was a case of a mortgage and not that of a promissory note, I would advert to and examine that distinction later; but it is clearly an authority for the proposition that even when all the members of a joint Hindu family have not been made parties to a suit, the entire family estate is, when the debt is incurred by a managing member or members, bound by the act of the latter and can pass at the sale in execution of a decree although he or they may not have been described to be such or stated to have been sued in their representative capacity. It would not be so when the mortgage is effected or a debt is incurred for a purpose not binding on the family; but, in order to test the correctness of the decision of the lower Courts, it must be assumed in the present case that the debt was of a nature that would bind the family of which Linga Reddi and the respondent were members. If a debt is therefore assumed or found to have been incurred for the family necessity by a manager who was not the father (or for a purpose that was not immoral or illegal when the father happens to be the managing member) in a subsequent litigation to which the other members were parties, it would have to be held that the managing member was sued in a representative capacity in the first litigation and that the whole of the family was bound by the decree passed therein. The only thing that the other members or the sons, as the case may be, can insist, as observed by their Lordships in the above decision, is that an opportunity may be afforded to them to contest their liability. If this is all, it is being given to them in the present litigation. This and other Privy Council decisions were referred to in a judgment of the Lahore High Court and discussed by Tek Chand J. in AIR 1935 Lah 1.[9] The headnote of that judgment is sufficiently clear and reads as follows :

> A decree passed against the managing member of an undivided Hindu family in respect of a liability incurred within the scope of his authority is enforceable against the interest of the junior members in the family property, even though they had not been made parties to the suit, but such members are not precluded from contesting the authority of the manager, of the nature of the debt and this they may do either in the course of execution proceedings or in a suit of their own. There is no presumption that a debt contracted by the manager of a Hindu family was contracted for family purposes and this fact must be proved by evidence. The mere circumstance that it had not been disclosed in the course of proceedings in the original suit against the managing member, that the debt had been raised for family necessity, or that the decree does not show on the face of it that the judgment-debtor had been sued in his capacity as manager, is not fatal to the right of the decree-holder to proceed against the entire family property. It is not the frame of the suit or the form of the decree which is conclusive of the matter; the essential point is whether in fact the debt, which is the basis of the decree, had been raised by the judgment-debtor within the scope of his authority as the manager and for the purposes of the family. This question of fact can be determined finally only after the junior members have had proper opportunity of being heard, either in the execution proceedings or in a separate suit, specially brought for the purpose. But if after hearing the junior members, the finding is that the debt satisfied the 'touch-stone of necessity' and is therefore binding on them, their interest in the property will be held to have passed at the sale, as effectively as if they had been made parties to the original suit.

This question came up for decision before a Full Bench of this Court in ILR (1937) Mad 880.[10] The facts of that case briefly were that, A, who constituted a member of a joint family with his sons B and C purchased on behalf of the joint family a certain property which was then subject to a mortgage. Subsequent to the purchase the mortgagee brought a suit to enforce the mortgage and impleaded A as the purchaser of the equity of redemption. A represented the joint family in the suit. There was a decree for sale and in execution of the decree the mortgagee purchased the property. He subsequently brought a suit for the recovery of possession of the property purchased by him and to this suit he impleaded not only A who had, as already stated, represented the family in the previous suit but his sons B and C, as well. He also claimed mesne profits in that suit. On the plea raised by B and C that they had ceased to have any interest in the property by virtue of a partition under which the property had fallen to A's share they were exonerated. It however transpired that in that partition A had taken the property not only for himself but for himself as well as for a minor son D with whom he was joint at the time when the partition was effected. The suit was decreed and the mesne profits were ordered to be ascertained. The decree for mesne profits was ultimately passed on 3rd April 1935. Two months later, A died and in February 1936 an application was filed on behalf of the decree-holder to recover the amount by sale of the other properties, in D's hands. D resisted the same on the ground inter alia that the properties in his hand could not be rendered liable in execution, firstly, as there

9. ('35) 22 A I R 1935 Lah 1 : 157 I C 739, Jai Kishen v. Ram Chand.

10. ('37) 24 A I R 1937 Mad 610 : 171 I C 101 : I L R (1937) Mad 880 : (1937) 2 M L J 251 (F B), Venkatanarayana Rao v. Venkata Somaraju.

had been a partition between him and his father A, and secondly, as the execution was being sought on the basis of the decree which was obtained against his father only. The partition alleged by D was found against him.

On the second point, the Full Bench held that the properties of the joint family in D's hands should be, in spite of the fact that he was not a party to the suit or to the decree, proceeded against in execution. It may be remembered, however, that this was so held not only on the ground that A happened to be the father of D but also on the ground that A was the kartha of the family of which D was a member. It was held by the Full Bench that when the suit related to joint family property and the person sued upon was either the father or the eldest member, i. e., the accredited head of the family, it must be presumed that he was sued in his representative capacity and he need not have been described as such in the pleadings and that it was not necessary that the decree should have been passed against him specifically as such. It was also held that since the liability was declared to be a family liability, every item of the joint family property was bound to satisfy the same. It may also be added here that although the three cases of the Privy Council on which reliance was placed by Venkatasubba Rao J., who wrote the leading judgment in that case related to immovable property, the principle of representation affirmed in that decision was held to apply "to other transactions as well." The decree for mesne profits which was being enforced against D was after all a decree for money. On the basis of these authorities it would seem to follow that in a case where it can be made out that a person against whom the decree was passed occupied a representative capacity at the time, as Linga Reddi did, and that the debt for which the decree was passed was one for family necessity, as the debt incurred by him must be, for the present, assumed, the property belonging to the other members should be, on that assumption, held liable, although they were not *co nomine* parties to the suit. If this is the correct position, the decision of the lower Courts in disallowing the questions in regard to the binding nature of the debt and the respondent's liability to discharge the same from being gone into, would be apparently wrong. It has been, however, contended by learned counsel for the respondent that although Linga Reddi was the kartha of the family at the time when the decree in O. S. No. 166 of 1932 was passed yet as the suit had not been brought on the basis of the original consideration but, on the basis of the promissory note itself and the other members of the family were not impleaded in that suit as parties, the decree should be found to have been passed against him (i. e., Linga Reddi) in his individual capacity and the entire family property of which he and his nephew were owners, could not be made liable in satisfaction of the decree.

During the course of his arguments, learned counsel for the respondent tried to base this contention partly on the ground of waiver by the plaintiff is not basing his claim in O. S. No. 166 of 1932 on the original consideration against the other members of the family and partly on the ground that a decree on the basis of the promissory note could only be passed against the maker or those who were parties to the note and that unless the promissory note was on the face of it found to have been executed on behalf of the joint family (which it was not) a decree against Linga Reddi cannot be held to have been passed in a representative capacity and the property belonging to the junior member of the family, (i. e., the respondent) could not be made liable. I do not think there is any force in either of these contentions. As for the question of waiver, it was never alleged by anyone in this litigation that the decree-holder had waived his right, if any, to recover the decree amount from the family property. That would be a question of fact, but it cannot be inferred merely from Bhimakka's omission to implead the other members of the family in O. S. No. 166 of 1932. As for the other contention, reliance was placed by learned counsel for the respondent on the decision in 68 M L J 104[1] and on the Full Bench decision in I L R (1938) Mad 568.[11] The question to decide in the Full Bench case was whether in a suit by an indorsee of a promissory note, persons other than those who were parties to the promissory note could be made liable. The promissory note in that case was found to have been executed by the managing member of a joint Hindu family but the promisee was held, in view of the words of the indorsement, not to have transferred the debt for which the promissory note was executed but the promissory note only. On these findings, the answer given by the Full Bench to the above mentioned question was in the nega-

11. ('38) 25 A I R 1938 Mad 377 : 174 I C 577 : I L R (1938) Mad 568 : (1938) 1 M L J 378 (F B), Maruthamuthu Naicker v. Kadir Badsha Rowther.

tive. But this was because the indorsee was held not entitled to sue on the debt which was transferred to him but merely on the promissory note which was. An indorsee could not, in the circumstances, sue on the basis of the original debt, but the case of a payee is different. The suit in O. S. No. 166 of 1932 was by the promisee himself and the question whether he was the owner of the debt apart from the promissory note does not arise. Moreover, the question whether the property belonging to the other members of the family could be made liable in execution of the decree passed against the maker of the promissory note or those who were parties to the same did not arise for consideration in that case, and was not considered. This would be clear from the following observation that was made in that judgment:

> The maker alone can be sued on the note and the fact that under Hindu law sons are liable in respect of the debts incurred on behalf of the family or by the father for his own purposes, provided that they are not incurred for illegal or immoral purposes, does not affect the principle involved.

The decision in 68 M L J 104[1] does undoubtedly proceed on the basis that the question of the binding character of the debt against the other members of the family cannot be, at least in cases when they are not the sons or descendants of the judgment-debtor, gone into in execution proceedings, but this was on the basis of the decision in 8 Mad 208,[12] which was, in view of the Privy Council decisions, considered by the Full Bench in I L R (1937) Mad 880[10] to be obsolete. It is true that the facts of the case in 68 M L J 104[1] as well as in 8 Mad 208,[11] were similar to the facts of the present case, but the objection was being raised, as pointed out by Mr. Ramaswami Iyengar in the last of the two cases, to the attachment and not as here, after the property had been sold, by the Court. This may make some difference although I very much doubt if it should. At all events, I see no justification for the reservation made by the learned Judges to cases where the other members of the family happen to be the sons or descendants of the judgment-debtor. If it was on the theory of representation the members other than sons or grandsons must be held to stand in the same position and to be similarly represented by the kartha. It may be that the Hindu father may have greater powers than an ordinary managing member, but so far as the question of liability on the promissory note was concerned, they stood in the same position. And sons or other descendants are not always bound by the debt incurred by their father or ancestor, e. g., where the debt is illegal or immoral. In any case, in view of the Full Bench decision in I L R (1937) Mad 880,[10] the authority of the decisions in 8 Mad 208[11] and 68 M L J 104,[1] must be found to have been considerably shaken. I find no reason for drawing a distinction between a debt raised on the security of a promissory note or of a mortgage after the decree is passed. The liability of the other members of the joint Hindu family must be, in both cases, determined by Hindu law and not by the reason that the kartha had executed a promissory note in one case and a mortgage deed in the other. Why should a distinction be drawn between various decrees and why should the liability of the other members of a joint Hindu family be determined in cases of some and not in cases of others, it is not quite easy to follow.

I must therefore hold that there is no merit in the contention that in a suit on a promissory note when the liability of persons other than the maker had not been alleged or determined, a creditor would be debarred for ever from enforcing the liability imposed by Hindu law as against the other members of the family of which the maker of the promissory note was the kartha or the head. The frame of the suit or questions relating to adjectival law or even considerations based on commercial convenience to be found in the Negotiable Instruments Act should not be allowed to prevail against the substantive law or to decide the point finally whether the other members of the family would or would not be liable for debts incurred by the manager. A decree may be passed against a manager or a kartha alone who happens to be the maker of the promissory note even in cases where a suit is brought on the basis of a promissory note; but once a decree has been obtained, the question whether the judgment-debtor was liable individually or was also representing the other members of the family of which he was the kartha should be left to be determined in appropriate proceedings and the power of the creditor to get the liability of persons other than the judgment-debtor declared subsequently should not be taken away or held to have been impliedly adjudicated against him simply because he brought the suit against the maker in the first instance. This would contravene the principle enunciated by their Lordships of the Privy Council and by the various High Courts in

12. ('85) 8 Mad 208, Viraraghavamma v. Samudrala.

cases, some of which only have been noticed by me.

It was wrong to suggest that an auction purchaser in a case like this was trying to go behind the decree. He is not, first of all, as contended by learned counsel for the respondent, standing in the shoes of the decree-holder. If at all, he stands in the shoes of the judgment-debtor whose right, title and interest he has purchased and the questions whether the judgment-debtor could alienate the entire family property in discharge of the particular debt or whether the whole of it could have been sold in execution would depend upon the nature of the debt and the position which the judgment-debtor occupied at all relevant times. If the decree-holder succeeds in establishing that the debt was incurred for a family necessity and that the judgment-debtor did represent the family at the time when the debt was incurred and at the time when the suit was brought against him, the share of the other members in the family property must be held equally bound to discharge the debt incurred by the kartha of the family. In my view, a decree obtained on the basis of a promissory note against a person who is the manager or kartha of the family would be executable against the family property of the other members provided the necessary conditions are established; and it is on those points that the auction purchaser was not allowed to adduce any evidence. The decisions of the lower Courts in preventing him from establishing the fact which would have justified the sale of the property claimed by the plaintiff are consequently incorrect and must be set aside. The appeal is therefore accepted and the case sent back to the trial Court for a full enquiry in the light of the observations contained in this order. This is an old case and must be expedited. The plaintiff will pay the costs of this appeal. The costs of the subordinate Courts will be costs in the cause. Leave to appeal is granted.

C.R.K./K.S. *Appeal allowed.*

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* (29) A. I. R. 1942 Madras 67

WADSWORTH J.

Athinarayana Konar and another — *Appellants*

v.

V. Subramania Ayyar — *Respondent.*

Second Appeal No. 231 of 1939, Decided on 14th February 1941, against decree of District Court, Trichinopoly, in A. S. No. 165 of 1938.

*** Transfer of Property Act (1882), Ss. 54, 40 —Contract to sell property—Subsequent attachment of same in execution of decree does not prevail over the contract to sell even if attaching creditor has no notice of such contract — Sale completed is not contrary to attachment.**

Though a contract to sell does not, having regard to the terms of S. 54 of the Act, create any interest in or charge on the property, it does give rise to an obligation which limits the right of the judgment-debtor and the attachment of the right, title and interest of the judgment-debtor is subject to any such limitation by which the judgment-debtor was bound. Therefore, where subsequent to a contract to sell certain property, it is attached in execution of a decree, the attachment does not prevail over the pre-existing contract to sell even though the attaching creditor has no notice of the contract to sell. The right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor : ('39) 26 A I R 1939 Mad 702, *Rel. on.* [P 68*c*, *g*; P 69*b*]

And if the attachment is subject to the obligation under the previous contract, the sale in pursuance of the contract will not be a transfer contrary to the attachment within the meaning of S. 64, Civil P. C. [P 69*b*]

C. Narasimhachariar, G. N. Thirumalachariar and G. Thiruvenkatachariar—for Appellants.

T. S. Venkatesa Ayyar — for Respondent.

Judgment. — This appeal arises out of a suit by a Court auction purchaser for possession of the land which he had purchased, from the appellants who are alleged to have trespassed upon that land after delivery through Court, claiming title to it under a private sale made at the time when the attachment was pending. The essential facts are that the appellants, who were defendants 1 and 2 in the trial Court, held certain mortgages over the land in question and they allege that on 10th March 1932 the mortgagor who was not a party in these proceedings entered into an agreement with them to sell to them the mortgaged land. The written statement does not describe this agreement, but it is said in the course of arguments that it was an unregistered written agreement. Nearly a month later, on 3rd April 1932, the present respondent in execution of a money decree against the mortgagor attached that land. It is not in evidence whether this attachment was with or without notice of the contract to sell. On 8th June 1932, that is to say, two months after the attachment the mortgagor executed a registered sale deed in favour of the appellants conveying to them the land which was under attachment. Some eight months later, on 15th February 1933, the respondent in execution of his decree

brought the same land to sale in court-auction and purchased it himself and 2 years later he got delivery through Court. Thereafter the appellants are alleged to have entered upon the land and hence this suit.

The trial Court disposed of the suit in a very short judgment without giving any finding on the issue relating to the alleged agreement to sell dated 10th March 1932. The learned District Munsif expressed the opinion that after the attachment the agreement could not have been carried out by the debtors to the detriment of the plaintiff. In appeal the attention of the learned District Judge was drawn to the decision in 68 M L J 67[1] and other cases and he found himself unable to agree with the District Munsif that the truth of the agreement of March 1932 was not a matter to be considered in the suit, but he supported the trial Court's decision on the ground that there was nothing in the written statement to show that the plainitff had notice of this agreement, apparently holding the view that, though a person who has rights under a contract to sell at the time of an attachment can enforce these rights as against the attaching decree-holder, the enforcement depends on the question whether the attaching decree-holder had at the time of the attachment notice of the existence of the contract and he also seems to think that it is the duty of the persons claiming under the contract to prove that the attaching decree-holder had notice.

Now, there is a line of decisions of this Court which make it quite clear that though a contract to sell does not, having regard to the terms of S. 54, T. P. Act, create any interest in or charge on the property, it does give rise to an obligation which limits the right of the judgment-debtor and that the attachment of the right, title and interest of the judgment-debtor is subject to any such limitation by which the judgment-debtor was bound. The cases which have been quoted before me on this point are 21 M L J 82,[2] 5 M L W 234,[3] 68 M L J 67,[1] 59 Mad 1,[4] (1939) 2 M L J 822[5] and there is a decision of the Privy Council which throws light on the same subject reported in 45 M L J 770.[6] An attempt has been made to distinguish these decisions on the ground that they are cases in which the prospective purchaser has under his contract either paid money or got possession, but it does not seem to me that this is the basis of any of these decisions. The matter has been well put by Varadachariar J. at p. 831 of the decision in (1939) 2 M L J 822.[5] The learned Judge says that :

> The question is not whether any interest has passed under the contract to sell. The attaching decree-holder attaches not the physical property but only the rights of the judgment-debtor in the property.

As explained in the decisions and recognized in S. 40, T. P. Act, the right of the judgment-debtor in the property is on the date of the attachment qualified by the obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation and proceed to bring the property to sale as if it remained the absolute property of the judgment-debtor. It seems to follow therefore that a finding as to the truth and validity of this agreement dated 10th March 1932 is an essential preliminary to the disposal of the present suit.

It is, however, contended that even assuming the truth of this agreement, the attachment will prevail against the agreement unless the attaching creditor had notice thereof. If this is the law, it seems to me obvious that the plaintiff who seeks to escape from the effects of the pre-existing contract by reason of his ignorance of the contract must himself allege and prove that he had no knowledge of it: *vide* 66 M L J 255[7] and (1879) 11 Ch D 327[8] at p. 337. But I cannot myself see any legal basis for the theory that an attachment will prevail against a pre-existing contract binding the owner of the land, if the attaching decree-holder has no notice of the contract. No doubt if the attachment is followed by a court sale and the purchaser at the court sale has no notice of this obligation, he will get a good title and the promisee under the private contract would be left to seek his remedy against his promisor. So much can

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1. ('35) 22 A I R 1935 Mad 193 : 157 I C 1104 : 68 M L J 67, Veeraraghavayya v. Kamaladevi.
2. ('11) 21 M L J 82 : 7 I C 795 : 1910 M W N 440 : 8 M L T 197, Bapineedu v. Venkayya.
3. ('17) 4 A I R 1917 Mad 4 : 38 I C 107 : 5 M L W 234, Rebala Venkata Reddi v. Yellappa Chetti.
4. ('35) 22 A I R 1935 Mad 872 : 158 I C 940 : 59 Mad 1 : 69 M L J 678, Veerappa Thevar v. Venkatarama Ayyar.
5. ('39) 26 A I R 1939 Mad 702 : 185 I C 562 : I L R (1939) Mad 853 : (1939) 2 M L J 822, Diravyam Pillai v. Veeranan Ambalam.
6. ('22) 9 A I R 1922 P C 393 : 71 I C 625 : 45 M L J 770 (P C), Nur Mahomed Peerbhoy v. Dinshaw Hormasji Motiwalla.
7. ('34) 21 A I R 1934 P C 68 : 147 I C 1134 : 13 Pat 242 : 61 I A 115 : 66 M L J 255 (P C), Bhup Narain Singh v. Gokul Chand Mahton.
8. (1879) 11 Ch D 327 : 49 L J Ch 68: 40 L T 201: 27 W R 621, Attorney-General v. Biphosphated Guano Co.

be deduced from the decision of the Privy Council in 45 M L J 770.[6] But, we are not concerned here with a purchaser for good consideration without notice of a contract to sell binding the vendor or judgment-debtor whose land is being sold. At the time of the court sale, there was already a registered sale deed in favour of the appellants which had been in existence for some eight months. How the court sale could have been held without knowledge of that registered sale deed is a matter for conjecture. But, if the registered sale deed is good, no amount of ignorance on the part of the court-auction purchaser will give him a good title. The sale in favour of the appellants can only be attacked on the basis of S. 64, Civil P. C., and, in order to make this section applicable, it must be shown that this sale was a private transfer contrary to the attachment. If the attachment was subject to the obligation under the previous contract, the sale in pursuance of the contract will not be a transfer contrary to the attachment. It is, therefore, incumbent upon the respondent to show that an attachment will prevail against a pre-existing contract to sell binding a judgment-debtor, if the attaching creditor had, at the time of the attachment, no notice of the existence of this contract. I have not been referred to any authority for this position and it seems to me to be a position which it would be difficult to support in logic. That which the creditor attaches is the right, title and interest of his judgment-debtor. When once it is conceded, as I think it must be in the light of the decisions quoted above, that the right, title and interest of the judgment-debtor is limited by any obligations with reference to the land binding upon the judgment-debtor, it is difficult to see how the attachment of that right, title and interest without knowledge of those limitations can enlarge the right, title and interest which the decree-holder attaches. The protection given to a bona fide purchaser for value without notice is based upon the fact that the purchaser has paid cash in all innocence for an apparently good title, but there is no logical reason why a similar protection should be given to an attaching creditor who has not paid cash at all. Surely, it is the duty of the attaching creditor to ascertain the extent of the rights of the judgment-debtor and it is only over such rights as they actually exist that the attachment will operate. Moreover, I am of opinion in the present case, there being no assertion by the plaintiff that he was ignorant of the defendants' rights and no proof that he had no notice thereof, the lower appellate Court was wrong in assuming that he had no notice merely because the written statement had failed to aver notice and the defendants had failed to prove notice. The appeal, therefore, succeeds and the suit will be remanded to the trial Court for fresh disposal after taking evidence and recording a finding on issue 4. Costs throughout will abide the result. The court-fee on the memorandum of appeal will be refunded. Leave to appeal is granted.

C.R.K./K.S. *Suit remanded.*

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(29) A. I. R. 1942 Madras 69

LAKSHMANA RAO J.

In re Sadasiva Goundar—Petitioner.

Criminal Misc. Petn. No. 270 of 1940, Decided on 6th March 1941, for transfer of C. C. No. 790 of 1940.

Criminal P. C. (1898), Ss. 526 and 203—Cross complaint by accused dismissed under S. 203—Accused's apprehension that his case had been prejudged held reasonable — Case held fit for transfer.

The cross complaint filed by the accused against the complainant in respect of the same occurrence was dismissed under S. 203 :

Held that the accused's apprehension that his case had been prejudged could not be said to be unreasonable and the case should be transferred to another Magistrate. [P 70*a*]

K. Venkataramani — for Petitioner.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

FACTS. — The petitioner was accused 1 in C. C. NO. 790 of 1940 on the file of the Sub-divisional Magistrate's Court, Tiruturaipundi and accused in C. C. NO. 811 of 1940 on the file of the same Court. The cases arose out of an occurrence on 1st November 1940. The petitioner filed in the Court of the Sub-Divisional Magistrate a complaint (C. C. NO. 884 of 1940) against the complainants in the other two cases arising out of the same occurrence and the same was transferred to the Sub-Magistrate, Tiruturaipundi. The Sub-Magistrate dismissed it on 24th December 1940 under S. 203, Criminal P. C., without examining the petitioner. The present application for the transfer of C. C. NO. 790 of 1940 to the file of some other Magistrate was made on the ground that the Sub-Magistrate of Tiruturaipundi had formed opinions adverse to the petitioner and the other accused and he had prejudged the case in a way.

a **Order.** — The complaint of the petitioner was dismissed by the Sub-Magistrate under S. 203, Criminal P. C., and his apprehension cannot be said to be unreasonable. The case is therefore transferred to the file of the District Magistrate, Tanjore for disposal by him or such other Magistrate as he may direct.

C.R.K./G.N. *Case transferred.*

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(29) A. I. R. 1942 Madras 70

LEACH C. J. AND MOCKETT J.

b *S. A. Ramanatha Sastrigal—Petitioner*

v.

Koladi Krishna Menon — Respondent.

Civil Misc. Petns. Nos. 3026 to 3030 of 1939, Decided on 24th April 1941, for leave to appeal to Federal Court against judgments of Lakshmana Rao J., in C. R. Ps. Nos. 1603 and 1604 of 1938, D/- 6th March 1939.

Civil P. C. (1908), S. 111A and O. 45, Rr. 17 and 7 — Certificate under S. 205, Government of India Act, given — No further certificate is necessary—Person aggrieved can go to Federal Court provided he deposits fund for printing record and transmitting it to Federal Court.

Where a judgment, decree or final order involves
c a substantial question of law as to the interpretation of the Government of India Act and the Court delivering the judgment or passing the decree or final order considers that a substantial question of law is involved as to the interpretation of the said Act of 1935, or any Order in Council made thereunder, it is its clear duty, as the law now stands, to give a certificate under S. 205, Government of India Act. When that certificate has been given, no further certificate is required and the person aggrieved is entitled to go to the Federal Court, provided that he complies with so much of R. 7, O. 45 as is incumbent upon him, i.e., makes the necessary deposit to cover the expenses of translating, transcribing, indexing and transmitting the record to the Federal Court : ('41) 28 AIR 1941 F C 5, *Rel. on;* ('40) 27 AIR 1940 Mad 890, *Approved.* [P 72 *f,g,h*]

K. P. Ramakrishna Iyer — for Petitioner.

d *P. Govinda Menon* — for Respondent.

Leach C. J. — These civil miscellaneous petitions can be dealt with conveniently in one judgment. In C. M. P. No. 3026 of 1939 the petitioner asks that he be granted leave to appeal to the Federal Court against the order passed by this Court in C. R. P. No. 1603 of 1938. In C. M. P. No. 3028 of 1939 he asks for leave to appeal to the Federal Court against the order of this Court in C. R. P. No. 1604 of 1938. In C. M. Ps. Nos. 3027 and 3029 of 1939 the petitioner asks for orders dispensing with deposits for printing charges and directing the office to issue bills setting out the amounts of the printing charges. His learned advocate has indicated that he is e prepared to pay the bills at once. In C. M. P. No. 3030 of 1939 the petitioner asks for an order consolidating the proposed appeals to the Federal Court.

The petitioner filed two suits against the respondent in the Court of the Subordinate Judge of Ottapalam to recover amounts claimed to be due on promissory notes. The suits were subsequently transferred to the Court of the Subordinate Judge of Calicut and there numbered as O. S. Nos. 52 of 1939 and 53 of 1939, respectively. In the first suit the petitioner asked for a decree for Rupees 13,932-13-4 and in the second suit for a decree for Rs. 19,762-1-3. The respondent pleaded f that he was an agriculturist and therefore entitled to the benefit of the scaling down provisions of the Madras Agriculturists Relief Act. The petitioner denied that the respondent was an agriculturist within the meaning of the Act. He also contended that the Act was ultra vires the Provincial Legislature. A preliminary issue was framed in each suit on the question of the validity of the Act and the Subordinate Judge held that it was ultra vires. The respondent then filed applications in this Court asking it to reverse the decision in the exercise of its revisional powers. Before the applications came into g the List for hearing, a Full Bench of this Court had held in ILR (1939) Mad 151,[1] that the Act was intra vires. Consequently when the applications were called before Lakshmana Rao J. they were allowed. The learned Judge was then asked to grant a certificate under S. 205, Government of India Act, which he did, whereupon the petitioner filed the petitions now before us.

The petitions came before the Court in the first instance on 25th September 1939, when the right of appeal to the Federal Court claimed by the petitioner was challenged by the respondent. The questions of fact arising h in the suits had not then been decided, and if decided in favour of the petitioner, the question of the validity of the Madras Agriculturists Relief Act would not arise. In these circumstances, the Court suggested to the learned advocates engaged in the case that the applications might stand over until after the suits or the appeals therefrom had been decided. They agreed to this course and the petitions were ordered to stand out of the List until decrees in the suits or appeals arising out of them had been passed.

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1. ('39) 26 AIR 1939 Mad 361 : 180 I C 994 : I L R (1939) Mad 151 : (1939) 1 M L J 272 (FB), Nagaratnam v. Seshayya.

The trial Court delivered judgment in the suits on 8th December 1939. In O. S. No. 52 of 1939 a decree was passed in favour of the petitioner for Rs. 2987-10-0, the claim having been reduced by nearly Rs. 11,000 under the provisions of the Madras Agriculturists Relief Act relating to scaling down. In O. S. No. 53 of 1939, only a decree for costs was passed, as it was found that when the provisions of the Act were applied nothing remained due. In neither case has an appeal been filed, and in the circumstances the petitioner asks that his petitions for leave to appeal to the Federal Court should now be decided. The respondent says that they do not lie as the decrees passed by the subordinate Court have not been challenged in appeal. By reason of S. 205 (1), Government of India Act, 1935, an appeal lies to the Federal Court from a judgment, decree or final order of a High Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Act or any order in Council made under it. Sub-section (2) states that where a certificate has been granted, any party in the case may appeal to the Federal Court on the ground that the question has been wrongly decided, and on any ground on which he could have appealed without special leave to His Majesty in Council, if no such certificate had been given, and, with the leave of the Federal Court, on any other ground. It has not been suggested that it was improper of Lakshmana Rao J., to give a certificate under S. 205 (1) and the certificate having been given, the petitioner is entitled to proceed to the Federal Court, unless there is some other provision of law with regard to procedure which prevents him.

Section 111A Civil P. C., says that where a certificate has been given under S. 205 (1), Government of India Act, 1935, Ss. 109, 110 and 111, Civil P. C., shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly reference to His Majesty shall be construed as references to the Federal Court, but there are two provisos the effect of which is to leave the right of appeal to the Federal Court unaffected by any of the restrictions imposed by Ss. 109, 110 and 111, Civil P. C., with regard to appeals to the Privy Council, when the appeal to the Federal Court is merely concerned with interpretation of the Government of India Act, 1935, or any Order in Council made thereunder. When the question is simply confined to interpretation, the right to appeal to the Federal Court depends upon the grant of a certificate under S. 205 of the Act. By the addition of R. 17 there has been a corresponding amendment of O. 45, Civil P. C. Rule 17 states that where a certificate has been given under S. 205 (1), Government of India Act, 1935, the provisions of the order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, subject, however, to these provisos:

(a) Rule 3 of this order shall have effect as if at the end of sub-r. (1) thereof there were inserted the words 'apart from any question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder':

(b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in R. 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent.

Rule 2 of O. 45 requires a person who desires to appeal to His Majesty in Council to apply by petition to the Court whose decree is complained of. Therefore, a person who wishes to appeal to the Federal Court must, after he has obtained a certificate under S. 205 (1), Government of India Act, 1935, file a petition in the Court which has passed the adverse decree or order and R. 8 of O. 45 indicates that the petition should ask for the appeal to be "admitted." Rule 3 says that every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of S. 110 or that it is otherwise a fit one for appeal, but by virtue of proviso (a) to R. 17 such a certificate is not required when it is a matter of appealing to the Federal Court on a question merely of interpretation of the Government of India Act, 1935. Rule 7 (1) states that where the certificate is granted, the applicant shall within the time allowed (a) furnish security for the costs of the respondent and (b) deposit the amount required to defray the expenses of translating, transcribing, indexing and transmitting the record. The certificate referred to here is the certificate referred to in R. 3, but such a certificate is not required when the appeal is only concerned with interpretation, nor is the petitioner required to furnish security for the costs of the respondent. Therefore all that the petitioner may be called upon to do in such a case is to furnish the amount required to defray the expenses which will be incurred

in connexion with the printing of the record and its transmission to the Federal Court. Rule 8 says that where the security has been furnished and the deposit made to the satisfaction of the Court, the Court shall (a) declare the appeal admitted, (b) give notice thereof to the respondent, (c) transmit a copy of the record to the Federal Court and (d) provide either party who applies with one or more copies of the record on payment. As security has not to be furnished when the appeal is to the Federal Court on a mere question of interpretation R. 8 (a) must be read here as being subject only to the requirement of R. 7 with regard to the necessity for a deposit to cover the expenses of translating, transcribing, indexing and transmitting the record.

In ILR (1941) Mad 43,[2] this Court held that an appeal lies to the Federal Court from a final order of a single Judge of a High Court when a certificate has been granted by him under S. 205 (1), Government of India Act, 1935, and that the provisions of S. 111A and O. 45, R. 17, Civil P. C., do not preclude the admission of the appeal. In 53 M L W 373[3] the Federal Court itself held that though the scheme of O. 45 implies that till the High Court makes the order under R. 8 it still retains a measure of control over the proceedings, such an order is not a condition precedent to the exercise of jurisdiction by the Federal Court. This was the opinion expressed by Varadachariar J. in 53 M L W 373[3] and it was concurred in by Gwyer C. J. Sulaiman J., however, considered that so long as R. 8 of O. 45 remains applicable to appeals to the Federal Court, an appellant cannot go to the Federal Court without his appeal having been admitted by the High Court. In view of the majority decision, it may be taken that when matters have proceeded as far as R. 8, a formal order of admission by the High Court is not necessary, but if all the requirements of the law up to that stage have been complied with it would be improper for the High Court not to declare the appeal admitted.

Learned counsel for the respondent has stressed the fact that no appeals have been filed from the decrees passed by the subordinate Court, and it is said that the Federal Court would not entertain an appeal against an order passed in revision in connexion with a preliminary issue when there has been no appeal preferred by the aggrieved party from the decree itself. As the law now stands this Court has no jurisdiction to decide the question. Proviso (a) to S. 111 (a), Civil P. C., governs the situation. It will be for the Federal Court to decide whether the question of the validity of the Madras Agriculturists Relief Act is debatable when there has been no appeal from the decree in a case such as we have here. Nor is it for this Court in the present proceedings to consider the effect of the judgment of the Federal Court in 3 F L J 157.[4]

If all the steps which it is necessary for the appellant to take have been taken or will be taken, this Court must admit the appeal. Section 111A and R. 17 of O. 45, Civil P. C., could very easily have been more clearly worded, particularly proviso (a) to S. 111A but we have no doubt as to the effect of the words used. Where a judgment, decree or final order involves a substantial question of law as to the interpretation of the Act and the Court delivering the judgment or passing the decree or final order considers that a substantial question of law is involved as to the interpretation of the Government of India Act, 1935 or any order in Council made thereunder, it is its clear duty as the law now stands, to give a certificate under S. 205. When that certificate has been given no further certificate is required and the person aggrieved is entitled to go to the Federal Court, provided that he complies with so much of R. 7 of O. 45 as is incumbent upon him. It may be mentioned that it has not been suggested that the order of Lakshmana Rao J. is not a judgment or a final order. It has been accepted that so far as the proceedings here are concerned the order of the learned Judge comes within the section and therefore this Court is not called upon to decide what will be the position if a certificate is given in respect of a decision which could not be classified either as a judgment, decree or final order.

It follows from what has been said that in our opinion all that the appellant is required to do here is to provide funds for printing the record and transmitting it to the Federal Court. He is willing to do this.

2. ('40) 27 A I R 1940 Mad 890 : 193 I C 865 : I L R (1941) Mad 43 : (1940) 2 M L J 170, Subramaniam v. Muthuswami.

3. ('41) 28 A I R 1941 F C 5 : 191 I C 659 : 53 M L W 373 : 20 Pat 429 : I L R (1941) Kar F C 1: 1940 F C R 84, Lachmeswar Prasad v. Keshwar Lal.

4. ('41) 28 AIR 1941 F C 47 : 192 I C 225 : 1940 F C R 188 : I L R (1941) Kar F C 25 : (1940) 3 F L J 157, Subramaniam Chettiar v. Muthuswami Goundan.

Therefore the office will be directed to inform the petitioner of the amount required for these purposes and when the amounts have been paid the appeals will be declared to be admitted, and the other requirements of R. 8 ordered. The appellant is given three weeks within which to pay the required amount, that is three weeks from the date the amount is communicated to him. The only other matter which requires to be dealt with is the petition for consolidation. The appellant is here under a misconception. The only provisions in the Code of Civil Procedure with regard to consolidation are those contained in R. 4 of O. 45. In this case there is no question of pecuniary valuation and that rule obviously does not apply. Therefore, the Court is not in a position to make any order of consolidation. There will have to be separate appeals and it will be for the Federal Court to say whether they should be heard together. The costs of these applications will be made costs in the appeals.

C.R.K./G.N. *Order accordingly.*

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(29) A. I. R. 1942 Madras 73

ABDUR RAHMAN J.

Panthanam alias Alagianayakathammal and others — *Appellants*

v.

P. R. M. K. Mohammad Abdul Rahiman Marakayar, trustee and landlord of Puthur Village — *Respondent.*

Second Appeals Nos. 906 to 934 and 999 of 1939, Decided on 14th August 1941, against orders of District Court, Ramnad at Madura, in A.S. Nos. 20 etc. of 1937.

Madras Estates Land Act (1 of 1908), Ss. 75, 74— Appeal to District Court from order of Collector under S. 74 — Collector's order affirmed — No further appeal lies either under Estates Land Act or under S. 100, Civil P. C., as order of District Court is not decree.

A right of appeal is a statutory right and cannot be inferred by implication : ('34) 21 A I R 1934 Mad 103 (F B) and 40 Cal 21 (P C), *Foll.* [P 75c]

The Collector's order for payment of rent in kind would be final if no objection is taken under sub-cl. (b) of S. 75 (8) and would continue to be so even if an objection is taken under that sub-clause if the District Court on being appealed to does not come to a different decision from that of the Collector. In both these cases, it is the decision of the Collector that remains final. If the District Court takes a different view on the other hand, the order of the Collector is to be substituted or replaced by the order of the former. But in the absence of a different conclusion by the District Court, the decision of the Collector would continue to hold the field and retain its character of finality and as there is no provision in the Act which permits a further appeal to the High Court no appeal lies under the Estates Land Act. Nor does an appeal lie under S. 100, Civil P. C., as the order of the Collector is only an order and not a decree and therefore the order on appeal cannot also be a decree even though it is final. An order does not become a decree merely because it happens to be an order which is final so far as the Court passing it is concerned. And the mere practice of the Court to embody such orders in the form of decrees would not confer a right of appeal where none exists or convert what was really an order into a decree : ('14) 1 AIR 1914 P C 87 ; ('14) 1 AIR 1914 Mad 135 ; 10 M L J 398 ; 11 Mad 309 (F B) and ('32) 19 A I R 1932 Mad 612 (F B), *Disting.* [P 74 *b,c,f,g,h*]

U. Somasundaram — for Appellants.

T. K. Subramania Pillai and M. G. Shanmugam — for Respondent.

Judgment. — This is a batch of 30 second appeals. A preliminary objection has been raised by Mr. Sitarama Rao. He contends that in the absence of a provision in the Estates Land Act conferring a right on the appellants to prefer second appeals, these are not competent and are liable to be dismissed. The question to decide is whether they are ? They arise out of objections made by the respondent-landholder for appraisement of the crop or division of the produce under S. 74, Estates Land Act. On receiving these applications, the Collector deputed an officer, as required by S. 75 of the Act, to make the division or appraisement. The officer appointed by the Collector carried out the orders and made a report. Objections were raised on behalf of the appellants to this. They were to the effect that the rent was payable in money and not in kind. These objections were disallowed. The appellants went upto the District Court in appeal but the Collector's decision was affirmed. They have preferred the present appeals against the orders of the District Court. Sub-clauses (d) and (e) to S. 75(8) which contain the provisions relevant to the point to be determined read as follows :

(d) The Collector's order for the payment of rent and costs, if any, shall be final unless an objection of the nature described in cl. (b) has been raised and shall be enforceable as a decree for arrears of rent.

(e) Where an objection of the nature described in cl. (b) has been raised, the Collector's decision thereon shall be subject to an appeal to the District Court. Such appeal shall be presented within thirty days from the date of the Collector's decision.

Clause (b) referred to in these sub-clauses provides that if an objection is raised that the rent is not payable by division or appraisement or that no rent is payable and the Collector upholds the objection, he shall set aside the award made by the person who was deputed to make the division or appraisement. According to the first of these

sub-clauses, the Collector's order for the payment of rent and costs has been declared to be final. Since, during the course of argument, learned counsel for the appellant contended that the order passed by the District Court and the orders passed by the Collector were decrees in fact, it would be useful to remember that sub-clause (d) does not declare the Collector's orders to be decrees but merely orders that are enforceable as decrees for arrears of rent. As to the character of the decision made by the District Court, sub-clause (e) provides that when the objection that the rent is not payable either at all or at least in kind, i. e., by division or appraisement but is payable in cash, is taken on behalf of a tenant, the Collector's decision (the use of the word 'decision' to which reference was made during the course of the arguments is not important as it obviously refers to the order passed by the Collector and to nothing else) shall be subject to an appeal to the District Court. If these two sub-clauses are read together, there would be no doubt as to their meaning. They lay down that the Collector's order for payment of rent in kind would be final if no objection is taken under sub-cl. (b) and would continue to be so even if an objection is taken under that sub-clause if the District Court on being appealed to does not come to a different decision from that of the Collector. In both these cases, it is the decision of the Collector that remains final. If the District Court takes a different view on the other hand, the order of the Collector is to be substituted or replaced by the order of the former. Whether such an order could be appealed against does not arise here for decision. But the point to be borne in mind is that in the absence of a different conclusion by the District Court, the decision of the Collector would continue to hold the field and retain its character of finality.

There is no provision in the Act which permits a further appeal to the High Court; but learned counsel for the appellant contends that in spite of the absence of a specific provision to that effect, such appeals are competent as under S. 192, Estates Land Act, the provisions of the Code of Civil Procedure have been made applicable to all appeals under the Act and in so far as the appeals to the District Court were laid under S. 75 (d), a further appeal to the High Court would lie under S. 100, Civil P. C. But before the provisions of S. 100 can be held to be attracted, it is incumbent upon the appellants to satisfy me that the orders passed by the District Court on appeals amounted to decrees. The proceedings, it must be remembered, arose out of applications made to the Collector for division or appraisement and not out of suits. The decision by the Collector has been described by cl. (d) to be in the nature of an order. The appeals against that order must be regarded to be a continuation of the proceedings before the Collector. If the decision by the Collector culminated in an order only, how can a decision by the District Court on appeal be characterized as a decree? There are a large number of orders against which appeals have been provided under O. 43, R. 1, Civil P. C. Can it be legitimately contended that the decision of the Court of appeal would amount to a decree although the decision of the first Court was in the nature of an order? I do not think so. The Code makes a clear distiction between decrees and appealable orders and it is impossible to forget that distinction in deciding this question. My attention was drawn to the fact that the decisions of the District Court were final so far as that Court was concerned and that they were embodied in the form of decrees. But I do not feel impressed by these facts. An order does not become a decree merely because it happens to be an order which is final so far as the Court passing it is concerned. As to the form in which these orders were embodied, a practice seems to have grown up in this presidency to embody every order or judgment passed by a Court in the form of a decree. In cases of orders, these formal expressions have come to be known by the style of decretal orders. This practice owed its growth probably to the difficulty experienced by the lower Courts in discriminating between judgments and orders and since no appeal is competent in case of judgments unless they are formally drawn up and embodied in decrees, it was probably considered safer to embody both judgments and order in that manner. This would not, however, confer a right of appeal where none exists or convert what was really an order into a decree.

Reliance was placed on behalf of the appellant on several decisions of this Court and of the Privy Council; but it is unnecessary to examine them in detail as the decisions in 37 Mad 443,[1] 1 M L W 89[2] and 10 M L J

1. ('14) 1 A I R 1914 P C 87 : 25 I C 305 : 37 Mad 443 : 41 I A 258 (PC), Veeraraghavalu v. Venkatanarasimha Naidu.
2. ('14) 1 AIR 1914 Mad 135 : 24 I C 754 : 38 Mad 655 : 1 M L W 89, Venkataramier v. Vaithilinga Thambiran.

398,[3] were decisions in suits instituted under the Rent Recovery Act or the Estates Land Act and must therefore have ended in decrees. The decision in 11 Mad 309,[4] on which very great emphasis was laid by learned counsel for the appellant has no application also, in my opinion, as the Forest Officer in that case was found by the Full Bench to have been constituted a Court with special jurisdiction which a Collector in deciding the question of appraisement under S. 75 is not. The last decision to which reference was made during the course of the arguments was that in 63 M L J 450,[5] but the real point to be determined in that case was whether the civil Court was a competent revising authority in regard to the directions given by the Board of Revenue to revise the proceedings of a revenue officer who had made a settlement of rents under Chap. 11, Estates Land Act. That is not the question which has to be determined now. In the course of the judgment, however, one of the learned Judges, Ananthakrishna Ayyar J., referred to the position whether second appeals would be competent in certain cases but there is nothing in those observations which may lead me to infer that the learned Judge was referring to the maintainability of such appeals from anything else other than decrees.

In my opinion, this case is governed by the principle enunciated in the Full Bench decision in 57 Mad 271[6] and in 40 Cal 21.[7] A right of appeal is a statutory right and cannot be inferred by implication. For the above reasons I must hold that the appeals are not competent. A request is made to me on behalf of the appellants that they may be permitted to convert these appeals into revisions. As I am assured that there are points of law which may have to be considered by the Court and in the ends of justice, I have no objection to grant that permission provided that the appellants make up the deficiency in the court-fee and pay a consolidated sum of Rs. 50 to the learned counsel on the other side both because these appeals have not been held to be competent and because of the adjournment which has been asked to make up the deficiency. These costs would be irrespective of any final orders as to costs that may be ordered to one party or to the other on the decision of appeals which are now being converted into revisions or what would be converted into revisions if the necessary deficiency in court-fee is made up. The necessary deficiency may be made up and the costs paid to the other side within a month.

C.R.K./K.S. *Order accordingly.*

3. (1900) 10 M L J 398, Ganne Kotappa v. Venkataramiah.
4. ('88) 11 Mad 309 (F B), Kamaraju v. Secretary of State.
5. ('32) 19 A I R 1932 Mad 612 : 140 I C 331 : 55 Mad 883 : 63 M L J 450 (F B), Rajah of Mandasa v. Jagannayakalu.
6. ('34) 21 A I R 1934 Mad 103 : 147 I C 614 : 57 Mad 271 : 66 M L J 43 (FB), Rajagopala Chettiar v. Hindu Religious Endowments Board, Madras.
7. ('13) 40 Cal 21 : 16 I C 188 : 39 I A 197 : 16 C W N 961 : 16 C L J 245 : 6 L B R 150 (P C), Rangoon Botatoung Co., Ltd. v. Collector of Rangoon.

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(29) A. I. R. 1942 Madras 75

HORWILL J.

Public Prosecutor — Appellant

v.

B. V. A. Lury Co. represented by A. V. Raghavaraju, Director and another — Respondents.

Criminal Appeal No. 149 of 1941, Decided on 14th August 1941, against acquittal of Sub-Divisional Magistrate, Coconada, in C. C. No. 71 of 1940.

Companies Act (1913), S. 32 (5) — Words "knowingly" and "wilfully" refer to company's officers and not to company itself—Company is always liable when return is not sent in — Its officers liable only when they knowingly or wilfully authorise or permit default.

The words "knowingly" and "wilfully" in S. 32 (5) are used with reference only to the officers of the company and not to the company itself because the company as a corporate body cannot either "know" or "will". The company is always liable where the return is not sent in; but the officers of the company are liable only if they knowingly or wilfully authorize or permit the default : (1904) 20 T L R 425, *Disting.*; ('38) 25 A I R 1938 Mad 640, *Approved.* [P 76*a*, *b*, *c*]

Appellant in person.

D. Narasaraju — for Respondents.

Judgment.—Under S. 32, Companies Act, a company has to draw up a list of the members of the company and of the persons who have ceased to be members since the date of the last return. That list has to be completed within 21 days after the ordinary general meeting and a copy has to be sent, signed by a Director or the Manager or the Secretary, to the Registrar. In this case, whereas the list should have been sent to the Registrar on or before 20th November 1939, it was not in fact filed until 3rd January 1940. A case was therefore filed against the company and its Directors for not complying with the requirements under S. 32 of the Act.

The Sub-Divisional Magistrate of Coconada held that there was no reason to think that the failure to submit this return was due to anything but negligence and that as the delay was not due to any wilful default, they were not guilty of any offence. He therefore acquitted them. The Crown has preferred an appeal with regard to the acquittal of the company. The words "knowingly" and "wilfully," which are found to be the necessary ingredients of the offence by the learned Magistrate, cannot be applied to a company at all. A company, as a corporate body, cannot either "know" or "will." That the Legislature did not personify companies and impute to them minds is made clear by the wording of the relevant sections. The punitive clause of S. 32, for example, reads :

> If a company makes default in complying with the requirements of this section, it shall be liable to a fine not exceeding Rs. 50 for every day during which the default continues, and every officer of the company, who knowingly and wilfully authorises or permits the default, shall be liable to the like penalty.

It is to be noted that the words "knowingly" and "wilfully" are used with reference only to the officers of the company and not to the company itself, obviously for the reason I have given above. The company is always liable where the return is not sent in; but the officers of the company are liable only if they knowingly or wilfully authorize or permit the default. Mr. Narasaraju for the respondent has quoted (1904) 20 T L R 425,[1] in which referring to the English Act, the Aldermen held that "the word 'default' in S. 27 implied a continued neglect to do an act required." The English Act has not been shown to me; and so I do not know to what extent, if at all, that case can safely be applied in India; but even if it could, it can be distinguished from the case before me by the fact that a prosecution had been launched apparently against the officers of the company as well as against the company, and also by the fact that in that case the omission was one which it was impossible to remedy. It may be noted that the company had already been fined for not having submitted the required return on the due date, and a daily penalty was also imposed on the company for its subsequent default. It was only when a prosecution was launched after the omission was impossible to remedy that the lower Court refused to impose a further penalty. The only Indian case that has been cited to me is a judgment of Burn J. in Cr. R. C. No. 601 of 1937,[2] which is a case in which the company and the Directors had been fined under S. 76, Companies Act. Burn J. acquitted the officers of the company because in the circumstances of that case he held that it could not be said that they had been "knowingly parties to the default"; but he upheld the penalty imposed on the company. Precisely the same conditions exist in this case. The learned Magistrate has found that there was no wilful default on the part of the officers of the company and the learned Public Prosecutor is not prepared to dispute that finding. So while the officers of the company were rightly acquitted, the company should have been punished. As far as the company is concerned, the order of the Magistrate is set aside and the company is ordered to pay a penalty of Rs. 50.

C.R.K./G.N. *Order accordingly.*

1. (1904) 20 T L R 425, Dorte v. South African Superaeratim Ltd.

2. ('38) 25 A I R 1938 Mad 640 : 177 I C 600 : 39 Cr L J 907 : (1938) 1 M L J 856 : 1938 M W N Cr 128, Sree Meenakshi Mills Co. Ltd. v. Assistant Registrar of Joint Stock Companies, Madras.

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(29) A. I. R. 1942 Madras 76

ABDUR RAHMAN J.

C. Krishnamachariar — Appellant

v.

B. Lakshmi Ammal — Respondent.

Second Appeal No. 903 of 1938, Decided on 23rd July 1941, against decree of District Court, Chingleput, in A. S. No. 256 of 1935.

Madras Land Encroachment Act (3 of 1905), S. 6—S. 6 does not deprive Government or their assignee of their right to proceed in civil Court and obtain assignment from previous lessee — Defendant in such suit not raising question of compensation for improvement in trial Court—High Court in appeal will not take notice of that question.

Section 6 gives a summary remedy to the Collector but does not take away the right of the Government to proceed in a civil Court or the right of the Assignee of the Government to obtain an assignment of the land after the lease had been cancelled and proceed against the previous lessee in a civil Court : ('14) 1 AIR 1914 Mad 659, *Disting.* [P 77*a*,*b*]

Where the defendant to such suit does not raise the question of compensation for improvements effected by him the High Court in appeal will not take notice of that question. [P 77*c*]

M. Krishna Bharathi and S. Annamalai — for Appellant.

S. Ramanujachariar — for Respondent.

Judgment. — This appeal arises out of a suit for possession of a certain site which was granted to the defendant by the Government on patta on certain conditions. The defendant failed to comply with those con-

ditions and the Revenue Divisional Officer cancelled the assignment in accordance with the terms of the patta and the Tahsildar assigned the site on 30th August 1931 to the present plaintiff. The only contention raised before me is that the suit for possession by the present plaintiff was not competent and that it was incumbent upon the Government to proceed under S. 6, Land Encroachment Act, and thus give him a right of appeal to the revenue authorities and failing that, to bring a civil suit within six months. Section 6, Land Encroachment Act, gives a summary remedy to the Collector but does not take away the right of the Government to proceed in a civil Court or the right of the Assignee of the Government to obtain an assignment of the land after the lease had been cancelled and proceed against the previous lessee in a civil Court. Learned counsel for the appellant wished to rely on 38 Mad 674,[1] but that has no application to the facts of the present case. The defendant-appellant can have no legitimate grievance if he, instead of being compelled to sue in a civil Court, is forced to come to the civil Court as a defendant in a suit instituted either by the Government or by the Government's assignee. The contention that the terms or conditions of the patta were complied with was not seriously pressed even before the lower appellate Court and nothing has been said here which would incline me to take a view different from what was taken by the learned District Judge. The appellant alleged that he had erected foundations on the patta land after the expiry of the lease at a cost of something like Rs. 250 and by this procedure he has been deprived of the compensation that he might have been able to persuade the revenue authorities to pay or to deal with him a little more leniently. I cannot however take notice of this fact. He should have asked for compensation in his written statement if he thought he was entitled to any. For the above reasons the appeal is dismissed. But in the circumstances I leave the parties to bear their own costs. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

1. ('14) 1 AIR 1914 Mad 659 : 21 I C 840 : 38 Mad 674 : 26 M L J 60, Bhaskaradu v. Subbarayudu.

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(29) A. I. R. 1942 Madras 77

HORWILL J.

M. N. M. Chelliah Pillai — Petitioner

v.

Ramiah Thevar alias Ramalinga Thevar and others — Respondents.

Criminal Revn. Case No. 529 and Criminal Revn. Petn. No. 498 of 1941, Decided on 8th August 1941, to revise order of Joint Magistrate, Devakottah, D/- 19th May 1941.

(a) Criminal P. C. (1898), Ss. 147, 145 and 146 — Right of easement in respect of certain lands — Magistrate unable to decide whether right exists — He cannot order attachment of lands under section 146.

Where a Magistrate is unable under S. 147 to decide whether a right of easement in respect of certain lands exists or not he cannot order the attachment of those lands under S. 146 for such an order can only be passed in dispute with regard to immovable property which can be dealt with under Ss. 145 and 146. [P 77*h*; P 78*a*]

(b) Criminal P. C. (1898), S. 147 — Evidence conflicting — Magistrate need not give definite finding.

Under S. 147 a Magistrate is not bound to give a definite finding one way or the other when the evidence is conflicting. [P 78*a*]

V. T. Rangaswami Iyengar — for Petitioner.

N. Somasundaram — for Respondents.

Public Prosecutor — for the Crown.

Order. — The question in dispute before the Magistrate was whether a right existed in the counter-petitioners to take rain water from the field of the petitioner through the bund separating the petitioner's field from the counter-petitioners' field. The learned Magistrate purported to make an inquiry under S. 145, Criminal P. C., and passed an order under S. 146 (1) ordering attachment by the Court because he was unable to decide whether such right existed or not. He clearly should have acted under S. 147, which deals with disputes with regard to easements: that section does not make any provision for action to be taken in case the Magistrate is unable to decide between the parties. If it appears to the Magistrate that such a right exists, he may issue an order prohibiting interference with the exercise of the rights; on the other hand, if it appears to the Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right. As he was not satisfied that either S. 147 (2) or S. 147 (3) applied, he was unable to pass an order either prohibiting interference or prohibiting the exercise of the alleged right : nor could he pass an order attaching the land; for such an order can only be passed where there is a dispute

with regard to immovable property that can be dealt with under Ss. 145 and 146, Criminal P. C. The order of the Magistrate is therefore clearly wrong and must be set aside. It has been suggested by the learned counsel for the 5th counter-petitioner that the Magistrate should be directed to give a definite finding one way or the other; but a definite finding where the evidence is conflicting may not be possible. The petition is therefore allowed and the order of the lower Court set aside.

C.R.K./G.N. *Petition allowed.*

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(29) A. I. R. 1942 Madras 78

WADSWORTH J.

Sri Raja Velugoti Venkata Rajagopala Krishna Yachendra Bahadur Varu — *Petitioner*

v.

Kuram Venkata Seshacharlu — *Respondent.*

Civil Revn. Petn. No. 1705 of 1939, Decided on 20th March 1941, to revise order of Special Deputy Collector, Chandragiri, D/- 12th January 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 15 (4) — Amount of rent already determined by decree of civil Court — Subsequent application under S. 15 (4) in revenue Court does not lie.

When there is a decree of a civil Court determining the amount of rent payable for the relevant period, there is no room for any application to the revenue Court under S. 15 (4). The object of S. 15 (4) is clearly to enable a tenant whose liability for rent has not yet come into Court to ascertain what is the extent of that liability as scaled down and pay it into the revenue Court in order to prevent an unnecessary suit. [P 78 *f*, *g*]

P. V. Rajamannar and K. Subba Rao — for Petitioner.

Kasturi Seshagiri Rao — for Respondent.

Order. — This revision petition is preferred by the landholder against an order of the Special Deputy Collector of Chandragiri purporting to have been passed under S. 15 (4), Madras Act, 4 of 1938. The applicant before the learned Deputy Collector was the owner of a 3/16th share in an agraharam and he claimed the right to get jodi scaled down on the basis of a deposit of the arrears for faslis 1346 and 1347, not of the whole jodi of the agraharam but of the proportionate arrears due on his 3/16th share. The learned Deputy Collector, accepting evidence that in practice the applicant had been paying his proportionate share of the rent separately from the other agraharamdars and that these payments had been received, held that the liability of the applicant was only a liability for 3/16th of the total jodi and allowed the application. It does not appear to have been realized in the Court below that the question whether the liability of the applicant was a joint and several liability or a separate liability for a proportion of the whole jodi was concluded so far as these particular faslis are concerned by the decisions which led up to decrees which decrees in fact the applicant was trying to get modified.

It has been recognized that one of the lacunæ in Act 4 of 1938 is that no procedure is laid down for scaling down decrees for rent. Section 19 provides only for the scaling down of a decree for the repayment of a "debt" which term does not, strictly speaking, include a liability for rent. But it has been held in (1940) 2 M L J 825[1] that a procedure analogous to that laid down in S. 19 of the Act should be followed with reference to decrees for rent and that view has been adopted in subsequent decisions. It seems to me apparent that, when there is a decree of a civil Court determining the amount of rent payable for the relevant period, there is no room for any application to the revenue Court under S. 15 (4). The object of S. 15 (4) is clearly to enable a tenant whose liability for rent has not yet come into Court to ascertain what is the extent of that liability as scaled down and pay it into the revenue Court in order to prevent an unnecessary suit. To permit this procedure to be used when another Court has already passed a decision as to the liability for rent, would be to sanction the existence of two conflicting judicial orders, neither of which would necessarily govern the other. It is moreover apparent that any procedure for reducing the amount due under a decree passed before Act 4 of 1938 came into force with a view to giving the relief laid down under S. 15 cannot be treated as an opportunity to alter the decree apart from the process of reduction provided in the Act. I held in C. R. P. No. 2169 of 1939[2] which was a similar case though on slightly different facts to the present that the petitioner cannot under the guise of scaling down a decree for rent, get that decree amended so as to give effect to a defence which should have been put forward in the suit and was not put forward or if put

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1. ('41) 28 AIR 1941 Mad 116 : (1940) 2 M L J 825, Ramadoss Reddiar v. Munusami Reddiar.
2. C. R. P. No. 2169 of 1939, Ramamurti Pantulu v. Sri Lakshmi Narayana.

forward, was not accepted. Still less can the same result be obtained by ignoring the decree and going to the Collector with an application for scaling down the rent on a basis which has been found to be untenable in the decree for the rent of the relevant period.

Turning to the facts of the present case, the application dealt with the arrears of jodi for Faslis 1340 to 1345. These Faslis are admittedly covered by two decrees, one O. S. No. 229 of 1934 and the other S. C. No. 473 of 1937 of the District Munsif's Court of Tirupati. The judgment in the latter case has been exhibited and that judgment expressly negatives the contention of the present applicant that by reason of separate possession of the 3/16th share and separate collection of the rent for that share he was liable only to 3/16th of the jodi of the whole agraharam. The learned District Munsif repels this contention on the ground that the decision in O. S. No. 229 of 1934 has decided that defendant 3 is liable jointly and severally with the other agraharamdars for the whole of the jodi. That is the suit covering the earlier Faslis in reference to which this present application is presented. It follows therefore that both of the decrees which covered the relevant Faslis proceeded upon a judicial decision binding upon the present respondent to the effect that he is liable jointly and severally for the whole of the rent of the agraharam. So long as these two decrees are in full force and effect, it is not open to the respondent to contend in proceedings for scaling down the rent of those Faslis that his liability is only for 3/16th of the rent. I doubt very much whether the learned Deputy Collector was right in entertaining the application at all when the matter was covered by civil Court's decrees. In my opinion the proper course would have been to refer the applicant to the Court which passed the decrees. But even assuming that the procedure taken by the respondent is one open to him, he clearly cannot be allowed to use the right to scale down the rent as a right to reopen the question of joint or several liability which has been finally decided for those particular Faslis by decrees of a competent Court. In the result therefore the revision petition is allowed with costs and the application is dismissed with costs throughout.

C.R.K./K.S. *Petition allowed.*

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(29) A. I. R. 1942 Madras 79

WADSWORTH AND PATANJALI SASTRI JJ.

Nagore Durga represented by Managing Trustees S. Sultan Kaliba Sahib and another — Plaintiffs — Appellants

v.

Chatram Manager Kannu Pillai — Respondent.

Second Appeal No. 1039 of 1939, Decided on 14th August 1941, against decree of District Court, East Tanjore at Negapatam, D/- 17th August 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 17—Object — Scope — S. 17 applies to all suits against defaulting tenants whether agriculturist or not.

The object of S. 17 is clearly to save the landholders from the necessity of filing large numbers of suits which would be met by payments under S. 15 of the Act, and a claim for the cancellation of the earlier arrears. The plain language of S. 17 includes all suits against defaulting tenants, agriculturists or non-agriculturists and covers any suit in respect of arrears of rent accrued for Fasli 1345 or any prior fasli and is not restricted to such a suit filed against an agriculturist. Consequently S. 17 saves limitation in respect of the suit for arrears of rent for Fasli 1344 due from a non-agriculturist. [P 80*e*,*f*,*g*]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 19 — Applicability.

Section 19 certainly applies to a decree which is passed against both agriculturists and non-agriculturists, though the relief may be confined only to the former. [P 80*b*]

K. V. Ramachandra Iyer — for Appellants.

S. Ramachandra Iyer and R. Sundaralingam — for Respondent.

Wadsworth J. — The only question in this second appeal is whether S. 17, Madras Act 4 of 1938 saves limitation in respect of a suit for arrears of rent for fasli 1344 due from a non-agriculturist. The arrears in question accrued due on 1st July 1935, the suit was filed on 1st December 1938 and would clearly be barred by limitation unless the plaintiffs-appellants here are entitled to the benefit of S. 17 of the Act. Section 17 says :

> Notwithstanding anything contained in the Madras Estates Land Act, 1908, or the Malabar Tenancy Act, 1929, or in any law of limitation or procedure in force for the time being, no suit or execution proceedings in respect of arrears of rent accrued for Fasli 1345 or any prior Fasli which, under the existing law, would become barred between 1st October 1937 and 30th September 1938, shall be so barred and the landholder . . . . . shall be entitled to file a suit or institute execution proceedings for recovery thereof, on or before 31st December 1938 . . . . .

Then follows a provision extending the period for filing suits in cases where the rent

for fasli 1347 has been paid within the time stipulated and the section concludes with a proviso covering cases in which applications under sub-s. (4) of S. 15 are pending on 31st December 1938 or 31st December 1939 as the case may be, extending the period of limitation to two months from the date of the order on such applications. Now the plain language of this section covers any suit in respect of arrears of rent accrued for fasli 1345 or any prior fasli and it is not restricted to such a suit filed against an agriculturist. In Act 4 of 1938 there are various sections dealing with decrees which are affected by the procedure under the Act. Section 18 deals expressly with a decree passed against an agriculturist. Section 19 deals with a decree for the repayment of a debt which has to be scaled down on the application of an agriculturist judgment-debtor. But this section certainly applies to a decree which is passed against both agriculturists and non-agriculturists, though the relief may be confined only to the former. Section 20 expressly applies only to a decree passed against an agriculturist. Sections 22 and 23 dealing with sales are not confined to decrees against agriculturists, but their operation is confined to cases in which the properties of agriculturists have been sold. It will thus appear that under the scheme of the Act the Legislature has distinguished between those judicial proceedings which are only against agriculturists and those judicial proceedings not necessarily taken against agriculturists solely but which affect the economic position of agriculturists.

Having regard to the distinction so made it is at least arguable that the use of general language in S. 17 was not accidental and that the fact that this section comes within an Act intended to benefit agriculturists and is closely connected with another section intended to benefit agriculturist tenants, is not of itself a sufficient warranty for restricting the scope of the section to suits against agriculturists. Moreover, the proviso to the section which imports the consideration of sub-s. (4) of S. 15 may itself come into effect where a non-agriculturist has instituted proceedings. Suppose a non-agriculturist made a deposit under sub-s. (4) of S. 15 claiming to be an agriculturist and claiming the benefits of that clause and his claim is resisted (as we understand happened in the present case) it would be difficult to deny to the landholder the benefits of the proviso to S. 17 merely because the contest on the application under S. 15 (4) ultimately ended in a decision that the applicant is not an agriculturist. The object of S. 17 is clearly to save the landholders from the necessity of filing large numbers of suits which would be met by payments under S. 15 and a claim for the cancellation of the earlier arrears. The landholders are permitted to stay their hand in order to give the tenants an opportunity of taking advantage of the provisions of S. 15 so that unnecessary litigation may be avoided. In large estates there will be a very obvious difficulty in ascertaining which of the many thousands of defaulters are entitled to the benefits of the Act and it is not unreasonable to suppose that the Legislature intended to discourage unnecessary litigation by allowing the landholders an extended period of limitation for all suits in respect of arrears of rent which are likely to be affected by the new statutory provisions, without imposing upon the landholder the necessity of ascertaining positively in every case whether the defaulter would or would not be entitled to the benefits of the Act.

We have, therefore, a section the plain words of which would include suits against all defaulting tenants, agriculturists or non-agriculturists, and the section read in its plain terms does not appear to run contrary to the general object of the Act. Nor is this interpretation of it unreasonable or improbable. In such circumstances there seems to be no justification for adding to this section words which would restrict its scope beyond the actual terms of the section. We are, therefore, of opinion that the appellant in this case was entitled to the benefit of S. 17 to save limitation in respect of arrears of rent for fasli 1344. We allow the second appeal with costs and remand the suit to the trial Court for ascertainment of the amount due for fasli 1344 and for passing a decree in accordance with the finding. Court-fee paid on the memorandum of second appeal will be refunded.

C.R.K./G.N. *Appeal allowed.*

(29) A. I. R. 1942 Madras 81 (1)

LAKSHMANA RAO J.

Ahmed Mohideen — Petitioner

v.

Yusuf Ali Syed — Respondent.

Criminal Revn. Case No. 733 and Criminal Revn. Petn. No 692 of 1940, Decided on 10th January 1941, to revise order of Chief Presidency Magistrate, Egmore, Madras, D/- 19th August 1940.

Criminal P. C. (1898), S. 197 — Assistant Police Commissioner arresting accused for offence under Madras City Police Act — On his order given while purporting to act in discharge of his official duty, Police Sub-Inspectors beating accused — Assistant Police Commissioner not removable from his office except with Secretary of State's sanction — Court held could not take cognizance of his alleged offence without Governor's previous sanction.

The Assistant Commissioner of Police arrested the accused for an offence under the Madras City Police Act. Acting under his order, given while purporting to act in the discharge of his official duty, the Police Sub-Inspectors beat the accused who thereupon filed a complaint against the acts of the Assistant Commissioner of Police :

Held that since the Assistant Commissioner of Police was not removable from his office save by or with the sanction of the Secretary of State, no Court could take cognizance of offence alleged against him except with the previous sanction of the Governor of the Province. [P 81*g*]

V. T. Rangaswami Ayyangar and K. Ramaswami Ayyangar — for Petitioner.

V. L. Ethiraj for A. S. Sivakaminathan — for Respondent.

Crown Prosecutor — for the Crown.

FACTS.—The petitioner herein complained to the Presidency Magistrate against the respondent, accused 1, Mr. Yusuf Ali Syed, the Assistant Commissioner of Police, Madras, and two Sub-Inspectors of offences under Ss. 323 and 352, Penal Code, read with Ss. 109 and 111, Penal Code, alleging that on account of long-standing enmity between himself and accused 1, he, accused 1, along with some policeman, saw the complainant near the Thousand Lights, took him in his car and after going some distance asked the complainant to get down from the car and walk the rest of the distance to the police station in company with the policeman. On reaching the police station, on the orders of accused 1, the two Sub-Inspectors who are accused 2 and 3 beat him on several parts of the body with a stick and fisted him resulting in injuries one of which was a bleeding injury. Accused 1 contended that material facts have been suppressed, that the act complained of was not an isolated act but in consequence of what transpired the previous day when the police raided the petitioner's premises which was used as a common gaming house for the purpose of accepting bets on horse races and seized incriminating documents, that as the petitioner who was wanted escaped, he was arrested on the next day. He further contended that the acts complained of were done in the course of the discharge of his duties appertaining to the office and that sanction of the Governor under S. 197, Criminal P. C., was a condition precedent and as no sanction was obtained the proceedings of the Presidency Magistrate were ab initio void and ultra vires. The Presidency Magistrate upheld the contention of accused 1 and quashed the proceedings against him alone. Against this order the complainant preferred this revision petition.

Order. — The house of the complainant was raided by the respondent, the Assistant Commissioner of Police, under the provisions of S. 42, Madras City Police Act, on 9th July last and instruments of gaming on horse races were found. The complainant escaped and he was arrested by the respondent on 10th July and taken to the police station. Two Sub-Inspectors are stated to have beaten him in the station under the orders of the respondent and as urged by the Crown Prosecutor the respondent gave the order while acting or purporting to act in the discharge of his official duty. He is not removable from his office save by or with the sanction of the Secretary of State and S. 197, Criminal P. C., enacts that no Court can take cognizance of such offence except with the previous sanction of the Governor of the Province in the exercise of his individual judgment. The revision petition therefore fails and is dismissed.

C.R.K./G.N. *Petition dismissed.*

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(29) A. I. R. 1942 Madras 81 (2)

LAKSHMANA RAO J.

In re Jalakam Venkata Subbadu — Appellant.

Criminal Appeal No. 317 of 1940, Decided on 22nd August 1940, against order of Court of Session, Cuddapah Division, D/- 26th February 1940.

Criminal Tribes Act (1924), S. 23 (1) (b) — Long interval (5 years) between accused coming out of prison after serving last sentence and commission of offence is "special reason to contrary" within S. 23 (1) (b).

A long interval of about five years between the accused coming out of prison after serving his last sentence and the commission of the offence is a "special reason to the contrary" within the meaning of S. 23 (1) (b) for imposing a lesser sentence than transportation for life : ('29) 16 A I R 1929 Mad 841, *Rel. on.* [P 82*a*, *b*]

K. V. Achari for Public Prosecutor — for the Crown.

Judgment.— The appellant has been convicted under Ss. 397 and 324, Penal Code, and S. 23, cl. (1) (b), Criminal Tribes Act, and sentenced to transportation for life. The appellant pleaded guilty to the charges and there is no ground for interference with the conviction. But his last conviction was on 12th March 1928 when he was sentenced to rigorous imprisonment for seven years, and the present offence was committed on 15th November 1939. There was thus an interval of about five years between his coming out of prison after serving his last sentence and the commission of the offence and as held in 53 Mad 80,[1] this is a special reason to the contrary within the meaning of S. 23 (1) (b), Criminal Tribes Act, for awarding a lesser sentence than transportation for life. This was overlooked by the Sessions Judge and having regard to all the circumstances a sentence of rigorous imprisonment for seven years would suffice. The sentence is therefore reduced to rigorous imprisonment for seven years and otherwise the appeal is dismissed.

C.R.K./G.N. *Sentence reduced.*

1. ('29) 16 A I R 1929 Mad 841 : 122 I C 655 : 31 Cr L J 454 : 53 Mad 80 : 57 M L J 743, In re Karuppa Thevan.

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(29) A. I. R. 1942 Madras 82

SOMAYYA J.

Kota Nagayya — Appellant

v.

Vanipenta Venkatayya and another — Respondents.

Second Appeal No. 1081 of 1938, Decided on 1st August 1941, against decree of Dist. Court, Kurnool, in A. S. No. 123 of 1937.

(a) Minor — Guardian — Negligence — Suit for possession by vendee from guardian on basis of sale deed — Guardian successful in his defence that sale should not be upheld and possession should not be decreed—Court finding minor liable for particular sum and granting decree for same — Decree held not erroneous.

The vendee from the minors' guardian sued for recovery of possession on foot of a sale deed executed by the guardian. The guardian successfully prevailed upon the Court and succeeded in his defence that the sale ought not to be upheld and that possession of the properties should not be decreed to the plaintiff. The Court went into the question as to what items of consideration for which the sale deed was executed by the guardian were really binding on the minor and finding that a particular sum was payable to the vendee plaintiff, granted a decree for the sum which was found to be binding on the minors :

Held that the decree could not be said to be erroneous since when a decree for possession was refused, the Court could pass a decree in favour of the plaintiff for recovery of the sum found to be binding on the minors. [P 84*a*]

(b) Minor — Decree against — No fraud or gross negligence on guardians's part in conduct of suit — Decree cannot be set aside merely because of guardian's failure to appeal—Guardian without funds cannot be said to be negligent in not preferring appeal.

If there is no fraud or gross negligence on the part of the guardian of the minor in the conduct of the suit, then the decree that is passed in that suit cannot be challenged on the mere ground that the guardian failed to carry the matter in appeal. Unless the guardian had sufficient funds to prefer and prosecute an appeal against the decree, it cannot be said that the guardian acted with any negligence in not having preferred any appeal. [P 84*b*, *d*]

V. Govindarajachari — for Appellant.

Kasturi Seshagiri Rao — for Respondents.

Judgment. — This is an appeal filed by the defendant against the decree of the District Judge of Kurnool passed by him in A. S. NO. 123 of 1937. The plaintiffs in the action Venipenta Venkatayya and Chinna Venkatayya are brothers. During their minority, a sale was effected by their mother and guardian in favour of the appellant for a sum of Rs. 300. The vendee was not able to get possession and therefore filed O. S. No. 40 of 1931 on the file of the District Munsif's Court of Markapur for recovery of possession of the property sold to him. The mother was also made a party as defendant 3; the two minors being made defendant 1 and 2. The mother declined to act as the guardian of her minor sons and thereupon their maternal uncle one Obiah was appointed their guardian. It is found that Obiah raised all possible defences to the suit including the question whether any portion of the sum of Rs. 300 which was the consideration for the sale was binding on the minors. The Court found that the properties were really worth very much more than the sum of Rs. 300 for which it was sold and therefore declined to uphold the sale and to give possession to the plaintiffs. The Court, however, held that two debts for the discharge of which the sale was effected were binding on the minors. One of them, a debt due to Baliah, is now admitted to have been contracted by the father of the minors and that it is therefore a proper debt. As regards the second debt which was due to one Nemiliah, he had obtained a sale from the mother and in execution of the money decree which Baliah got for the recovery of his debt, he filed a claim petition, I. A. NO. 180 of 1921. It was ordered on the claim petition that Nemiliah was not entitled to

enforce his right as the vendee and that he was entitled to a charge for Rs. 116. Therefore execution of Baliah's decree was directed to proceed subject to a charge for Rs. 116 in favour of Nemiliah.

In order to avoid that sale which was about to take place in execution of Baliah's decree, the sale in favour of the present defendant was effected by the mother of the minors and the sale was for the purpose of discharging Baliah's debt and also Nemiliah's debt to the extent to which a charge had been declared in favour of Nemiliah. It is upon this sale deed that O. S. No. 40 of 1931 was filed by the present defendant. In that suit the District Munsif found that both Baliah's debt and Nemiliah's debt were binding on the minors. But he found that the property was worth much more than the consideration mentioned in the sale deed. He refused to give a decree for possession but at the same time he gave a charge decree to the extent of the moneys which were advanced by the plaintiff in that action and which went to the discharge of debts binding on the minors. A preliminary decree was passed and money not having been paid, an application for a final decree was filed and the final decree followed. In execution of the final decree, the property was brought to sale and purchased by the plaintiff therein and he got possession. The present suit is filed by the two brothers one of whom has attained majority for a declaration that the decree in O. S. No. 40 of 1931 is not binding on them on the ground that their guardian ad litem was guilty of fraud and gross negligence in the conduct of the previous suit.

The trial Court found that all the defences that were open to the minors were advanced by Obiah their guardian in the previous suit, that he appeared at the trial, that he adduced all the evidence available and that the Court passed a decree for money and gave a mortgage decree for the sum found binding on the minors. On appeal the District Judge has not found that Obiah failed to advance any defence which it was open to him to advance. The judgment proceeded upon the footing that all the defences were put forward in the previous suit. One allegation which the plaintiffs put forward in the present suit, namely, that the guardian ad litem, did not appear at the trial in the previous suit has been found by the District Munsif not to be correct. He finds that the guardian ad litem was present at the trial in the previous suit. He apparently did not go into the witness-box for the reason that he did not know personally any of the facts which had to be placed before the Court. The mother of the minors was examined and three other witnesses were also examined. Mr. Kasturi Seshagiri Rao, the learned advocate for the respondents, is not able to suggest any defence which Obiah might have put forward and which he did not in fact put forward in the previous suit. Nor is it alleged that any evidence oral or documentary was not placed before the Court which tried O. S. No. 40 of 1931. The chief complaint is that the Court passed a decree which it ought not to have passed, that on the findings arrived by it, the Court should have dismissed the suit leaving it to the plaintiff to enforce his right to recover the sums which were found binding on the minor defendants and that the Court fell into a grievous error in passing a mortgage decree. It is also said that an appeal ought to have been preferred on behalf of the minors and that no appeal was in fact preferred on their behalf. The District Judge also finds that the District Munsif who was executing the decree in Baliah's suit and in the course of which a charge was given in favour of Nemiliah also fell into a grievous error in creating what the District Judge terms a charge on that claim petition.

To start with, what the Court did in the claim petition is not the subject of attack in the present suit. What we are concerned with is whether there was any fraud or gross negligence in the conduct of the previous suit (O. S. No. 40 of 1931). I do not agree with the District Judge in his statement that the District Munsif fell into a grievous error in passing the decree which he did in that suit. The suit was by the vendee from the minor's guardian for recovery of possession on foot of a sale deed executed by the guardian. The sale itself was for the purpose of discharging at least one debt which was the father's debt and another debt for which a charge had been created in a claim proceeding. The guardian (the maternal uncle) successfully prevailed upon the Court and succeeded in his defence that the sale ought not to be upheld and that possession of the properties should not be decreed to the plaintiff. The District Munsif had necessarily to go into the question as to what items of consideration for which the sale deed was executed by the mother were really binding on the minor defendants. The Court found that a particular sum was payable to the vendee plaintiff. Why he should have been directed to a separate suit and why he should not have been given a decree for the sum which was

found to be binding on the minors, it is difficult to see. No doubt the suit was one for ejectment. But one of the important questions which had to be decided was how far the consideration was binding on the minors. That being decided by the Court, there is no reason why when a decree for possession is refused, the Court should not pass a decree in favour of the plaintiff for recovery of that sum; why again a charge decree which was executable in pursuance of that very decree is not again clear. At any rate, I cannot see any grievous error in the decree that was passed by the District Munsif in O. S. No. 40 of 1931.

Assuming that the District Munsif was not justified in giving a decree that he did, how can it be said that the guardian was bound to prefer an appeal and that his omission to do so gives a good ground for the minors to file the present suit. This assumes that a guardian in every case must spend the funds of the estate in carrying a judgment of the trial Court in appeal. For this purpose he must have necessary funds. Unless the plaintiffs allege that the guardian had sufficient funds to prefer and prosecute an appeal against the decree of the District Munsif in O. S. No. 40 of 1931, it cannot be said that the guardian acted with any negligence in not having preferred any appeal. If he had no funds he could not possibly file an appeal. Besides the court-fee payable, there are other expenses to be incurred for an appeal. What appears to one Judge as a grievous error may not appear to another to be such and unless we can postulate that in every case the guardian of a minor defendant must carry the decree in appeal and that in default of his so doing, the plaintiff is not entitled to take advantage of that decree and that the decree is liable to be set aside is a proposition for which there is absolutely no authority and it is not supported by any reason, justice or equity. The plaintiff files a suit on his sale deed and if no one defends the action on behalf of the minor defendant, he has to get a Court guardian appointed and put the said guardian in possession of sufficient funds to carry on the defence. There is no duty on his part to invite the guardian ad litem to prefer an appeal against the decree on pain of having the decree reopened later on at the instance of the defendant. If there is no fraud or gross negligence in the conduct of the suit, then the decree, that is passed in that suit cannot be challenged on the mere ground that the guardian failed to carry the matter in appeal. In this case the plaintiff who was not given a decree for possession filed an appeal and the minors' guardian defended the appeal and was successful in the appellate Court. The appeal was dismissed. On these facts, it is impossible to sustain the conclusion of the lower appellate Court that any fraud or gross negligence is made out which entitles the plaintiffs to set aside the decree in O. S. No. 40 of 1931. The appeal is allowed with costs here and in the lower appellate Court and the decree of the District Munsif is restored. Leave to appeal is refused.

C.R.K./G.N. *Appeal allowed.*

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(29) A. I. R. 1942 Madras 84

WADSWORTH J.

Uppala Appanna Sastri alias Annappa Sastri — *Appellant*

v.

Sree Raja Sobhanadri Appa Rao Bahadur Zamindar Garu, Zamindar of Elamarru Estate, Nuzvid —

Respondent.

Second Appeal No. 118 of 1938, Decided on 23rd January 1941, against decree of Sub-Judge, Bezwada, D/- 27th August 1937.

(a) Madras Estates Land Act (1 of 1908), S. 117 — Sale in execution of rent decree—Personal notice to defaulter is not necessary.

There is no necessity under S. 117 to give personal notice of a sale in execution of a rent decree to the defaulter, the kind of notice contemplated being by beat of drum in the village and by an affixture in a conspicuous place in the village. [P 85*d*]

(b) Madras Estates Land Act (1 of 1908 as amended by Act 8 of 1934), S. 125—Amendment is not retrospective.

The amendment of S. 125 by Act 8 of 1934 has no retrospective effect. [P 86*c*]

(c) Madras Estates Land Act (1 of 1908 as amended by Act 8 of 1934), Ss. 125 and 127 — Rent decree—Execution—Sale of holding puts an end to landlord's charge in respect of arrears accrued due since decree at time of sale.

Under S. 125 as it stood before the amendment of 1934, read in the light of S. 127, the sale of a holding in execution of a decree for rent must be deemed to put an end to the landlord's charge over that holding in respect of the arrears and interest thereon which have accrued due since the decree at the time of the sale. The amendment of S. 125 by Act 8 of 1934 merely clarifies the existing law : 21 Cal 169, *Approved.* [P 86*d*, *e*]

P. Sivaramakrishnayya — for Appellant.

P. Satyanarayana Rao — for Respondent.

Judgment. — The plaintiff who is the appellant here brought a suit for a declaration that a sale in execution of a decree, obtained in S. S. No. 287 of 1924 was not binding upon him. The suit in question was brought

against one Gangulu, who was the original pattadar of land situated in an estate under the Madras Estates Land Act. We are concerned throughout this appeal with the Act prior to the amendment of 1934. Gangulu fell into arrears and two decrees were obtained against him. The first was in S. S. No. 373 of 1922 and the second was in S. S. No. 287 of 1924. The earlier decree was executed in 1926 after the second decree had been obtained, and in the execution proceedings, the land put up for sale was purchased by the present appellant on 5th May 1926. I am informed that this land was only a portion of the holding of Gangulu. After the purchase the appellant does not appear to have produced the sale certificate before the land-holder, as he should have done under S. 146 (1) of the Act; but he paid the rent and got a receipt showing that he had paid the rent on his own account. In subsequent years, rent was paid by his agent and the receipts wrongly indicate that it was paid on account of the registered pattadar Gangulu. In 1933 the land-holder proceeded to execute the second decree obtained in 1924 and in the course of execution without notice to the appellant he brought the holding to sale and purchased it himself. Subsequently the land-holder ejected the appellant and it was his dispossession which gave rise to the suit.

Two contentions have been urged in appeal. One is that the second sale is bad for want of notice to the appellant who must be deemed to be the defaulter in the light of the Full Bench ruling in 1941 M W N 35[1] as interpreted by a later Full Bench ruling in S. A. No. 820 of 1936.[2] The second is that, whether the sale is bad for want of notice or not, it is bad because the charge in respect of the arrears which had accrued due after the first decree at the time of the first sale must be deemed to have been wiped out by that sale so far as the liability of the portion of the holding sold is concerned. It seems to me that the appellant must fail on the first contention, for there appears to be no necessity under S. 117, Estates Land Act, to give personal notice of a sale in execution of a rent decree to the defaulter. The kind of notice contemplated is by beat of drum in the village and by an affixture in a conspicuous place in the village. It is, therefore, not necessary to go into the question whether there has been such recognition of the appellant by the land-holder as would enable him to claim rights as a defaulter even though he has not complied with the formalities required by S. 146.

The second contention seems to me to be more substantial. It is true that under S. 5 of the Act a first charge is created on the holding in respect of the arrears due thereon, so that the arrears due under the second decree would be a charge on the holding just as much as the arrears due under the first decree; and it is also true that S. 118 read with S. 126 contemplates only the sale of so much of the holding as is necessary to satisfy the particular demand which in the present case must be the amount due under the first decree. It is argued that the provisions of S. 125 whereby the sale is free of incumbrances other than those specified will not extend to statutory incumbrances such as are created by S. 5 and it must therefore be held that when the sale was held in execution of the first decree, though the proclamation did not recite the existence of the second decree, and no notice was taken to the purchaser at the time of the subsequent sale, the sale under the first decree must be deemed to be a sale subject to the charge for rent in respect of the second decree which was not being worked out by that particular sale. This argument would be forcible argument were it not for the provisions of S. 127. By sub-s. (c) of that section, if a sale results in a surplus after paying the costs and the amount of the arrears in respect of which the sale was held, the land-holder has a right to appropriate from and out of the surplus any rent which may have fallen due to him in respect of the holding between the date of the suit and the sale.

The effect of this provision seems to be to make the sale a sale in liquidation not only of the charge for the arrears in respect of which a sale was expressly held but also in liquidation of the charge for any subsequent arrears due on the same holding. To hold otherwise would involve the anomalous consequence that the land-holder would be entitled to liquidate a portion of the charge in respect of the latter arrears from and out of the proceeds of that sale and to treat that charge as still subsisting for any balance and bring the same property to sale again. The original defaulter would get a price which was determined by the value of the

1. ('41) 28 A I R 1941 Mad 149 : 192 I C 469 : I L R (1941) Mad 356 : (1941) 1 M L J 1 : 1941 M W N 35 (F B), Lakshmana Ayyar v. Aiyaswami Chettiar.
2. *Reported in* ('41) 28 A I R 1941 Mad 539 : 196 I C 406 : I L R (1941) Mad 785 : (1941) 2 M L J 79 (F B), Munisami Mudali v. Narasappa Mudaliar.

land less the amount of arrears including any subsequent arrears and the purchaser would pay a price which would take into consideration the amount of subsequent arrears. But the landholder would have a right to deduct those arrears from the price so paid and also would retain the right to claim those arrears over again to the extent to which they had not been satisfied from the purchaser of the land. The same question came up before the Calcutta High Court in a case under the Bengal Tenancy Act the provisions of which are in this respect essentially similar to those of the Estates Land Act: *vide* 21 Cal 169.[3] The learned Judges point out that the view similar to that which has been put forward on behalf of the respondent in this case would result in the landlord having a charge on the tenure as well as on the surplus sale proceeds, and, if that was the law, would lead to great injustice for the defaulter might be made to pay the full amount of the arrears without getting the full value of his tenure from the auction purchaser and the auction purchaser would get a tenure for less than its full value without having to pay the arrears of rent.

The learned Subordinate Judge who heard the appeal in the Court below has rejected the appellant's contention on the simple ground that the amendment of S. 125 by Act 8 of 1934 expressly provides that the purchaser at the rent sale shall take subject to any incumbrance created before the passing of the Act but not subject to any arrears of rent due in respect of the holding before the date of sale or to interest on such arrears, whether a decree has been obtained or not for such arrears or interest. After stating quite correctly that this amendment will have no retrospective effect, he assumes that the amendment necessarily makes a change in the law and that therefore the law as it stood prior to the amendment made such sales subject to any claim for arrears subsequent to the date of the decree. It seems to me that no such assumption is warranted and that the effect of the amendment of S. 125 by Act 8 of 1934 is merely to clarify the existing law and to remove the possibility of a contention such as has been urged before me on behalf of the respondent. I am of opinion that under S. 125 as it stood before the amendment, read in the light of S. 127, the sale of a holding in execution of a decree for rent must be deemed to put an end to the landlord's charge over that holding in respect of the arrears and interest thereon which have accrued due since the decree at the time of the sale. It follows, therefore, that the sale of the appellant's holding in pursuance of the decree obtained anterior to the purchase by the appellant was illegal. I accordingly allow the second appeal with costs throughout and restore the decree of the trial Court. Leave to appeal is granted.

C.R.K./G.N. *Appeal allowed.*

3. ('94) 21 Cal 169, Faez Rahaman v. Ramsukh Bajpai.

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(29) A. I. R. 1942 Madras 86

LEACH C. J. AND CHANDRASEKHARA AYYAR J.

Prabhulal Madhavlal Desai—*Appellant*

v.

Messrs. Jeshing Bhai Bala Bhai and Sons and others — *Respondents.*

Appeal No. 11 of 1941, Decided on 20th August 1941, from order of Krishnaswami Ayyangar J., in Appln. No. 284 of 1940, D/- 17th February 1941.

Presidency Towns Insolvency Act (1909), S. 9 (g)—Adjudication under S. 9 (g)—Petition and affidavit verifying same should be read together — Sufficient details of facts on which creditor relies should be given.

Where the petition for adjudication under S. 9 (g) states that the debtor has given notice to his creditors that he has suspended or that he is about to suspend payment of his debts and the affidavit verifying the petition shows that this is in fact the case, there is compliance with the law's requirements. The petition and the affidavit should be read together and if the petitioning creditor sets out in sufficient detail the facts on which he is relying, the debtor can have no complaint whether the information is contained in the petition or the affidavit. The Court has to be satisfied that there has been notice of suspension of payment or that the debtor has intimated to his creditors that he is about to suspend payment and the supporting affidavit is filed for that purpose : ('35) 22 A I R 1935 Rang 352, *Not approved.* [P 87 *f*]

B. K. B. Naidu and S. Athmanathan — for Appellant.

T. K. Srinivasathathachariar and T. V. Srinivasan — for Respondents.

Leach C. J. — The appellant and one Ramanlal Trikamlal Desai carried on business in partnership in Madras under the style of Prabhulal Madhavlal Desai. On 14th October 1940, respondents 1 and 2 filed a petition in this Court asking for an order adjudicating the appellant and his partner insolvents. On 17th February 1941 an order of adjudication was passed. This appeal is against that order. It may be mentioned that the correctness of the order has not been challenged by Ramanlal. In the petition three acts of insolvency were alleged, namely, (1) with intent to defeat and delay the firm's

creditors Ramanlal had absented himself from the firm's usual place of business, (2) with similar intent he had secluded himself so as to deprive the creditors of the means of communicating with him and (3) the debtors had intimated that they had suspended payment of their dues. The learned Judge sitting in insolvency (Krishnaswami Ayyangar J.) has found that all these allegations are true. The appellant contends that the action of his partner in absenting himself from the place of business and in secluding himself cannot affect him, but he concedes, as he must, that if the appellant's partner gave notice of suspension of payment, the law allows both of them to be adjudicated. The appellant, however, says that there was no notice of suspension of payment. It is not necessary to consider whether there is any substance in the appellant's first contention because it is obvious that in this case notice of suspension of payment was given. Before considering the evidence relating to the notice of suspension of payment it is necessary to deal with a preliminary argument advanced on behalf of the appellant to the effect that the petition is defective in so far as it relates to the third act of insolvency. The allegation in the petition is couched in these words: "On the evening of 5th October 1940 the debtors intimated that they had suspended payment of their dues." In para. 3 of the affidavit which was filed in support of the petition it is said :

> On the evening of 5th October 1940 the second debtor when pressed for payment intimated to me and Mr. Vallabhdas, a partner of Vallabhdas and Brothers, another creditor, that the firm was no longer in a position to meet its dues and that it had suspended payment of debts due by it and that he intended to file an insolvency petition.

It has been argued by Mr. Naidu on behalf of the appellant that the actual words used by Ramanlal should have been set out in the petition and that a defect of this nature is not cured by anything contained in the affidavit filed in verification. In this connexion, Mr. Naidu has drawn our attention to the decision of the Rangoon High Court in 13 Rang 686.[1] In that case the petition merely alleged that the debtors had given notice to the petitioners as well as to their other creditors that they had suspended or were about to suspend payment of their debts, but in the affidavit which verified the petition the deponent made this statement :

> I say that the debtors' manager and kartha further told me that they were not in a position to pay in full to their creditors.

The Court held that the act of insolvency alleged in the petition was not couched in terms sufficiently clear and precise to be the basis of an insolvency petition or to justify the Court in passing an order of adjudication. It was also held that an affidavit filed in verification could not be read in conjunction with the petition in order to supply a deficiency in the petition itself. With great respect, we are unable to accept this judgment as representing a correct statement of the law. In our opinion technicality is here carried too far. Where the petition states that the debtor has given notice to his creditors that he has suspended or that he is about to suspend payment of his debts and the affidavit verifying the petition shows that this is in fact the case, there is compliance with the law's requirements. The petition and the affidavit should be read together and if the petitioning creditor sets out in sufficient detail the facts on which he is relying, the debtor can have no complaint whether the information is contained in the petition or the affidavit. The Court has to be satisfied that there has been notice of suspension of payment or that the debtor has intimated to his creditors that he is about to suspend payment and the supporting affidavit is filed for that purpose. In the present case Krishnaswami Ayyangar J. held that the petition was sufficiently clearly worded and we are in full agreement with him. Turning now to the facts, the evidence is that Mr. Babu Bhai, a partner in respondent 1's firm met Ramanlal on the evening of 5th October 1940, and demanded payment of Rs. 7000, which was due to his firm by the insolvents. Thereupon, Ramanlal replied :

> My firm is not in a position to pay your moneys. I am not going to pay anyone anything. I want to file my insolvency.

A clearer intimation of suspension of payment is hardly possible to imagine; but it has been contended that the Court should not give these words their plain and ordinary meaning because Mr. Babu Bhai renewed his demand the next day. It is said that the renewal of the demand shows that he did not regard Ramanlal's statement to him on the 5th as being an intimation of suspension of payment. Mr. Babu Bhai was asked in cross-examination why he made a demand after the notice which he received on 5th October. His reply was that he made the demand "hoping against hope", but that the statement of the day before convinced him that

1. ('35) 22 AIR 1935 Rang 352 : 159 I C 1055 : 13 Rang 686, C. A. P. C. S. Chettiar Firm v. V. V. R. Chettiar Firm.

the insolvents would not pay. We consider that there is no substance in this appeal which consequently will be dismissed with costs in favour of respondents 1 and 2. The costs will come out of the estate.

C.R.K./G.N. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 88

KING J.

K. Sambasiva Ayyar and others — *Appellants*

v.

Official Receiver, West Tanjore — *Respondent.*

Appeals Nos. 127 and 136 of 1939, Decided on 24th September 1940, against appellate order of District Court, West Tanjore, D/- 27th July 1939.

(a) Insolvency—Adjudication—Application—Date of admission of.

On the presentation of an insolvency petition on 3rd July the Court ordered "check and file emergently." It was checked and was filed, and on the same day the Court further ordered that publication charges should be deposited by 7th July. On 7th July notice and publication were ordered :

Held that the date of admission was 3rd July and not 7th July. No doubt the order to issue notice may constitute the act of admission in many cases but it cannot be a universal rule of law: ('40) 27 A I R 1940 Mad 624, *Expl.* [P 89*a*]

(b) Provincial Insolvency Act (1920), S. 51—"Assets realized" — Sale of three lots of property originating from single proclamation — Amounts deposited on different dates—Assets are realized on dates of deposit into Court for each lot and not only on date of last deposit.

No doubt assets are realized only when the full amount of the bid is deposited. But where three lots of properties are sold originating from a single proclamation and the amounts are paid on different dates the assets are realized on the dates on which deposit for each lot is made and not only the date on which deposit is made for the third lot: 26 Mad 179, *Dissent.*; ('25) 12 A I R 1925 Mad 248, *Ref.*; ('25) 12 A I R 1925 Cal 966, *Rel. on.* [P 89*b*,*g*]

(c) Provincial Insolvency Act (1920), S. 51—"Benefit of execution"—Meaning of.

The phrase "benefit of execution" in S. 51 means the sum realized less the costs of execution: C. M. A. No. 175 of 1937, *Foll.* [P 90*b*]

(d) Provincial Insolvency Act (1920), S. 51—Official Receiver is entitled to interest on assets realized.

Under S. 51, the Official Receiver is entitled to interest on the assets realized as this is a matter analogous to restitution. [P 90*b*]

R. Sundaralingam and A. V. Viswanatha Sastri — for Appellants.

T. K. Subramania Pillai — for Respondent.

Judgment. — These are appeals by five persons who were in 1933 some of the creditors of one Kasinatha Aiyar. One of the appellants in C. M. S. A. No. 136 (respondent 6 in the Courts below) was pursuing execution against Kasinatha Aiyar and on 30th June 1933 three lots of Kasinatha Aiyar's property were sold in court auction. Two lots in Annakudi village were sold for Rs. 7500, which amount was paid in full there and then. The third lot in Manikandi village was sold for Rs. 4520. One quarter of this amount was deposited on 30th June as required by O. 21, R. 84, and the remaining three-quarters on 4th July. The sum of Rs. 12,020 was treated as assets realized and rateably distributed amongst the appellants and another creditor who has not appealed. On 3rd July an insolvency petition was presented against Kasinatha Aiyar which resulted in his adjudication. The Official Receiver in administering his estate applied to the Court for an order directing the appellants to pay to him the sums which had thus been distributed to them with interest; and such an order has been passed in appeal by the learned District Judge of West Tanjore under the provisions of S. 51, Provincial Insolvency Act. Whether that order is right or wrong is the issue in these appeals. Section 51 (1), Provincial Insolvency Act, runs as follows :

> Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the course of the execution by sale or otherwise before the date of the admission of the petition.

There are four points for determination in these appeals : (i) What is the date of the admission of the insolvency petition ? (ii) What is the date (or are the dates) of the realization of the assets ? (iii) If the receiver is found entitled to all or any of these assets what is the precise meaning of benefit of the execution ? and (iv) Is the receiver entitled to interest on any sum awarded to him ? On the first point the District Judge has held that the insolvency petition was admitted on 3rd July. I have already mentioned that it was presented on that date. On its presentation the Court ordered 'check and file emergently.' It was checked and was filed, and on the same day the Court further ordered that publication charges should be deposited by 7th July. On 7th July notice and publication were ordered. It is now argued for the appellants that the insolvency petition was not 'admitted' until 7th July and I am referred to a ruling in (1940) 1 M L J 350[1] as an authority for the position that the order to issue notice con-

1. ('40) 27 A I R 1940 Mad 624: 191 I C 29: (1940) 1 M L J 350, Narasimha Pattamahadevi v. Amman Naidu.

stitutes the act of admission. In many cases this may well be so but it cannot be a universal rule of law. In the present case it cannot be disputed that the Court on 3rd July accepted the insolvency petition as having been validly presented, and that in my opinion, means that the insolvency petition was admitted on that day. I hold accordingly and it will now follow that any assets realized after 3rd July must go to the Official Receiver.

I come accordingly to the second point, and here repeat that two sums, Rs. 7500 and Rs. 1130 respectively, were paid into Court on 30th June, and that Rs. 3390 was paid in on 4th July. Clearly then the Official Receiver is entitled to at least Rs. 3390. He is also entitled to the sum of Rs. 1130. It has been held by a Bench of this Court, *see* 48 Mad 656,[2] that in a case of this kind assets are realized only when the full amount of the bid is deposited. There remains the principal item of Rs. 7500. This sum too has been held by the learned District Judge to have been realized only on 4th July, on the authority in 26 Mad 179.[3] That is the decision of a single learned Judge, Sir Arnold White, then Chief Justice of Madras, from which I must most respectfully express my dissent. I do so for the following reasons:— In the first place, it seems contrary to plain language and to common sense to say that Rs. 7500 which was actually realized on 30th June was not realized until 4th July. The learned Chief Justice gives no reasons for his view. It seems to me upon a critical examination of the position that the assets can be deemed not to have been realized on 30th June only if they are held insecurely and may prove, on the happening of some subsequent event, not to be assets after all, but only a temporary deposit. That is clearly the reason why the 25 per cent. deposit of Rs. 1000 in this case was not assets, until the remaining 75 per cent. had been paid. If the 75 per cent. were not paid, immediate resale of the property is obligatory : *see* O. 21, R. 86. There is therefore no sale and no assets can have been realized.

Now the subsequent event which the learned District Judge here holds converts the Rs. 7500 paid on 30th June into assets realized on 4th July is the payment of the remaining Rs. 3390 upon the third lot. I ask myself in vain why it should have this effect. The two transactions are quite distinct. If the Rs. 3390 were not paid and a resale were necessary under O. 21, R. 86 it is conceded that the resale would be confined to the third lot. How then can the nature of the payment made on 30th June be in any way affected by the payment or nonpayment on 4th July of money due on different property ? It is also clear law that when a sale is set aside under O. 21, R. 90 it can be set aside in respect of one lot only: *see* 1910 M W N 834[4] and 59 Mad 438.[5] It seems to me therefore very evident that the sale of three lots of property — though originating from a single proclamation of sale—is really equivalent to three sales. It is impossible to regard such a sale as one and indivisible on which basis alone, I think, can there be any logical principle for following 26 Mad 179.[3] I have been referred to only two other decisions on this matter. In 33 C L J 7,[6] (a judgment delivered in 1920) a Bench of the Calcutta High Court follows 26 Mad 179,[3] without any discussion. In 29 C W N 575[7] (a judgment delivered in 1924) another Bench of the same High Court takes the opposite view, though without reference to 26 Mad 179.[3] It sets out the essence of what is in my opinion a very simple matter in these simple words :

> The properties were sold separately, their sale proceeds were realized separately, and the sale of each lot was completed when the whole of the balance of the purchase money was deposited in Court.

I accordingly hold that the sum of Rs. 7500 represents assets realized on 30th June, and that the Official Receiver's claim in respect of this sum must be dismissed. As I have held that the appellants have no title to retain the sum of Rs. 4520 realized for the third lot the question next arises whether they must refund that sum in full, or whether the "benefit of execution" means that sum less any expenses incurred in realizing it, and if so, what is the measure of those expenses. Three different views have been taken by three learned Judges of this Court, all sitting singly. These cases in chronological order are : (i) 57 Mad 330[8] where it was

2. ('25) 12 A I R 1925 Mad 248 : 85 I C 216 : 48 Mad 656 : 47 M L J 759, Ramanathan Chettiar v. Subramanian Chettiar.
3. ('03) 26 Mad 179, Ramanathan Chettiar v. Subramania Sastrial.
4. ('10) 1910 M W N 834 : 8 I C 1100 : 9 M L T 250, Ramachandra Aiyar v. Primathi Ammal.
5. ('36) 23 A I R 1936 Mad 121 : 160 I C 645 : 59 Mad 438, Narasimhamurthi v. Official Receiver.
6. ('21) 8 AIR 1921 Cal 801 : 62 I C 167: 33 C L J 7, Barendra Nath v. Martin & Co.
7. ('25) 12 A I R 1925 Cal 966 : 87 I C 783 : 29 C W N 575, Girindranath Ray v. Kedar Nath.
8. ('33) 20 A I R 1933 Mad 703 : 145 I C 999 : 57 Mad 330 : 65 M L J 402, Swaminatha Iyer v. Official Receiver, South Malabar.

held that the benefit of execution meant the amount realized less both expenses of the execution petition and expenses of the suit in which the decree was obtained; (ii) (1939) 1 M L J 205[9] in which the benefit was held to be the gross sum realized without any deductions, and (iii) an unreported decision of Wadsworth J. in C. M. A. No. 175 of 1937 in which the benefit is held to mean the sum realized less the costs of execution. I do not think I am called upon to discuss these points of view in detail. I need only say that I agree entirely with the view expressed by Wadsworth J. in the latest case, and following it, direct that the appellants here be permitted to deduct such costs of the execution petition as were necessary to realize the Rs. 4520 payable to the Official Receiver.

The final question is whether on the sum so calculated the Official Receiver is entitled to interest. The District Judge holds that he is so entitled, as this is a matter analogous to restitution. The appellant's learned advocate attempts to distinguish this case by arguing that, unlike persons whose decrees have been reversed, the appellants had a 'right' to receive the money. But as S. 51 denies them any such right they cannot be said to have possessed it. The parallel with restitution is I think complete, and interest must be allowed. The parties will pay and receive proportionate costs throughout. Leave granted.

C.R.K./K.S. *Order accordingly.*

9. ('39) 26 AIR 1939 Mad 291 : 183 I C 441 : I L R (1939) Mad 343 : (1939) 1 M L J 205, Balarami Reddi v. Official Receiver, Nellore.

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* (29) A. I. R. 1942 Madras 90

LEACH C. J. AND HORWILL J.

Puthur Veettill Krishnan Chettiar — *Appellant*

v.

Ammalu Amma and others — *Respondents.*

Second Appeal No. 239 of 1937, Decided on 17th September 1940, against decree of District Court, South Malabar, in A. S. No. 244 of 1934.

*** Malabar law — Tarwad — Karnavan not shown to have renounced — He alone can bind family by alienation — Performance of minor acts of management by karnavan's mother during his absence cannot constitute her karnavastri of tarwad so as to alienate property on tarwad's behalf.**

The mere fact that the karnavan's mother performed minor acts of management during his absence cannot constitute her the karnavastri of the tarwad. Before the Court would be justified in holding that she had become the karnavastri and was entitled to alienate property on behalf of the tarwad it must be shown by positive evidence that the karnavan had renounced or that this was the only legitimate conclusion open to the Court. While there is a karnavan capable of acting and he has not renounced, either directly or by implication, he alone can bind the family. [P 91*g*, *h*]

K. Kuttikrishna Menon — for Appellant.

K. P. Ramakrishna Aiyar — for Respondents.

ORDER OF REFERENCE

Krishnaswami Ayyangar J. — The question raised in this second appeal relates to the power of a karnavastri to mortgage the property of the tarwad for what may be described as necessary purposes of the tarwad. The karnavan of the tarwad is alive but seems to have left the tarwad house for a considerable time. After he left, the tarwad property was in the management of the karnavastri who executed the mortgage in suit. The facts referred to in the finding of the District Munsif in para. 9 seem sufficient to establish that the karnavastri was in the position of a de facto manager of the tarwad property. The learned District Judge is not apparently prepared to accept this view, but as the question is one of inference to be drawn from the facts found I should be prepared to accept the view of the District Munsif as correct. But still the main point for consideration is as to whether a karnavastri has the powers of a de facto manager to bind the tarwad property by her alienation. If the rule in *Hanooman Pershad's case*[1] is applicable to Malabar families I see no reason why a karnavastri, though not the legal manager of the tarwad properties, should not have the powers which the Judicial Committee have recognized as vested in a de facto manager. There is no direct decision of this Court brought to my notice. The only case cited, namely 29 M L J 632,[2] seems rather to be confined to a situation where the karnavan is acting prejudicially to the interests of the tarwad, a situation in which the junior members are allowed to do what in other circumstances the karnavan alone can do. In my opinion the question is sufficiently important for its being considered by a Bench of two learned Judges of this Court. The papers will accordingly be placed before the learned Chief Justice for his orders.

Judgment of Division Bench

Leach C. J. — On 11th October 1928 respondent 4 mortgaged certain property to the

1. (1854-57) 6 M I A 393 : 18 W R 81 : 2 Suther 29 : 1 Sar 552 (P C), Hunooman Pershad Panday v. Mt. Babooe Munraj Koonweree.
2. ('16) 3 A I R 1916 Mad 976 : 31 I C 482 : 29 M L J 632, Rajah of Arakal v. Churia Kunhi Kannan.

appellant and she purported to do so as the karnavastri of a tarwad. There was at the time a karnavan, who is respondent 5 and the son of respondent 4. He was employed as a pointsman on the railway and by reason of his employment he was absent from the family house for the greater part of the year. The appellant filed in the Court of the District Munsif of Tirur the suit out of which this appeal arises for the purposes of enforcing the mortgage. Two defences were raised, namely, (i) no consideration had passed and (ii) the mortgage had not been created in order to provide funds to meet a family necessity. The District Munsif found for the appellant on both these issues. An appeal was filed to the District Court of South Malabar by respondents 1, 2 and 3 who are the junior members of the family. The District Judge was not satisfied that certain questions of fact had been fully investigated by the District Munsif and he remanded the case for findings on two questions. The first was whether the mortgaged property belonged to the tarwad or was the private property of respondent 4 and the second was whether respondent 4 was entitled to alienate the property on behalf of the family as she was a woman. On remand the case was further investigated by the successor of the District Munsif who had tried the case in the first instance. The successor held that the property did not belong to the tarwad, but to respondent 4. He also held that the respondent 4 in any event had the right of alienation as the de facto karnavastri.

When the matter came before the District Judge again he overruled the finding of the District Munsif that the property belonged to the respondent 4. He considered that the evidence proved that it was tarwad property. He concurred, however, in the findings of the District Munsif that consideration had passed and that the alienation had been occasioned by family necessity and he confirmed the decree in part on the ground that there had been a prior mortgage in which the karnavan had joined. The District Judge was of the opinion that respondent 4 was not entitled to act on behalf of the family and that in consequence the mortgage of 11th October 1928 was not binding on the tarwad, but inasmuch as there had been a previous mortgage in which the karnavan had joined he allowed a decree for the amount of the earlier mortgage. This had the effect of reducing the decree in favour of the appellant by Rs. 102 and corresponding interest. The only question which this Court is called upon to decide is whether the District Munsif was right in holding that respondent 4 was not entitled to bind the family. The appellant has not printed the evidence and the Court can only look to the judgment under appeal for the purpose of ascertaining the facts. The District Judge held that the only acts of management which respondent 4 could claim as having been performed by her were these : (i) she lived in the family house ; (ii) she had plucked fruits from the trees on the paramba and (iii) she has paid the revenue or the *purappad* due to the jenmi. He was, however, of the opinion that attending to these matters when the karnavan was employed elsewhere did not amount to management and did not indicate abdication by the karnavan so as to give any right of alienation to respondent 4. In due course of his judgment the District Judge said :

> In thousands of families in Malabar it would now be happening that the karnavan is living elsewhere following some occupation or profession and that the three acts mentioned above are being performed as a matter of course by the members of the family living on the tarwad paramba. It cannot be stated that thereby a junior member of the family acquires a right to alienate the property.

With these remarks we are in agreement. There is no evidence in this case that the karnavan ever renounced his position. According to the karnavan's own evidence his mother paid the revenue out of moneys remitted to her by him for the purpose. This may not be true, but as the evidence has not been printed it is rather difficult for the Court to decide whether it is true or false. Be it either way, the mere fact that respondent 4 did perform minor acts of management during the absence of her son would not constitute her the karnavastri of the tarwad. Before the Court would be justified in holding that she had become the karnavastri and was entitled to alienate property on behalf of the tarwad, it must be shown by positive evidence that the karnavan had renounced or that this was the only legitimate conclusion open to the Court. While there is a karnavan capable of acting and he has not renounced, either directly or by implication, he alone can bind the family. In this case the document might have been sent tohim for signature as was done in the case of the first mortgage, but his mother decided to act without him. We consider that she was not justified in so doing. For these reasons the appeal will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

(29) A. I. R. 1942 Madras 92 (1)

HORWILL J.

In re P. Rama Naidu — Appellant.

Criminal Appeal No. 287 of 1941, Decided on 27th August 1941, against order of the Court of Sessions Chittor Division, in C. C. No. 7 of 1941.

Penal Code (1860), Ss. 192 and 193—Accused attesting forged document purporting to discharge decree debt — Accused interested in bringing document into existence — Accused is guilty of abetment and fabrication of false evidence.

The accused attested a forged document purporting to discharge a decree debt and was interested in bringing the document into existence. It was contended that as the document being a receipt did not need attestors, the receipt was complete before the accused signed it, and therefore he could not be said to have abetted the making of a false document :

Held that the accused was guilty under S. 193 of fabricating false evidence as he knew that the document was intended to prove discharge of the decree debt: ('39) 26 A I R 1939 Mad 730, *Disting.* [P 92*g*]

Held further that since the persons who brought the document into existence intended that it should be attested and the accused should be one of the attestors, the document was not complete until the accused had signed and therefore the accused abetted the making of a false document. [P 92*f*]

K. S. Jayarama Iyer and V. V. Chowdhury — for Appellant.

Public Prosecutor — for the Crown.

Judgment. — The appellant was admittedly an attestor to a forged document. There had been litigation between P. W. 9 and the 9th accused and P. W. 9 had obtained a decree against the 9th accused for maintenance. The forged document purported to be a discharge of that decree debt. The appellant admits that he was an attestor, and the evidence shows that he knew of the litigation between the parties. The writer of the document turned approver and was examined as P. W. 3. He states that at the time when the document was forged, a blank space was left for the attestation of some other person and that when he saw the document again, that space was filled by the signature of the appellant. The appellant did not deny this but explained :

I was in my field in Nalagampalle. I did not see the payment of any money. I said 'how can I sign when I have not witnessed the payment?' He (Lingama Naidu, the first accused) said, 'she has affixed her thumb impression. The witnesses have all signed. Can you not trust me?' I then believed him and signed.

This statement itself suggests that the appellant was somewhat suspicious of the document. It is clear from the evidence that he knew of the suit that had been brought and that he was sufficiently nearly related to the parties to be interested in bringing such a document into existence in the interests of the first and the ninth accused in support of whom he had already deposed in the maintenance proceedings. On these facts, I think that the learned Judge was justified in coming to the conclusion that the appellant was guilty of forgery and of fabricating a false document. The judgment of Pandrang Row J. in 1939 M W N Cr 86[1] has been referred to as providing an instance where a learned Judge of this Court thought that the bare fact of an attestation was not sufficient to justify an inference that the attestor knew that he was attesting a forged document. The learned Judge had however other facts before him besides the mere fact of attestation, and he quoted the judgment of the trial Judge to show that it was improbable that the attestor had the knowledge imputed to him. Mr. Jayarama Ayyar has also argued that as a receipt does not need attestors, the receipt was complete before the appellant signed it, and that he therefore could not be said to have abetted the making of a false document. The fallacy of this argument is that although attestation was not necessary, the persons who brought this document into existence intended that it should be attested and that the appellant should be one of the attestors. The document was therefore not complete until the appellant had signed. He therefore abetted the making of a false document, and as he must have known that the document was intended to prove the discharge of the decree debt, he was also guilty under S. 193 of fabricating false evidence. The conviction is right and the sentence extremely light. They are therefore affirmed and the appeal dismissed.

C.R.K./G.N. *Appeal dismissed.*

1. ('39) 26 A I R 1939 Mad 730 : 184 I C 460 : 41 Cr L J 11 : 1939 M W N Cr 86, Chinna Veera Reddi v. Emperor.

(29) A. I. R. 1942 Madras 92 (2)

KING J.

Chettikulam Sri Ekambareswaraswami and Sri Dhandayudhapaniswami Temples, represented by sole trustee, Devaraya Reddiar — Petitioner

v.

Arunachala Goundar and another — Respondents.

Civil Revn. Petn. No. 809 of 1937, Decided on 17th September 1940, to revise decree of Dist. Munsif, Turaiyur, in S. C. S. No. 592 of 1936.

(a) Religious Endowment—Trustees—Powers of—One of trustees authorised by others to borrow executing promissory note for loan taken—Transaction is transaction of all.

There is no rule of law which requires all the trustees of an institution actually to sign a promissory note. It is enough if those trustees who do not sign have authorised the transaction. Where the remaining trustees have authorised the trustee who executed the promissory note for the loan, the transaction is the transaction of them all. [P 93*e*]

(b) Religious Endowment—Loan incurred by trustees without sanction of temple committee but ratified by Religious Endowment Board—Loan expressed to be repayable out of properties of temple—Loan held binding on temple.

A loan was incurred by the trustees of a temple without the previous sanction of the temple committee as required under the terms of a scheme. It was expressly mentioned that the loan was to be repaid out of the properties of the temple. It was ratified by the Hindu Religious Endowments Board itself. There was no clear indication in the evidence whether the temple committee was in existence either when the loan was incurred or when it was ratified:

Held that when ratification had been secured from so high an authority there could be no ground for holding that the debt was in any way improper from the point of view of the temple and that it was binding on the temple. [P 93*f*]

(c) Provincial Small Cause Courts Act (1887), S. 25—Interference is discretionary.

Interference by the High Court in a revision petition under S. 25, is discretionary. [93*f*]

A. V. Narayanaswamy Iyer — for Petitioner.

M. S. Vaidhyanatha Iyer — for Respondents.

Order.—The subject-matter of this petition is a promissory note executed by one T. D. Palaniappa Mudaliar in favour of respondent 1 for Rs. 100 on 14th August 1933. Palaniappa Mudaliar described himself therein as managing dharmakartha of a certain temple at Chettikulam, and recites also that he is borrowing the money as manager of the temple and that repayment is to be made "from out of the properties of the said temple." Respondent 1 sued upon the note and obtained a decree both against Palaniappa Mudaliar personally, and against the properties of the temple. This is a petition by the temple with the contention that it should not have been held liable. That the money was actually borrowed, and expended for temple purposes, and that the loan was necessary are facts which are not now disputed. Nor can it be seriously urged that if Palaniappa Mudaliar was in fact authorised to borrow, his transaction will not bind the temple. It is contended, however, that he was not so authorised—on two grounds: (i) because the other two trustees did not join in executing the note; and (ii) because he did not obtain the previous sanction of the temple committee as he was bound to do under the terms of a scheme which had been framed to regulate the management of the temple.

There is no rule of law which requires all the trustees of an institution actually to sign a promissory note. It is enough if those trustees who do not sign have authorised the transaction. It is found as a fact in this case that the two remaining trustees did authorise it. The transaction was therefore the transaction of them all. The second objection is more substantial, but respondent meets it by saying that after the loan was incurred it was ratified by the Hindu Religious Endowments Board itself. This ratification is found to be true by the District Munsif. There is no clear indication in the evidence whether the temple committee was in existence either when the loan was incurred or when it was ratified—though it is probable enough that the reason why ratification was sought from the Board was the non-existence at that time of the committee. I need not, I think, pursue this matter further as this is only a revision petition in which interference by this Court is discretionary, and when ratification has been secured from so high an authority there can be no ground for holding that the debt was in any way improper from the point of view of the temple. This petition accordingly fails and is dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

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(29) A. I. R. 1942 Madras 93

ABDUR RAHMAN J.

Dukka Gangayya and another — *Appellants*

v.

Buddepu Lakshmi Devi — *Respondent.*

Second Appeals Nos. 1124 and 1125 of 1938, Decided on 5th August 1941, against decrees of Sub-Judge, Chicacole, in A. S. Nos. 326 and 329 of 1937.

(a) Criminal P. C. (1898), Ss. 88 (6D) and 386 — Wife *A* obtaining maintenance order under S. 488 — Certain property attached and money deposited in Court — Claim by other wife *B* rejected — Suit by *B* under S. 88 (6D) — Fact that *B* asked for money decree and not for declaration held did not take suit out of S. 88 (6D)—Money in Court not being held by or at disposal of Government, Secretary of State held not necessary party.

Wife *A* obtained a maintenance order under S. 488 and in execution thereof got certain property attached. The property was sold and money deposited in Court. The claim of the other wife *B* having been rejected, she instituted a suit against *A* under S. 88 (6D), with a prayer for declaration that the order in the claim proceedings was incorrect:

Held that (1) the mere fact that on account of
a the sale of the attached property the plaintiff asked for a decree for money instead of a declaration did not take the suit out of the purview of S. 88 (6D); [P 94*g*]

(2) the suit need not have been for a declaration as attached property having been converted into money, the relief that should have been and was in fact claimed on behalf of the plaintiff was for that money itself; [P 95*a*]

(3) although the money in Court was capable of being realized as fine under S. 488 (3), it was not in fact a fine itself and was not being held by or at the disposal of the Government and hence the Secretary of State was not a necessary party to the suit : 28 Cal 540, *Disting.* [P 94*g*, P 95*a*]

(b) Practice—Relief — Necessary facts given —Court ought to grant relief to which party is
b **found entitled even if it was mistakenly not asked for.**

Where all the necessary facts have been given in the plaint, it is the duty of the Court to grant the relief to which a party is found entitled even if it has not been by a mistake asked for by the party. [P 95*b*]

B. Jagannadha Das—for Appellants.

G. Chandrasekhara Sastri—for Respondent.

Judgment. — The facts which led to the institution of the two connected suits out of which the present appeals have arisen are simple and may be briefly narrated. The respondent obtained an order under S. 488, Criminal P. C., for maintenance against her
c husband in M. C. No. 97 of 1933 in the Court of the joint Magistrate of Berhampur. She got certain quantities of paddy attached in execution of the order passed by that Court. After attachment the paddy was stored in two pits. It was subsequently sold by the Magistrate and the sale proceeds are lying in that Court. The plaintiff in O. S. No. 201 of 1936 is the second wife of the respondent's husband, the plaintiff in the other suit being (her) maternal uncle. Both of them set up a claim to the whole of the paddy attached by the Magistrate but their claim petitions were rejected. They consequently brought the two suits. These suits were for the
d recovery of money either from the Magistrate's Court or from the respondent in the event of the money having been paid by the Magistrate to her (who was the petitioner in M. C. No. 97 of 1933). These suits were dismissed by the District Munsif of Sompeta on the ground that the plaintiffs had failed to establish their title. The objection that the suits were not maintainable in their present form was, however, overruled by that Court. On appeal the Subordinate Judge of Chicacole did not go into the question of title but dismissed the appeals on the ground that the suits were not competent as the Secretary of State had not been impleaded as a party to the present suits. In dismiss-
e ing the appeals on that ground he relied on a decision in 28 Cal 540.[1] The plaintiffs had consequently preferred the present appeals which may be disposed of by one judgment.

The contention advanced on behalf of the respondent is that the plaintiffs should have asked for a declaration to the effect that the order passed in the claim proceedings was incorrect and should be set aside. Since, it is contended, the suits are not for declaration, they are not competent. It is contended in the alternative that in so far as money was lying in the Court of the joint Magistrate and as long as that money was not paid, it was or must be deemed to be at the
f disposal of the Secretary of State, the latter, that is the Secretary of State should have been made a party to the suits. There is no force in my opinion in either of these contentions. No rules have been framed by the local Government under S. 386, Criminal P. C., and it is therefore urged that the provisions of S. 88 of that Code must be held to be applicable. But even if that contention is assumed to be correct it would not help the respondent. There is a distinct provision in S. 88, cl. (6-D) which entitles a party whose claim or petition has been disallowed in whole or in part to go and institute a
g suit to establish the right which he claims against the property in dispute and that is exactly what the plaintiffs in both the suits are trying to do. The mere fact that on account of the sale of the paddy, they have asked for a decree for money instead of a declaration does not take these suits out of the category of the suits contemplated by S. 88, cl. (6-D), Criminal P. C. It must not be overlooked that the money which has been realised although capable of being realised as fine under S. 488, cl. (3) is not in fact a fine itself and is not being held by or at the disposal of the Government for its own purposes, but with the object of paying
h maintenance to the person in whose favour the order was passed. The Government cannot and does not lay any claim to any portion of the money thus realised. It is therefore futile to argue that the Secretary of State was interested in the decision whether the property attached at the instance of the respondent belonged to her, and should have been for that reason impleaded. The only party who is interested in the result is the respondent and the suit was instituted against her. There is therefore no force in

1. ('01) 28 Cal 540 : 6 C W N 175, Secy. of State v. Jagat Mohini Dasi.

the contention that the suit should have been against the Secretary of State and since the Secretary of State was not impleaded as defendant, is not maintainable.

I cannot understand the ground on which the lower appellate Court dismissed the plaintiffs' suits. The decision in 28 Cal 540[1] had absolutely no application to the facts of the present case. As for the contention that the suits should have been for declaration the answer is simple. First of all the paddy having been converted into money, the relief that should have been and is being claimed on behalf of the plaintiff is for that money itself. But conceding for the sake of argument that the contention of the learned counsel for the respondent is correct all the necessary facts have been given in the plaint and it is the duty of the Court to grant the relief to which a party is found entitled even if it has not been by a mistake asked for by the party. Both these contentions therefore fail. The appeals must consequently be accepted and the suits sent back to the lower appellate Court for disposal of the appeals on their merits. It is unfortunate that the lower appellate Court did not go into the question of title at the same time. Had that been done a further delay would have been avoided. The costs in these appeals both in this and the lower appellate Court will be costs in the cause. The court-fees in these appeals may be refunded to the appellants.

C.R.K./G.N. *Appeals accepted.*

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(29) A. I. R. 1942 Madras 95

LEACH C. J. AND
CHANDRASEKHARA AYYAR J.

K. C. Pandalai — Appellant

v.

South Indian General Assurance Co. Ltd. (in liquidation) by its Official Liquidator — Respondent.

Appeal No. 18 of 1941, Decided on 14th August 1941, from order of Gentle J., in Appln. No. 36 of 1941 (in O. P. No. 206 of 1940), D/- 28th February 1941.

Company—Directors—Meeting of—Quorum—Validity—Director interested in resolution cannot vote — Company can agree that debt due to shareholder should be set off against future calls — Director and managing agent held in fiduciary relation to company and hence incompetent to decide whether resolution was for company's benefit.

The company owed a sum of Rs. 16,000 to *C* who was its director and managing agent. *C*'s brother, *S*, was also a director and a shareholder of the company and though he was not a creditor of the company, he had lent a considerable sum of money to *C* which was utilized for the purposes of the company. Article 29 of the articles of association stated that the directors might, if they thought fit, receive from a member all or any part of the capital due upon shares held by him beyond the sums actually called for, and permitted the directors to pay interest on any sum so received. The full quorum for a meeting of the board of directors was three. At a meeting of the directors in which three out of the five directors including *C* and *S* were present a resolution in terms of Art. 29 was passed and an arrangement arrived at whereby *C* purported to set off Rs. 11,900, out of the amount due to him from the company against what he owed in respect of the shares:

Held that (1) it was open to the company to agree with a shareholder to whom it owed money that the debt shall be set off against future calls: (1906) 18 Eq 670 and (1889) 41 Ch D 159, *Rel. on*; [P 97*a*]

(2) the arrangement arrived at the meeting was invalid as *C* and his brother *S* were not competent to vote as they were personally interested and the third director present, acting alone, could not give authority to *C* to apply the provisions of Art. 29. If three directors who had no interest in the matter had resolved that the debt due to *C* should be set off to the extent of Rs. 11,900 against his liability on his shares or the company in general meeting had so decided, the position would have been different; [P 96*g*,*h*]

(3) even assuming the resolution to have been lawfully passed, *C* as a director and the managing agent of the company was in a fiduciary position and was not in a position to decide whether it was fit and proper from the company's point of view that there should be the arrangement arrived at the meeting and therefore he could not act on the arrangement in respect of his own shares: ('38) 25 AIR 1938 P C 159 and (1914) 2 Ch 488, *Rel. on.* [P 97*a*]

O. T. G. Nambiar and K. N. Pandalai — for Appellant.

Leach C. J. — This is an appeal from an order passed by Gentle J. confirming the action of the Official Liquidator of the South Indian General Assurance Company Ltd. in placing the appellant's name in the list of contributories. The company was formed in the year 1929. On 29th August 1940, this Court passed an order directing that it be wound up compulsorily. During the 11 years, the company was operating, it never made a profit. Each year, in fact, showed a loss and long before the winding up order was passed, the company was in a precarious position. The appellant was a director of the company and was also its managing agent. The managing agents were stated to be K. C. Pandalai & Co., but it is common ground that the appellant is the sole proprietor of that firm. In 1936 the company owed the appellant a sum of Rs. 16,000. The appellant held 120 preference and 220 ordinary shares of Rs. 50 each in respect of which only Rs. 15 per share had been paid up. The appellant's brother, Mr. K. S. Pandalai, was also a director of the company. He held some 200

shares and these also were only paid upto the extent of Rs. 15 per share. Mr. K. S. Pandalai was not a creditor of the company, but he had lent a considerable sum of money to his brother and admittedly this money was utilized for the purposes of the company. Article 29 of the articles of association stated that the directors might, if they thought fit, receive from a member all or any part of the capital due upon shares held by him beyond the sums actually called for, and permitted the directors to pay interest on any sum so received. On 15th December 1936, a meeting of the board was held and was attended by the appellant, his brother and Mr. P. E. Raman Menon, who was also a director. They purported to pass the following resolution :

> Resolved that as per Art. 29 of the articles of association of the company the managing agents be hereby authorized, if they think fit, to receive from any member willing to advance the same, all or any part of the capital due upon the shares held by him beyond the sums actually called for; and upon the amount so paid or satisfied in advance, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which such advance has been made, to pay interest at 6 per cent. per annum.

There can be no doubt that this resolution was passed in order that an arrangement might be entered into relieving the appellant from liability in respect of his shares. This is obvious from what happened on 31st December 1936. On that date the appellant purported to set off Rs. 11,900, out of the amount due to him from the company against what he owed in respect of the shares and consequently called upon the Registrar of Joint Stock Companies to record that his shares had been fully paid up. When the company went into liquidation the validity of this transaction was questioned by the Official Liquidator and he decided that the appellant should be placed on the list of contributories in respect of Rs. 11,900. The appellant objected and asked the Court to strike out his name from the list, but this Gentle J. refused to do. The appellant as a director and the managing agent of the company was in a fiduciary position and in the circumstances the learned Judge held that he was not in a position to decide whether it was fit and proper from the company's point of view that there should be this arrangement. The learned Judge relied on the decision of the Privy Council in I L R (1938) Bom 421,[1] where the Judicial Committee held that the provisions of S. 91B, Companies Act, as it was before the amendment of 1936 were a concise statement of the general rule of equity. The Judicial Committee approved of these observations of the Court of appeal in England in (1914) 2 Ch 488[2] at p. 503 :

> Where a director of a company has an interest as a share-holder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagement with the company of which he is a director, he is in our opinion, within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as a trustee for others. He is bound to do as well for his cestui que trust as he would do for himself. Again the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the cestui que trust, upon which subject no inquiry is permitted.

When the case was before Gentle J., it appears to have been accepted that the resolution of 15th December 1936 was validly passed. The only point taken by the Official Liquidator was that the appellant could not act upon the resolution in respect of his own shares. It is, however, manifest that the validity of the resolution is open to question. Section 91B (1), Companies Act, as it stood at the time read as follows :

> No director shall, as a director, vote on any contract or arrangement in which he is either directly or indirectly concerned or interested; and if he does so vote, his vote shall not be counted.

At the time this resolution was passed, there were five directors, but only three of them attended and two of those present, the appellant and his brother, were not in a position to vote on the question as they were personally interested. Article 113 fixes the quorum for a director's meeting at three. As the appellant and his brother were not competent to vote and as the third director present, acting alone, could not give authority to the appellant to apply the provisions of Art. 29 the transaction cannot be regarded as binding upon the company. If three directors who had no interest in the matter had resolved that the debt due to the managing agent should be set off to the extent of the Rs. 11,900 against the appellant's liability on his shares or the company in general meeting had so decided the position would have been different. It is open to a company

1. ('38) 25 A I R 1938 P C 159: 174 I C 545: I L R (1938) Bom 421 : 32 S L R 517 (P C), T. R. Pratt (Bombay Ltd.) v. M. T. Ltd.

2. (1914) 2 Ch 488: 84 L J Ch 94: 112 L T 965: 21 Manson 364 : 59 S J 27 : 31 T L R 1, Transval Lands Co. v. New Belgium (Transval) Land & Development Co.

a to agree with a share-holder to whom it owes money that the debt shall be set off against future calls. This is well settled law: *see Adamson's case*, (1906) 18 Eq 670[3] and (1889) 41 Ch D 159.[4] But here the appellant applied the provisions of Art. 29 without lawful authority and consequently he cannot take advantage of what he has done. Even assuming the resolution to have been lawfully passed there is still the objection pointed out by Gentle J. The appeal fails and will be dismissed. There will be no order as to costs as the Official Liquidator appears in person.

b C.R.K./G.N. *Appeal dismissed.*

3. (1906) 18 Eq 670: 44 L J Ch 125 : 22 W R 820, In re Paraguassu Steam Tramroad Co.

4. (1889) 41 Ch D 159 : 58 L J Ch 582 : 61 L T 219 : 37 W R 615 : 1 Meg 161, In re Jones Lloyd & Co. Ltd.

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(29) A. I. R. 1942 Madras 97

BURN AND MOCKETT JJ.

Shunmugam Chettiar (minor) through Guardian Shanmugam Chettiar — *Appellant*

v.

c *N. M. Rayaloo Ayyar Nagaswami Ayyar and Co.* — *Respondent.*

Appeal No. 436 of 1938, Decided on 25th March 1941, against order of Addl. Sub-Judge, Madura, D/- 16th November 1937.

(a) Hindu law — Joint family — Creditor can attach coparcener's interest in portion of joint family property *(Obiter)*.

It is possible for a creditor to attach his judgment-debtor's interest in a part only of the joint family property. Therefore, the holder of a money decree against one of several coparceners can attach and bring to sale that coparcener's interest in a portion of the joint family property, and need not proceed against his interest in the whole of the joint family property : 5 Cal 425 and 10 Cal 626 (P C), d *Rel. on.* [P 98*f*, *g*]

(b) Appeal — New point — Point requiring investigation into facts cannot be raised.

A judgment-debtor cannot lie by in the executing Court with an allegation which would require an investigation into facts and then bring it up in appeal and found upon it a proposition of law to the effect that the sale is bad : 12 Mad 19 (P C), *Rel. on.* [P 98*h*]

(c) Civil P. C. (1908), S. 60 (1) (m)—Interest of coparcener in joint family property is not contingent interest.

The interest of a coparcener in joint family property cannot be said to be a merely contingent or possible right of interest. So far as it is an interest at all it must ex hypothesi be a vested interest : (39) 26 A I R 1939 P C 6 and 14 M I A 40 (P C), *Disting.* [P 99*c*]

(d) Civil P. C. (1908), O. 21, R. 66 — Want of specification of judgment-debtor's interest in joint family property does not invalidate sale proclamation. e

The want of specification of the extent of the judgment-debtor's interest in the joint family properties cannot invalidate the proclamation or the sale. [P 99*c*]

K. S. Ramabhadra Ayyar — for Appellant.

B. Sitarama Rao and O. V. Baluswami — for Respondent.

Burn J. — This appeal is from the order of the learned Subordinate Judge of Madura dismissing an application under O. 21, R. 90, Civil P. C., to set aside a sale of immovable property held in execution. The sale was held on 13th July 1936. The application under O. 21, R. 90 was presented on 11th August f 1936 and was disposed of by the learned Subordinate Judge on 16th November 1937. The learned Subordinate Judge held that there were no material irregularities or fraud established in the case and that therefore the application to set aside the sale could not be allowed. He dismissed it accordingly. We have heard a very lengthy argument from Mr. K. S. Ramabhadra Ayyar on behalf of the appellant, defendant 2 in the suit O. S. No. 114 of 1925. The appellant is the son of defendant 1 in the suit and the suit was filed on a mortgage executed by defendant 1 who represented when he took the money from the g lender that the hypotheca was his self-acquired property. The learned Subordinate Judge held that the hypotheca was not the self-acquired property of defendant 1 but joint family property. The suit was dismissed against defendant 2; but, on appeal to the High Court by the plaintiff, the High Court passed a personal decree for money against defendant 2 also, and indicated in its decree that the plaintiff could recover against defendant 2 by proceeding in execution against his share of the joint family property. The present application for sale is in respect of four items of joint family property which were attached in execution of the h decree.

The hearing of this appeal has been considerably complicated by the fact that learned counsel for the appellant has chosen to abandon all the grounds of irregularity and fraud which were alleged in the application to the lower Court under O. 21, R. 90. He no longer contends that the sale was vitiated by any irregularity or fraud in the conduct of the sale. What he contends now is that the sale was ab initio illegal and therefore void; in other words, he says that the application to the lower Court ought not to have been an application under O. 21, R. 90, as in fact

it was, but that it ought to have been an application under S. 47, Civil P. C. We have therefore heard no arguments with regard to the usual allegation under O. 21, R. 90, namely that there was no proper tom-tom or that there was combination preventing adequate bidding or that there was no proper advertisement of the sale; nor have we heard arguments on the point that the sale was adjourned without specifying the hour of the date to which it was adjourned or on the allegation that the encumbrances had not been properly mentioned. Learned counsel for the appellant has devoted his arguments entirely to an attempt to show that the attachment itself and the sale in pursuance of it were illegal.

The first point taken by the learned counsel for the appellant is that the sale in this case was in violation of the direction of the High Court in its decree in A. S. No. 406 of 1930. The relevant portions of the decree are as follows:

> (1) That defendant 2 in the suit (the present appellant) also do pay to the plaintiffs the amount decreed by the lower Court in O. S. No. 114 of 1925 with subsequent interest . . . . subject to the declarations that the plaintiffs are entitled to get a money decree in the suit as against defendant 2 and that the suit document is not binding on defendant 2 as a mortgagee; (2) that cl. (4) in the said decree be and hereby is deleted; (3) that plaintiffs be at liberty to execute the said decree by attaching and selling not only the share of defendant 1 but also the share of defendant 2 in the joint family properties.

There is no dispute about the fact that these items, which were items of the hypotheca, were attached and brought to sale as the self-acquired properties of defendant 1 and were purchased by the decree-holder for about Rs. 43,000. There is also no doubt about the fact that he applied to attach and bring to sale the interest of defendant 2 also in these properties. Learned counsel's contention that the sale proceedings in this case are in contravention of the High Court's decree is based upon an allegation that these four items of immovable properties did not constitute the whole of the joint family property in which defendant 1 and defendant 2 are coparceners. He says that besides these the joint family is entitled to vast extents of immovable property. He says that the only course open to the decree-holder in A. S. No. 406 of 1930 was to attach the share of defendant 2 in the whole of the joint family properties and to bring that to sale to satisfy his decree for money against defendant 2. He says that the attachment and sale of defendant 2's interest in only a small portion of the joint family property are illegal. This contention is one which, I think, cannot be heard in this appeal. It has nowhere been alleged in the execution proceedings in the lower Court, and it does not appear in the decree of the High Court which is being executed, that the joint family is possessed of any other properties besides the items concerned in this sale. As the learned Subordinate Judge has pointed out, the appellant has been aware of all the steps taken in execution, and he has never brought it to the notice of the executing Court that he had a coparcener's interest along with his father in vastly greater extents of immovable property and that therefore it was not in accordance with law to attach and sell his interest in these four items alone. It is not, I think, absolutely clear that the holder of a money decree against one of several coparceners is not at liberty to attach and bring to sale that coparcener's interest in a portion of the joint family property, but must proceed against his interest in the whole of the joint family property. Such a proposition would lead to absurdities. For instance, in the case of a creditor holding a money decree against a minor coparcener entitled to, say, a half share in properties of very great value, it would seem to be absurd to require the decree-holder to bring to sale the judgment-debtor's interest in joint family properties worth perhaps ten lakhs in order to satisfy a decree for money for say Rs. 100. Yet, that would follow from the contention put forward on behalf of the appellant in this case. It is only necessary to cite the decisions of the Calcutta High Court reported in 5 Cal 425[1] and of the Privy Council reported in 10 Cal 626[2] in order to show that it is possible for a creditor to attach his judgment-debtor's interests in a part only of the joint family property. But I would prefer to decide the question with reference to the principle that the judgment-debtor cannot lie by in the executing Court with an allegation of this kind, and then bring it up in appeal and found upon it a proposition of law to the effect that the sale is bad. I must agree with the learned counsel for the respondent that this allegation, namely that the joint family properties consist of more items than were brought to sale, is an allegation which would require an investigation into facts. The appellant ought to have brought this forward during the execution proceed-

1. ('81) 5 Cal 425: 5 C L R 112, Collector of Monghyr v. Hurdai Narain.
2. ('84) 10 Cal 626: 11 I A 26: 4 Sar 510 (P C), Hardi Narain Sahu v. Ruder Parkash Misser.

a ings and, as he has not done so, I think it is not proper to allow him to do so now.

The second objection made by the learned counsel for the appellant is that the decree-holder brought the interest of defendant 2 in these four items of joint family property to sale without specifying what interest it was and indeed coupled with an allegation that defendant 2 had no interest in these properties. Learned counsel for the appellant contends that the sale is invalid for these reasons, but there is no authority for such a statement. Learned counsel has only referred us to S. 60 (1) (m), Civil P. C., whereby b a merely contingent or possible right or interest cannot be attached and brought to sale in execution of a decree. That provision clearly has no application. There is no question here of the interest of defendant 2 being a merely contingent or possible right or interest. What the decree-holder said was, "I wish to sell the interest of defendant 2 in these items of property, whatever it may be. I do not know whether he really has any interest in it. I contend that he has not and I have filed in the Sub-Court O. S. No. 75 of 1934 to establish that contention of mine. But however that might turn out and whatc ever his interest might turn out to be when it is ascertained, I wish to bring it to sale." There is no allegation that the interest of defendant 2 is a matter of contingency or dependent upon any future happening. So far as it is an interest at all it must ex hypothesi be a vested interest. The case reported in (1938) 2 M L J 906,[3] therefore has no application, nor the case reported in 14 M I A 40.[4] I am not able to see how the want of specification of the extent of defendant 2's interest in the joint family properties could invalidate the proclamation or the sale.

d The third objection is that the order of attachment at first passed by the learned Subordinate Judge on the decree-holder's application for attachment was illegal. The order is "Attachment of defendant 2's interest in this property by 28th March 1935." The contention with regard to this point depends again upon the allegation that it was not permissible for the decree-holder to attach defendant 2's interest in separate items of joint family property and that he ought to e have attached defendant 2's interest in the whole of the joint family property. There is nothing in the order passed by the learned Subordinate Judge to show that the property, the attachment of which was sought, was not the whole of the joint family property or that the learned Subordinate Judge was ordering the attachment of anything less than defendant 2's interest in the whole of it. This point therefore also fails, in my opinion. For these reasons I think that this appeal ought to be dismissed with costs.

Mockett J.—I entirely agree. Although frequently pressed to do so, the learned f counsel for the appellant has never been able to indicate to us that anywhere on the record there appears any trace of this contention, on which this appeal has been argued fully today, having been mentioned. It is quite clear that in the lower Court the appellant primarily went to attack the sale on the ground of the several irregularities to which my learned brother has referred. He also argued that owing to the alleged uncertainty of defendant 2's position his rights, if any, in this property came within the provisions of S. 60 (1) (m), Civil P. C., being in the nature of *spes successionis* and therefore something that could not be attached. The order in- g voked to set aside the sale was O. 21, R. 90, and it is worthy of mention that there is no reference to S. 47. The appellant is now asking us to order an enquiry into a state of fact which was peculiarly within his own knowledge and which we are satisfied was never mentioned to the lower Court. He is saying now that the decree-holder is seeking to execute the decree against part of a vast estate. I am certain that this was never mentioned to the lower Court. I am equally clear that it cannot be raised before us. The Judicial Committee have on two occasions dealt with positions similar to that which h arises before us today. In 15 I A 171,[5] their Lordships, referring to another decision of the Board in 10 I A 25,[6] said that if there was really a ground of complaint and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. Their Lordships proceed:

> It would be very difficult indeed to conduct proceedings in execution of decrees by attachment

3. ('39) 26 A I R 1939 P C 6 : 179 I C 995 : I L R (1939) Bom 36 : 32 S L R 963 : (1938) 2 M L J 906 (P C), Firm Pestonjee Bhicajee v. Patrick H. Anderson.
4. ('70-72) 14 M I A 40 : 7 Beng L R 186 : 2 Suther 434 : 2 Sar 656 (P C), Syed Tuffuzool Hussain Khan v. Raghunath Pershad.
5. ('88) 12 Mad 19 : 15 I A 171 : 5 Sar 265 (P C), Arunachalam Chetty v. Arunachalam Chetty.
6. ('83) 9 Cal 656 : 10 I A 25 : 11 C L R 494 : 4 Sar 417 (P C), Olpharts v. Mahabir Parshad.

and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated.

I respectfully consider that these remarks are particularly applicable to the case before us. I agree that this appeal should be dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 100

BURN J.

In re Venkatachalam Chetty — Accused — Appellant.

Criminal Appeal No. 357 of 1941, Decided on 28th August 1941, against order of Court of Session, Coimbatore Division, in C. C. No. 30 of 1941.

Penal Code (1860), Ss. 302 and 328—Accused administering dhatura with food to three persons—All of them found lying in open next day—Two of them recovering but third developing pneumonia and dying week after—Death not due to poisoning — Accused held not guilty under S. 302.

On the night of 6th December the accused gave some food with which dhatura was mixed to three persons in order that he might rob them of whatever they had on their person. The three men were found next morning lying out in the open as a result of the coma or unconsciousness produced by the poison and were taken to the hospital. Two of them recovered completely. The third though he recovered from dhatura poisoning developed pneumonia and died on 13th December :

Held that the accused was not guilty under S. 302 since it was not shown that pneumonia was a likely consequence of the administration of dhatura nor was it established that the pneumonia was caused by the exposure or was a probable consequence of sleeping out. The accused was guilty under S. 328 : ('23) 10 A I R 1923 All 608, *Disting.* [P 101*b*]

V. L. Ethiraj, Public Prosecutor — for the Crown.

Judgment.—The appellant was tried by the learned Sessions Judge of Coimbatore on a charge of murder (S. 302) and two charges of administering poison with intent to commit an offence. The facts found against him were that on the night of 6th December last at Pollachi he gave some food with which dhatura was mixed to three Malayalees in order that he might rob them of whatever they had on their person. The three men were found next morning lying out in the open and they were taken to the hospital. The medical evidence showed that all of them had been given dhatura. Two of them recovered completely. The third developed pneumonia and died on 13th December. There is no reason to differ from the finding of the learned Sessions Judge with regard to these facts. The learned Public Prosecutor has taken me through the evidence of the important prosecution witnesses, P. Ws. 1 and 2. These are the two men who recovered from the dhatura poisoning. P. W. 1 is the son of the deceased. This man identified the accused at parades held on different dates some time after the occurrence. The accused at the trial merely pleaded that he knew nothing and that the case was false. He was not able to say why any of the witnesses should have given false evidence against him.

The only point that needs discussion is whether the conviction of the accused for the offence of murder is correct. The conviction for the two offences under S. 328 of poisoning P. Ws. 1 and 2 is clearly correct and the sentences of seven years rigorous imprisonment passed upon the accused for those offences are not excessive. With regard to the person who died the learned Sessions Judge has convicted him of murder finding that he died of pneumonia consequent upon the exposure occasioned by coma or unconsciousness produced by the poison. The learned Judge refers to a case reported in 45 ALL 557.[1] There is however one important difference between the Allahabad case and this. In the Allahabad case it was proved that the deceased died within a very short time of the dhatura poisoning and the learned Judges held that the accused ought to have been charged under S. 302, Penal Code, and that his offence clearly fell within paras. 3 and 4 of S. 300. In the present case however death was not due to dhatura poisoning. The doctor's evidence is clear that the victim recovered from dhatura poisoning and that he died of pneumonia. The question therefore is whether pneumonia was a likely consequence of the administration of dhatura. If it was likely that the victim after being given dhatura and thereby being rendered unconscious would develop pneumonia, a disease which is very often fatal, then the pneumonia can be said to be so connected with dhatura poisoning that the act of the accused in administering dhatura had caused the death of the victim. But there is no evidence that pneumonia was a probable consequence of sleeping out at Pollachi on the night of 6th December. The doctor does not say that anyone who slept out in the open on that night was likely to get

1. ('23) 10 A I R 1923 All 608 : 75 I C 361 : 45 All 557 : 24 Cr L J 937, Emperor v. Nanhu.

pneumonia. He says merely that the man "developed pneumonia on account probably of exposure in the open maidan on 6th December 1940."

Thus it is not established that the pneumonia was in fact caused by the exposure. Moreover, the doctor did not say that pneumonia was a probable consequence of sleeping out; and as a matter of fact it appears that the other two men who were poisoned, P. Ws. 1 and 2, although they also slept out in the open for the same length of time, did not develop pneumonia. In these circumstances it is clear that the act of the accused in administering dhatura to Kunjan Nayar has not been shown to have caused his death. The conviction of the appellant for the offence of murder cannot therefore be sustained and it is set aside. The appellant must be convicted in the case of Kunjan Nayar also of an offence under S. 328, Penal Code. I set aside the sentence of transportation for life and for the offence under S. 328, Penal Code, I sentence the appellant to ten years rigorous imprisonment, the sentence to run concurrently with the other two sentences of seven years rigorous imprisonment.

C.R.K./G.N. *Order accordingly.*

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(29) A. I. R. 1942 Madras 101

PATANJALI SASTRI J.

S. Sankaranarayana Iyer — Petitioner

v.

Paramasivam Pillai and others — Respondents.

Civil Revn. Petn. No. 710 of 1937, Decided on 1st August 1940, to revise order of Sub-Judge, Tinnevelly, D/- 19th January 1937.

Civil P. C. (1908), S. 55 (4) — Surety under, cannot claim to be released from obligation at his pleasure—Principle of S. 130, Contract Act, does not apply.

There is no analogy between a security bond executed by a surety under S. 55 (4), Civil P. C., and a continuing guarantee as defined in S. 129, Contract Act. In the former case, there is no series of transactions giving rise to distinct liabilities which the guarantee is intended to cover but there is only a single transaction under which the surety undertakes responsibility for certain things to be done in future though on different occasions. The markedly different terms of S. 55 (4), Civil P. C., and the absence of any provision for the discharge of the surety at any stage before he has fully carried out his undertaking point clearly to the conclusion that a person who becomes a surety under this section cannot claim to be released from his obligation at his pleasure and the principle of S. 130, Contract Act, does not apply. Therefore, where it is clearly provided by the terms of the security bond which is in conformity with S. 55 (4), Civil P. C., that the security deposited by the petitioner should be realized if the judgment-debtor did not apply to be declared an insolvent within a month from that date or did not appear when called upon to do so in the proceedings on such application or in execution of the decree, it would be contrary to this stipulation to release the petitioner from his undertaking and set free his security deposit : 28 Mad 161, *Rel. on*; ('34) 21 A I R 1934 Lah 962, *Dissent.*; ('35) 22 A I R 1935 Mad 543, *Expl.* [P 102*a*, *b*, *c*, *d*]

R. Ramamurthy — for Petitioner.

Order. — This is a petition to revise the order of the Additional Subordinate Judge, Tinnevelly, refusing to discharge the petitioner from his suretyship under a security bond executed by him under S. 55 (4), Civil P. C. The facts are simple and not in dispute. Respondent 1 obtained a decree against respondent 2 and had him arrested in execution thereof. When the latter was brought before the Court under arrest, the petitioner deposited Rs. 500 as cash security and executed a surety bond on the strength of which the Court released the judgment-debtor from arrest. The bond runs as follows :

In case the respondent (i. e., the judgment-debtor) fails to apply to be declared an insolvent within one month from this date, and in case the said respondent fails to appear, when called upon in any proceeding upon such application or upon the decree in execution of which the said respondent was arrested, the Court may direct the cash security to be realized, but not personally from the depositor.

Respondent 2 then applied to be adjudicated insolvent and was adjudged accordingly. A few months later, when those proceedings were still pending, the petitioner applied to the executing Court under Ss. 55 and 151, Civil P. C., offering to produce the judgment-debtor before the Court on any day that might be fixed and praying for discharge from his suretyship, as he did not like to continue as surety any longer. The Court below rejected this application on the ground that, in view of the terms of the security bond, the petitioner could not claim release from his obligation as surety, and there was nothing in S. 55 of the Code to justify such release. The petitioner has challenged the validity of this order. He contends that a security bond given under Sec. 55 (4) of the Code is in the nature of a continuing guarantee for the production of the judgment-debtor whenever required by the Court, and when the surety offers to produce the judgment-debtor and desires to be absolved from further liability under the bond, the Court is bound to cancel the bond and discharge the surety. His learned counsel did not suggest that S. 130, Contract Act, which entitles the surety to revoke a continuing guarantee as to future transactions was in terms applicable to the present case,

but it was said that the principle of that section applied by way of analogy. It is difficult to see what analogy there is between a security bond executed by a surety under S. 55 (4), Civil P. C., and a continuing guarantee as defined in S. 129, Contract Act. In the former case, there is no series of transactions giving rise to distinct liabilities which the guarantee is intended to cover but there is only a single transaction under which the surety undertakes responsibility for certain things to be done in future though on different occasions. In 28 Mad 161,[1] a Bench of this Court held that a security bond given by a surety under S. 78, Probate and Administration Act, for the due administration of an estate could not be revoked as to future acts of administration by the surety giving notice to the Judge or other officer of the Court. I can see no distinction between a security bond of the kind dealt with in that decision and the one now before me so far as the applicability of S. 130, Contract Act, or its principle is concerned.

It is clearly provided by the terms of the security bond in this case which is in conformity with S. 55 (4) of the Code, that the security deposited by the petitioner should be realized if the judgment-debtor did not apply to be declared an insolvent within a month from that date or did not appear when called upon to do so in the proceedings on such application or in execution of the decree. It would be contrary to this stipulation to release the petitioner from his undertaking and set free his security deposit, and I can find nothing in the Code or under the general law to warrant such procedure. This conclusion derives further support from a comparison of S. 55 (4) with the provisions of O. 38, Rr. 2 and 3. These rules expressly provide that a person who becomes a surety for the appearance of a defendant may at any time apply to the Court to be discharged from his obligation and that the Court shall direct his discharge on such application when the defendant is either produced by the surety or appears in pursuance of a summons or warrant issued by the Court. The markedly different terms of S. 55 (4) and the absence of any provision for the discharge of the surety at any stage before he has fully carried out his undertaking point clearly, in my view, to the conclusion that a person who becomes a surety under this section cannot claim to be released from his obligation at his pleasure.

1. ('05) 28 Mad 161 : 14 MLJ 482, Subroya Chetty v. Rangammal.

Petitioner's learned counsel placed reliance on a decision of a single Judge of the Lahore High Court in A I R 1934 Lah 962,[2] which no doubt supports his contention but with all respect I am unable to agree with it. I was also referred to a decision of Pandrang Row J., in A I R 1935 Mad 543,[3] which I find, however, is no authority on the point now under consideration. The question for decision in that case did not relate to the right of a surety to be released at any time from his liability on production of the judgment-debtor, but to the extent of his liability under a bond executed under S. 55 (4) when the judgment-debtor did not file the insolvency petition within a month. The learned Judge held, on the terms of the bond before him, that the only liability of the surety was to produce the judgment-debtor before the Court and that he was entitled to be given an opportunity of producing the judgment-debtor in Court on a date fixed by it before his security could be realized. It may be that, in the present case also, the petitioner would be entitled to an opportunity of producing the judgment-debtor if the latter does not appear as required by the Court before the security furnished can be realized. This is not, however, the question before me and the decision cited above has no application. The civil revision petition fails and is dismissed.

C.R.K./K.S. *Petition dismissed.*

2. ('34) 21 A I R 1934 Lah 962 : 151 I C 154, Sirajuddin v. Gurenditta Mal.
3. ('35) 22 A I R 1935 Mad 543 : 156 I C 113, Alagammal v. Arunachalam.

(29) A. I. R. 1942 Madras 102

WADSWORTH J.

Kota Ramaya and others — *Petitioners*

v.

Tummalapalli Peda Kotayya and another — *Respondents.*

Civil Revn. Petns. Nos. 1039 and 1040 of 1939, Decided on 7th October 1940, to revise orders of Dist. Munsif, Kovur, D/- 9th December 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 23—Words "property, in which agriculturist had interest has been sold" in S. 23—Meaning.

The words "property, in which an agriculturist had an interest has been sold" in S. 23 refer to the state of affairs at the time of the sale and cannot cover a case in which the agriculturist had parted with his interest in the property sold long before the sale. [P 103*a*]

P. Somasundaram and P. Suryanarayana — for Petitioners.

V. Viyyanna — for Respondents.

Order. — It seems to me clear that in S. 23 of Madras Act 4 of 1938 the words "property, in which an agriculturist had an interest has been sold" must refer to the state of affairs at the time of the sale and cannot cover a case in which the agriculturist had parted with his interest in the property sold long before the sale. Admittedly, the property sold in the present case belonged solely to the non-agriculturist defendants. Section 23 has therefore no application. The petitions are dismissed with costs in civil revision petition No. 1039 of 1939.

C.R.K./G.N. *Petitions dismissed.*

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(29) A. I. R. 1942 Madras 103 (1)

LAKSHMANA RAO J.

Ponnada Mallayya and another — Petitioners

v.

Ponnada Jagannadhamma and others — Respondents.

Civil Revn. Petn. No. 343 of 1940, Decided on 18th August 1941, to revise order of Dist. Munsif, Rajahmundry, D/- 25th January 1940.

Court-fees Act (1870, as amended by Madras Act 5 of 1922), Sch. 2, Art. 17-B—Partition suit by person in joint possession—Value for jurisdiction is market value of property claimed.

The value of a suit for partition by person in joint possession for purposes of jurisdiction is the market value of the property claimed : ('27) 14 AIR 1927 Mad 563; ('29) 16 A I R 1929 Mad 396 and ('39) 26 AIR 1939 Mad 776, *Rel. on.* [P 103*c*,*d*]

G. Chandrasekhara Sastri — for Petitioners.

P. Satyanarayana Raju and M. R. Raju — for Respondents.

Order. — The suit is for partition by persons in joint possession and it is common ground that court-fee is payable under Art. 17-B of Sch. 2, Court-fees Act. The dispute is as to the value of the suit for purpose of jurisdiction and as pointed out in 50 Mad 646,[1] in which all the decisions were considered, the valuation to be adopted for the purpose of jurisdiction is the actual market value of the property in suit. To the same effect are the decisions in 56 M L J 394[2] and (1939) 2 M L J 226[3] and it is found by the lower Court that the value of the shares of the plaintiffs will be not less than Rs. 10,000. This suit should therefore have been instituted in the Subordinate Judge's Court of Rajahmundry and the District Munsif has no jurisdiction to entertain it. The order of the District Munsif is therefore set aside and he is directed to return the plaint for presentation to proper Court. There will be no order as to costs.

C.R.K./G.N. *Order set aside.*

1. ('27) 14 AIR 1927 Mad 563 : 101 I C 379 : 50 Mad 646 : 52 M L J 381, Vasireddi Veeramma v. Butchayya.
2. ('29) 16 AIR 1929 Mad 396 : 119 I C 35 : 56 M L J 394, Kattiya Pillai v. Ramaswami Pillai.
3. ('39) 26 AIR 1939 Mad 776 : 189 I C 289 : (1939) 2 M L J 226, Karuppanna Nadar v. Karuppa Nadar.

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(29) A. I. R. 1942 Madras 103 (2)

KRISHNASWAMI AYYANGAR J.

In re T. N. Panchapakesa Iyer, an insolvent.

Application No. 122 of 1940 (in I. P. No. 123 of 1932), Decided on 21st July 1941.

Presidency Towns Insolvency Act (1909), S. 31—Creditor denied participation in dividend by reason of fraud practised on Court by insolvent—Payment of dividend to other creditors is not duly made.

Where a creditor has been denied participation in the dividend by reason of a fraud practised upon the Court by the insolvent, the payment of dividends to the other creditors cannot be held to have been duly made within the meaning of the expression in Section 31. [P 103*g*]

S. Venkatarama Iyer, V. Srinivasan and S. Anudachari — for Creditors.

Official Assignee in person.

Order.—Prayer (c) is the only outstanding matter to be dealt with. The applicant who has been found to be a creditor was denied participation in the dividend by reason of a fraud practised upon the Court by the insolvent. It was represented that the applicant had agreed to have her rights postponed to those of the other creditors and that she was a major at the time. It is clear that she was not a major at the time and there is reason to think that the learned advocate who purported to act for her proceeded upon a mistake of fact in making such a representation to the Court. In these circumstances I hold that the payment of dividends to the other creditors cannot be held to have been duly made within the meaning of the expression in S. 31, Presidency Towns Insolvency Act. The creditors who received dividends from the official assignee shall pay back into his hands such amount each as is necessary to make up the proper dividend payable to the applicant on the amount of her admitted claim. The creditors in the list herewith appended will pay to the official assignee the several sums set out against their names respectively making a total of Rs. 932-1-9 which I understand will be sufficient to pay Rs. 0-4-3 in the rupee to all the creditors including the applicant.

C.R.K./K.S. *Order accordingly.*

(29) A. I. R. 1942 Madras 104

SOMAYYA J.

Samuel Nadar — Appellant

v.

Thangayya Nadar — Respondent.

Second Appeal No. 1084 of 1938, Decided on 1st August 1941, against decree of Sub-Judge, Devakottah, in A. S. No. 31 of 1937.

(a) Partnership Act (1932), S. 42—Partnership for carrying on chit to run for 50 months—Partnership does not terminate immediately on expiry of 50th month—It comes to an end only when monies due are collected and liabilities discharged.

When two persons form themselve into a partnership for the purpose of carrying on a chit transaction for 50 months, the chit may come to an end on the expiry of the 50th month; but as between the two persons who are joint stakeholders the adventure or undertaking does not come to an end immediately. All the monies due to the partnership have to be collected and the liabilities have to be discharged and it is only then that the business can be said to come to an end. As between the two the relationship of partners continues until the termination of the business of the partnership, i.e., until all the assets of the partnership are realised and the liabilities paid. [P 104*c*,*f*,*g*]

(b) Partnership—Dissolution—Suit for taking account — Onus of proving that dissolution had taken place three years before suit is on defendant.

A suit for taking the accounts of a partnership would not be barred unless the defendant makes out that there has been a dissolution of the partnership more than three years prior to the institution of the suit. The onus of making out such dissolution is upon the defendant and the mere fact that after a particular date no further business was done will not amount to a dissolution of partnership: ('37) 24 AIR 1937 Mad 599, *Foll.* [P 105*a*]

K. Bhashyam and V. C. Veeraraghavan — for Appellant.

K. Rajah Ayyar — for Respondent.

Judgment. — This is an appeal against the decree of the Subordinate Judge of Devakottah in A. S. NO. 31 of 1937. The plaintiff (appellant) filed in the suit out of which this second appeal arises for dissolution of a partnership which he and the defendant are said to have been carrying on. The business of the partnership consisted in the running of a chit transaction, both the partners acting as stakeholders. The chit was to be conducted for a period of 50 months. Two prizes were to be taken by the stakeholders and the remaining forty eight were to be open to the other subscribers. The person who offered the lowest bid was given the prize. The suit has been dismissed by the lower appellate Court as barred by limitation. The chit started on 13th March 1924 and the 50 months expired on 14th May 1928. The present suit was filed on 13th February 1933. If the adventure or undertaking of carrying on a chit fund was completed by the end of the 50th month, then there was a dissolution of the partnership under S. 42, Partnership Act. That would be on 14th May 1928. If there was a dissolution on that date, then under Art. 106, of Sch. 2, Limitation Act, a suit for an account would have to be filed within three years from that date, unless in the meanwhile there were acknowledgments within three years of each other. The lower appellate Court held that the business of the partnership or the undertaking or adventure as mentioned in S. 42 (b) came to an end on the expiry of the 50 months during which the chit was to run. If this is conceded, the rest follows. The lower appellate Court says :

> Ordinarily a chit to run for 50 months by two persons in partnership is an adventure which terminates at the 50th month, or it is a partnership for a particular period.

This is a thorough misunderstanding of the nature of the partnership. When two persons form themselves into a partnership for the purpose of carrying on a chit transaction, the chit may come to an end on the expiry of the 50th month; but as between the two persons who are joint stakeholders the adventure or undertaking does not come to an end immediately, for monies due to the partnership from the subscribers have to be collected. If it is a case of single stakeholder there is no trouble; he will collect all the monies due from the subscribers who drew the prizes. But in a case where two persons form themselves into a partnership and the partnership is the stakeholder, then the partnership business does not cease or terminate with the 50th month or earlier if the auction of the chits every month comes to an end, earlier for other reasons. Very much more has to be done; all the monies due to the partnership have to be collected and the liabilities have to be discharged and it is only then that the business can be said to come to an end. As between the two the relationship of partners continues until the termination of the business of the partnership, i.e., until all the assets of the partnership are realised and the liabilities paid. It is this initial misunderstanding of the nature of the business, namely, that the partnership business came to an end at the termination of the 50th month, that has led the lower appellate Court to hold that the suit is barred. As held by a Bench of this Court in

45 M L W 749,[1] a suit for taking the accounts of a partnership would not be barred unless the defendant makes out that there has been a dissolution of the partnership more than three years prior to the institution of the suit. The onus of making out such dissolution is upon the defendant and it is well established that the mere fact that after a particular date no further business was done will not amount to a dissolution of the partnership.

It is unnecessary to refer to the decisions cited in that judgment. In this case the onus of proving that there was a dissolution lay upon the defendant. All that is said by the respondent in support of the judgment of the lower Court is that the plaintiff pleaded that there was a reference to arbitration and an attempt to settle the accounts and that there was an agreement for division of the assets and liabilities of the partnership between the partners. Unfortunately the agreement pleaded by the plaintiff was denied by the defendant and the defendant succeeded in satisfying the lower Courts that the plaintiff's case in regard to the settlement is not true. The first Court found that there was only an attempt at settlement and the lower appellate Court says that the finding of the trial Court that the settlement was only an abortive settlement in April or May 1928 was not even challenged before him. In the evidence given by the defendant at page 18 of the printed papers this is what he says :

> The chit was stopped because plaintiff said the 43rd auction might be postponed owing to want of collections. The plaintiff looked into the accounts with his accountant for the attempted agreement. The proposed terms were the assets and liabilities should be divided equally. I do not remember the persons who might have been present at that time. There was only a proposal to wind up our business as stated above.

After this evidence it is idle to contend that there was a dissolution or a completed agreement in April or May 1928. I hold that the suit is not barred by limitation. I reverse the decree of the lower appellate Court and restore that of the District Munsif with costs here and in the lower appellate Court. Leave to appeal is refused.

C.R.K./K.S. *Appeal allowed.*

1. ('37) 24 A I R 1937 Mad 599 : 173 I C 194 : 45 M L W 749 : (1938) 1 M L J 574, Gundayya v. Siddappa.

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(29) A. I. R. 1942 Madras 105

WADSWORTH J.

S. Subramania Iyer — Petitioner

v.

India Equitable Insurance Co. Ltd. through agent S. B. Mitra — Respondents.

Civil Revn. Petn. No. 1324 of 1939, Decided on 30th July 1941, to revise order of Sub-Judge, Tinnevelly, D/- 16th March 1939.

Madras Agriculturists Relief Act (4 of 1938), Ss. 10 (2) (iii), 8 and 9—Liability excluded from operation of Ss. 8 and 9 is present liability under which debtor is indebted at time of his application —Debt on which decree was passed carrying interest not more than 9 per cent.—Fact that debts of which it was renewal carried interest over 9 per cent. cannot exclude it from operation of S. 10 (2) (iii).

The liability excluded from the purview of operations under S. 8 or S. 9 is the present liability under which the debtor is at the time of his application indebted. Consequently, a debt due to a company on the basis of which the decree was passed and which carried interest at not more than 9 per cent. is clearly excluded from the operation of Ss. 8 and 9, and the fact that the debts of which it is the renewal carried interest in excess of 9 per cent. cannot bring it within the operation of Ss. 8 and 9 so as to exclude it from the operation of section 10 (2) (iii). [P 106*a*]

T. L. Venkatarama Iyer — for Petitioner.

L. Krishnaswami Ayyar — for Respondents.

Order. — The contention raised in this petition under Madras Act 4 of 1938 is one which, so far as I am aware, is not covered by authority, but it seems to me to be clearly untenable. The petitioner was employed by the Indian Equitable Insurance Co., Ltd., and he borrowed from his employers in 1927 a sum of Rs. 250 on a promissory note carrying interest at 12 per cent. per annum. In 1930 that debt was renewed by the execution of a fresh promissory note for Rs. 340 with interest at the same rate. In 1933 there was a further renewal by the execution of a note for Rs. 450 carrying interest at only 9 per cent. On this note the company sued and got a decree on 23rd October 1936. The debtor applied to scale down this decree under S. 19 of the Act, and has been met by the objection that under S. 10 (2) (iii) of the Act, nothing in Ss. 8 and 9 applies to a liability in respect of a sum due to a public company when the interest payable in respect of the liability is not more than 9 per cent. The argument advanced before me is that because the debt which has been decreed is itself a renewal of earlier debts carrying interest at 12 per cent., the explanation to S. 8 can be applied and that by the application of this explanation the liability becomes tranformed into one bearing inte-

rest in excess of 9 per cent., so as to exclude it from the operation of S. 10 (2) (iii). That is to say, the petitioner proposes to apply S. 8 of the Act, in order to make this liability into one to which S. 8 of the Act shall apply. This process seems to me unjustifiable. The liability excluded from the purview of operations under S. 8 or S. 9 of the Act is the present liability under which the debtor is at the time of his application indebted. If that liability is due to a company and carried interest at not more than 9 per cent., it is clearly excluded from the operation of Ss. 8 and 9 and, therefore, these sections cannot be called in aid to substitute for this liability an earlier liability which bore a higher rate of interest. The petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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* (29) A. I. R. 1942 Madras 106

VENKATARAMANA RAO J.

T. Srinivasa Rao and another — *Appellants*

v.

Annadhanam Seshacharlu and another — *Respondents.*

Second Appeal No. 970 of 1937, Decided on 14th March 1941, against decree of Sub-Judge, Chittoor, in A. S. No. 1 of 1936.

(a) Adverse possession — Person in adverse possession of property inheriting same within 12 years from date of his adverse possession— Vesting of property by inheritance puts an end to adverse possession.

A person cannot perfect his title to certain property by adverse possession if subsequently he inherits that property within twelve years from the commencement of his adverse possession as the legal consequence of the vesting of property in him by inheritance is that the adverse possession that was running against the owner comes to an end. When he becomes the owner adverse possession cannot run against himself: ('19) 6 AIR 1919 P C 44, *Expl.*; ('40) 27 AIR 1940 Mad 102, *Disting.* [P 107*c*]

(b) Hindu law — Inheritance — Daughter as heir of parents takes restricted interest similar to that of widow—Alienation for spiritual welfare of parents is for necessity.

Under the Hindu law the daughter as heiress of her father or mother takes a restricted interest similar to that taken by a widow with a similar power of disposal. Hence for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her parents the daughter has a larger power of disposition than that which she possesses for purely worldly purposes: 8 M I A 529 (P C); 34 Mad 288; ('22) 9 AIR 1922 P C 261, *Rel. on*; ('16) 3 A I R 1916 Cal 792, *Approved.* [P 108*h*; P 109*a*]

(c) Hindu law — Alienation — Daughter inheriting property from mother — Daughter can alienate property for marriage of her daughter's daughter as it is pious and meritorious purpose under Hindu law.

Under the Hindu law a daughter inheriting property from her mother can alienate the property for the reasonable expenses for the marriage of her daughter's daughter (the girl's father being poor and mother being dead) as the performance of such a marriage is pious and meritorious act under the Hindu law which would conduce to the spiritual benefit of the deceased parents of the alienor: *Case law referred.* [P 111*a*, *b*]

A. Bhujanga Rao and D. R. Krishna Rao — for Appellants.

S. V. Venugopalachariar — for Respondents.

Judgment. — This second appeal arises out of a suit for a declaration that the sale of a house and lands (Ex. X) executed by defendants 1 and 2 in favour of defendant 3 is not binding on the plaintiffs beyond the lifetime of defendant 1. Defendant 1 is the daughter of one Tirupati Ramarao who died without any male issue leaving him surviving his widow Janaki Bai and his daughter defendant 1. The case for the plaintiffs is that the suit properties belonged to Ramarao and devolved on Janaki Bai by right of inheritance and on her death, on the plaintiffs and that the said alienation by defendant 1 was not for any legal necessity. The case for the defendants is that the property was the absolute property of Janaki Bai, that she gifted them to defendant 1 in or about 1904, that ever since the said date she had been in absolute possession and enjoyment of the property and acquired title thereto by adverse possession. Defendant 1 also pleaded that the said sale was made for discharging a prior mortgage which was executed for a necessary purpose, namely for discharging certain debts incurred for repairs to the house, for medical treatment and for obsequial ceremonies of her mother and for the marriage expenses of her daughter's daughter. She also denied that plaintiffs are the reversioners. The learned District Munsif found that the plaintiffs are the reversioners of Ramarao and also of Janaki Bai, that the property belonged to Janaki Bai, that though the property was gifted to defendant 1 in 1904, she did not acquire title thereto by adverse possession because Janaki Bai died within twelve years before succession opened, that the mortgage for the discharge of which the sale was executed was valid only to the extent of Rs. 600 on the ground that that sum must be deemed to have been spent towards the necessary expenses binding on the estate and that the balance of Rs. 1200 spent for the marriage expenses of her daughter's daughter was not

a a legal necessity and that the said sale was therefore binding upon the plaintiffs only to the extent of Rs. 600. On appeal the learned Subordinate Judge confirmed the finding as to the status of the plaintiffs as the reversioners of Janaki Bai and also in regard to the question of adverse possession. He upheld the sale in its entirety on the ground that the amount borrowed for the marriage of the daughter's daughter of defendant 1 was for a necessary purpose. He took the view that the marriage of the daughter's daughter was a proper religious object which would conduce to the spiritual benefit of defendant 1's father Ramarao and her mother Janaki Bai.

b This appeal is preferred by the plaintiffs and on their behalf their learned counsel Mr. Bhujanga Rao contended that the view taken by the learned Subordinate Judge in regard to the expenses incurred towards defendant 1's daughter's daughter's marriage was wrong and that, in any event, the amount borrowed was excessive. The questions therefore to be decided are: (1) Was the amount borrowed for the expenses of the said marriage for a necessary purpose so as to bind the estate and (2) was the amount of Rs. 1200 spent in connexion therewith proper and justifiable, if not, what is the rea-
c sonable amount that can be allowed? Before dealing with these questions, I shall deal with the argument of Mr. Venugopalachari on the finding of the lower Court in regard to the question of adverse possession. He contended that the finding was wrong and if it was decided in his favour, the decree of the lower Court could be supported on that ground. He put his argument thus: long before succession opened the property was gifted away by Janaki Bai to defendant 1 and from the date of the gift defendant 1 was dealing with the property in her own right and when Janaki Bai died she did not
d take the property as her heir but continued to hold it adversely to the estate and no suit having been filed within 12 years from the date of the gift, she acquired title thereto by adverse possession after the lapse of the said period. In support of his contention he relied on the decision of the Privy Council in 43 Mad 214[1] and a decision of this Court reported in 50 M L W 571.[2] On principle, it seems to me that the contention is untenable. On the death of Janaki Bai the property vested in defendant 1 by right of inheri- e ance. Under the Hindu law, succession cannot remain in abeyance and whether the heir at law wills or not the property will vest in him. Before the title to the suit property was perfected by adverse possession by defendant 1, the property vested in her. The legal consequence of that vesting is that the adverse possession which was running against the owner came to an end. Defendant 1 became the owner and adverse possession could not run against herself.

In 43 Mad 214[1] the facts were as follows: Gopalakrishna Pillai and Parthasarathi Pillai owned a mitta in equal shares. Gopalakrishna died leaving his widow f Rajammal and Parthasarathi Pillai died leaving his widow Alangarammal to whom he bequeathed absolutely his share in the said mitta. The whole mitta was registered in the names of both Rajammal and Alangarammal. On 10th October 1895 two petitions were presented to the Collector of Chingleput, one by Alangarammal and the other by Rajammal stating that each had gifted away the share in the mitta to which each was entitled to Duraisani Ammal on 8th October 1895 and that therefore the mitta might be transferred in her name. This was accordingly done and ever since that date g until the date of her death in 1911, Duraisani Ammal enjoyed the property and was in receipt of rents and profits solely. Rajammal died in 1901 and Alangarammal died in 1912, a year after Duraisani Ammal's death. Duraisani left a daughter Jeevaratnammal who succeeded to her property. The plaintiffs who were the reversioners of Parthasarathi Pillai and his widow Alangarammal sued to recover a half-share of the mitta. Among other pleas Jeevaratnammal pleaded that Duraisani Ammal acquired title to that share by adverse possession. This plea was upheld by their Lordships of the Privy h Council. They took the view that the gift was invalid on the ground that it was not made in conformity with the provisions of the Transfer of Property Act but Duraisani must be deemed to have enjoyed the property adversely to both Rajammal and Alangarammal from the date of the gift and that as by the date of her death in December 1911, 12 years had elapsed, the claim of Alangarammal and therefore of her heirs, the plaintiffs, was barred by adverse possession. It was contended before their Lordships that when Rajammal died in 1901 Duraisani succeeded to her moiety by right of inheritance and therefore her possession from that date must

1. ('19) 6 A I R 1919 P C 44 : 53 I C 901 : 43 Mad 214 : 46 I A 285 (P C), Varada Pillai v. Jeevaratnammal.
2. ('40) 27 A I R 1940 Mad 102 : 187 I C 376 : 50 M L W 571, Alagiri Chetty v. Muthusami Chetti.

a be deemed to have been as a co-owner and that the possession of Duraisani as such co-owner could not be adverse to Alangarammal or her heirs. This contention was negatived by their Lordships and they remarked thus:

> In the present case it is plain that during the life of Rajammal the possession of Duraisani was adverse as against both co-owners; and this being so, there is no reason for holding that when on the death of Rajammal she became legally entitled to a moiety of the property, the character of her possession of the other moiety as against Alangarammal was changed. There having been an ouster of Alangarammal before the death of Rajammal, this ouster continued after her death, and the possession of Duraisani was adverse to Alangarammal
> b throughout. This contention therefore also fails.

It will thus be seen that their Lordships dealt only with the adverse possession regarding the share of Alangarammal. The possession of Duraisani even of the share of Rajammal during her lifetime was not as co-owner and therefore it was prima facie adverse to Alangarammal in respect of her share. Thus, on the death of Alangarammal, as against her heirs, the character of this possession would continue. She was not an heir of Alangarammal and therefore had no interest in her share. But their Lordships did not decide the question that if Rajam-
c mal had left a co-heir along with Duraisani Ammal whether Duraisani could plead adverse possession in respect of Rajammal's moiety. In 50 M L W 571[2] this question pointedly arose and my learned brother Patanjali Sastri J. took the view that the principle of the decision in 43 Mad 244[1] would apply to it. In that case there were two brothers Servarayya Chetti and Alagiri Chetti. Servaraya died in 1891 leaving him surviving his widow who also died in the same year. Alagiri was therefore the person who became entitled to the property. But on the date of the death of the widow, one
d of the sons of Alagiri (Alagiri had five sons) was in possession of the house and continued to be in sole possession thereof until the date of Alagiri's death in 1900. The plaintiffs who were the grandsons of Alagiri by two of his sons Annasami and Kandasami sued to recover the share of their fathers. Respondent 1 resisted the claim on ground of limitation and his plea was upheld on the ground that under Art. 141, Limitation Act, the suit should have been filed within twelve years from the date of the widow's death. It would seem to me that prima facie on the death of Alagiri Chetti the property having vested in all the heirs of Alagiri Chetti as tenants in common the adverse possession which was running against Alagiri Chetti must be deem-
e ed to have come to an end. In the case of a tenancy in common each tenant has the entire possession as well of every part as of the whole. It cannot be said that one tenant in common who is in possession of the property can be held to be exclusively in possession of that whole because the principle is each has got an undivided moiety of the whole and not the whole of the undivided moiety. Therefore, on the death of Alagiri Chetty, all the heirs became entitled to the property and there was thus unity of title. The question is whether there was unity of possession. It cannot be denied that so far as
f possession of respondent 1 was concerned, he cannot be said to be holding adversely to himself in respect of any portion of the property because the character of possession must necessarily change in consequence of the vesting in himself as part owner. As the possession of one tenant in common is prima facie possession of the other, the possession therefore of respondent 1 must only be held to be adverse after the date of the death of Alagiri.

There must be distinct evidence of ouster after that date because it cannot be said that at the moment of vesting there was ouster. In order to constitute ouster, there
g must be assertion of a hostile title after vesting and notice thereof to the other co-heirs, direct or indirect, inferable from acts and circumstances which would warrant such an inference. It may be possible for the Court to infer that the possession of respondent 1 from the date of the death of Alagiri cannot be said to be on behalf of all the heirs of Alagiri having regard to the prior hostile possession of respondent 1. Whether 50 M L W 571[2] was correctly decided or not, the present case is distinguishable. The property vested solely in respondent 1 on the death of Janaki Bai. The person to sue and the
h person to be sued being one and the same person, the owner must be deemed to have regained possession thus putting an end to any prior hostile title. I am therefore of the opinion that the view taken by the lower appellate Court that respondent 1 did not acquire title by adverse possession as against reversionary heirs is correct. I shall now deal with the question regarding the validity of the mortgage in so far as it was executed for borrowing moneys for the expenses of the daughter's daughter's marriage of defendant 1. Under the Hindu law, the daughter as heiress of her father or mother takes a restricted interest similar to that taken by

a a widow with a similar power of disposal. The power of disposal of a Hindu widow inheriting her husband's property is thus defined by the Privy Council in 8 M I A 529[3] at p. 551 :

> For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she (the widow) has a larger power of disposition than that which she possesses for purely worldly purposes.

Dealing with this passage, Benson and Krishnaswami Ayyar JJ. in 34 Mad 288[4] remarked thus :

> Their Lordships did not attempt to further define the spiritual purpose. We have endeavoured to suggest the further limitation that the spiritual
b purpose should be such as is regarded by Hindu community as reasonable and proper though not absolutely necessary.

The learned Judges further pointed out that

> if the expenditure by the daughter is for the spiritual needs of the father's soul, it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband.

I would add that in the case of an alienation by a daughter of her mother's stridhanam if the expenditure by the daughter was for the spiritual needs of the soul of her parents, it stands on the same footing as the expenditure by the widow for the spiritual needs of her husband. The views expressed
c in 34 Mad 288[4] have received the approval of the Privy Council in 44 ALL 503.[5] Their Lordships of the Judicial Committee also cited with approval the observations of Mukerjee J. in 43 Cal 574,[6] namely that :

> It is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, because it must depend upon the circumstances of the disposition whenever such disposition shall be made, and must be consistent with the law regulating such disposition.

Their Lordships further pointed out in that case that the necessity for the alienation need not be of the same character as in the case of alienations for secular purposes, that
d the Hindu system recognises two sets of religious acts, one obligatory and the other optional, and that the alienation for both the sets of acts would be binding on the reversionary heir but only in regard to acts which are optional, the alienation must relate only to a reasonable portion of the property. Their Lordships upheld the gift of a small
e portion of the property for the offerings to the deity and for the maintenance of the priest charged with the performance of that duty on the ground that it was a pious act in the Hindu system.

The question in the present case is whether the marriage of a daughter's granddaughter could be said to be a pious and meritorious act which would conduce to the spiritual benefit of the deceased parents of defendant 1. Judicial decisions have upheld alienations made for the marriage of a daughter's daughter or a daughter's son of a propositus. If, in this case, the marriage
f expenses had been incurred for the expenses of the daughter of respondent 1 and the mother of the girl whose marriage is the subject of consideration, there could be no doubt as to the validity of the mortgage : *vide* 3 I C 77[7] following 18 ALL 474,[8] and 57 Mad 772[9] and 62 M L J 39.[10] In the case of the daughter's daughter's marriage of the propositus the alienation was upheld on the ground that the husband of the daughter and the father of the girl was indigent and the propositus, if he had been alive, would be under a moral duty to perform her marriage. In the case of a daughter's son, Venkatasubba Rao J.
g in 62 M L J 39[10] took the view that a Hindu would be morally bound to give support to the marriage of his daughter's son. In that same case he observed that so far as the marriage of a daughter's daughter is concerned, there could be no question that the costs incurred for her marriage would be a proper legal necessity to justify an alienation. In 57 Mad 772,[9] the learned Judges upheld an alienation made by a Hindu widow for debts contracted for the thread and marriage ceremonies of one of her daughter's sons even in a case where the father was not indigent. The learned Judges took the
h view that the expenditure incurred must be said to be for purposes connected with the husband's spiritual welfare. In disapproving the contrary view taken by the lower Court, the learned Judges remarked thus :

> The pious endeavour of this widow to promote her husband's spiritual bliss by honouring his daughter's son may for aught we know in its result

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3. (1859-61) 8 M I A 529 : 2 W R 61 : 1 Suther 476 : 1 Sar 820 (PC), Collector of Masulipatam v. Cawley Venkata Narainapah.

4. ('11) 34 Mad 288 : 6 I C 240 : 20 M L J 798 : 1910 M W N 222, Tatayya v. Ramakrishnamma.

5. ('22) 9 A I R 1922 P C 261 : 69 I C 36 : 49 I A 383 : 44 All 503 (P C), Sardar Singh v. Kunj Bihari Lal.

6. ('16) 3 A I R 1916 Cal 792 : 31 I C 433 : 43 Cal 574 : 22 C L J 345, Khub Lal Singh v. Ajodhya Mitter.

7. ('09) 3 I C 77 (Mad), Chundanmal v. Nadamuni Naidu.

8. ('96) 18 All 474 : 1896 A W N 155, Rustam Singh v. Moti Singh.

9. ('34) 21 AIR 1934 Mad 432 : 155 I C 79 : 57 Mad 772 : 67 M L J 204, Venkatasubba Rao v. Ananda Rao.

10. ('32) 19 A I R 1932 Mad 28 : 135 I C 715 : 62 M L J 39, Mallayya v. Bapi Reddi.

fall short of her intention; but so long as she acted with piety and in consonance with prevalent notions we do not think it incumbent upon us to interfere any more than the Judicial Committee interfered with the gift to the idol.

The ratio decidendi of these cases appears to be that if the acts for which alienations were made can be considered to be pious and meritorious according to the prevalent Hindu notions, the alienations, provided the quantum is reasonable, should be upheld. The question in this case is whether the marriage of daughter's grand-daughter would satisfy this test. It is recognized by Hindu Shastras that the gift of a virgin in marriage is a very pious and meritorious act that will confer spiritual benefit : *cf.* 22 Mad 113[11] at p. 115. In Danachandrika Anukramanicka by Divakara Bhatta we find the following :

हेमाद्रौ —

सहस्रमेव धेनुनां शतं वा न डुहां समम् ।
दशानडुत्समं यानं दशयान समो हयः ॥
दशवाजि समाकन्या भूमि दानं च तत्समं ।
तस्मात्सर्वेषु दानेषु कन्यादानं विशिष्यते ॥ इति

आग्निपुराणे —

श्रुत्वा कन्याप्रदानं च पितरश्च पितामहः ।
विमुक्ताः सर्वपापेभ्यो ब्रह्मलोकं व्रजन्ति ते ॥ इति

Then the gift of a Kanya — in Hemadri (it is said): The gift of a thousand cows or that of a hundred is equal to that of a Bull. The gift of a vehicle (vahanam) is equal to that of ten Bulls. The gift of a horse is equal to that of ten vehicles. The gift of a Kanya is equal to that of ten horses or to that of land. Hence gift of Kanya is highly praiseworthy. In Agnipurana (it is said): Hearing about the gift of a Kanya (by a descendant) one's parents and grandparents are liberated from all sins and attain heaven (the abode of Brahman).

In Samskara Ratnamala of Bhatta Gopinatha (1st canto of Grihya Sutras edited by V. S. R. Kasinatha Sastri Bahu Sastri Padke, 1899 Edition) it is stated thus : (p. 499):

अनाथायाः कन्यायाः धर्मार्थविवाहकरणम्

तत्फलं च उक्तं पुराणान्तरे —

आत्मीकृत्य सुवर्णेन परकीयां तु कन्यकां ।
धर्म्येण विधिना दातुं असगोत्रोऽपि युज्यवे ॥
अनाथां कन्यकां दृष्ट्वा योदद्यात्सदृशे वरे ।
द्विगुणं फलमाप्नोति कन्यादाने यदीरितम् ॥

Page 501 :

सालंकार कन्यादाने फलविशेषमाह सकर्तुः ।
कूकुदश्चाऽश्वमेधीच प्राणदाता यथेषुच
समयान्ति रथा एषां त्रयोवै नाऽत्र संशयः ।
सत्कृत्यालंकृतां कन्यां यो ददाति सकूकुदः ॥

Page 499 :

The benefits accruing from the shastraic gifting of a destitute Kanya are told thus in Puranas. It is advisable to make one's own, another's daughter (Kanya) in exchange for gold, even though the Kanya does not belong to one's own Gotra and gift her away according to Sastraic injunctions — He who on perceiving a destitute girl makes a gift of her to a proper bridegroom obtains twofold the benefits accruing from the gift of a Kanya.

Page 501 :

The benefits accruing from the gifting of a Kanya—bejewelled and with ornaments (Kookuda), i. e., a person making such a gift mentioned above, a man performing Aswamedha Sacrifice, a man who protects another in peril, all three are invited to Indra's abode in his car.

In Mahabaratham Anusasana Parvam XIII, Chap. 235, stanzas 67 to 73, the spiritual benefit of Kanyadhanam is thus described :

Sloka 1. उमोवाच —

भगवन् कानि देयानि धर्ममुद्दिश्य मानवैः ।
तान्यहं श्रोतुमिच्छामि तन्मेशंसितुमर्हसि ॥

Sloka 68. ईश्वरः उवाच —

अतः परं प्रवक्ष्यामि कन्यादानं यथाविधि ।
कन्या देया महादेवि परेषामात्मनोऽपिवा ॥
69. कन्यां शुद्धव्रताचारां कुलरूपसमन्वितां ।
यस्मै दित्सति पात्राय तेनापि भुजकाभिताम् ॥
70. प्रथमं तत्समाकल्प्या बन्धुभिः कृतनिश्चयः ।
कारयित्वा गृहं पूर्वं दासीदासपरिच्छदैः ॥
71. गृहोपकरणैश्चैव पशुधान्येन संयुतां ।
तदर्थिने तदर्हाय कन्यां वां समलंकृतां ॥
72. सविवाहं यथान्यायं प्रयच्छेदग्निसाक्षिकम् ।
कृत्यायतां यथाकृत्वा सद्गृहे तौ निवेशयेत् ॥
73. एवं कृत्वा वधूदानं तस्य दानस्य गौरवात् ।
प्रेत्यभावे महीयेत स्वर्गलोके यथासुखं ॥
पुनर्जातस्य सौभाग्यं कुलवृद्धिं समाप्नुयात् ।

Goddess Uma said to Iswara: 'Oh Lord, what are the things that can be given as gifts with a view to Dharma? Please explain them to me. I wish to hear the same.

The Lord said :

* * * * * *

68 to 73 :

After this, I shall say about Kanyadhanam (gift of a maiden). Oh Mahadevi, one must give a girl with clean vratams, good conduct, good caste and good looks, either his own girl or another's girl, to a good boy who has an affection for her, after first coming to a decision himself on the propriety of the boy and then in consultation with the relations, the gift to be made according to Sastras. That girl is to be gifted with house, with all jewels, maidservants, menservants, gifts, household articles, cattle, grains, etc., to one who is fit for her and who loves her, before agni (fire) and the marriage celebrated according to Sastras. The couple must be provided with means of livelihood and they both

11. ('99) 22 Mad 113, Ramaswami Ayyar v. Vengidusami Ayyar.

must be settled in a good house. If Kanyadhanam is done in this manner, by virtue of that dhanam, the giver after death will reach Swarga, be praised there and be happy. Even in the next birth, he will acquire wealth and progeny.

Thus, the gift of a destitute virgin in marriage is a pious and meritorious act from a religious point of view. Much more so, it must be in the case of a daughter's grand-daughter whose parents are indigent. According to prevalent Hindu notions the propositus would be morally bound to perform her marriage. It is clear from the evidence in this case that the mother of the girl was dead and the father was poor and not possessed of any means to perform the marriage. The girl and her parents lived with defendant 1 and she was being brought up by her. I would, therefore, hold that the marriage of this girl is a pious and meritorious act according to the Hindu system and the expenses incurred therefor must be deemed to be expenses incurred for charitable or religious purposes within the meaning of the rule laid down by the Privy Council and that it was open to defendant 1 to mortgage the property for the expenses in connexion therewith.

The question is whether the sum of Rs. 1200 spent towards the expenses of the marriage was justifiable; if not, what is the reasonable amount to be allowed? The property was sold for Rs. 2700. It appears to me that a sum of Rs. 1200 towards marriage is a little excessive. Having regard to the fact that the girl was given away to a well educated bridegroom, I would hold that the widow would be justified in this case to alienate a third of her property and I would, therefore, uphold the mortgage to the extent of Rs. 900. The result of my finding is that the sale in favour of defendant 3 must be upheld subject to the obligation of refunding a sum of Rs. 300 to the next reversioner. I accordingly hold that the sale is valid and binding on the reversioners, but I direct defendant 3 to refund after the death of defendant 1 a sum of Rs. 300 with interest at 6 per cent. per annum to the plaintiffs from that date if they happen to be the next reversioners or to the persons who happen to be the next reversioners on the date of her death. Parties will bear their own costs in this appeal.

C.R.K./G.N. *Order accordingly.*

Advocate High Court
Jammu & Kashmir
Srinagar.

(29) A. I. R. 1942 Madras 111

KING J.

Kovvuri Subba Rao — Petitioner

v.

Venkatapuram Panchayat Board represented by President Gudipati Venkatappayya — Respondent.

Civil Revn. Petn. No. 482 of 1938, Decided on 11th October 1940, to revise decree of Sub-Judge, Masulipatam, in S. C. S. No. 36 of 1936.

Local Authorities Loans Act (1914), S. 3— Panchayat Board borrowing money from plaintiff for purpose falling under S. 3, Local Authorities Loans Act, without Local Government's sanction as required by rules framed under Act — Contract is void — But plaintiff is entitled to restoration of his money under S. 65, Contract Act — Plaintiff can amend his plaint so as to claim relief under S. 65, Contract Act—Purpose not falling under S. 3, Local Authorities Loans Act of 1914—Plaintiff is not entitled to equitable relief under S. 65, Contract Act — Burden to show that S. 65, Contract Act, does not apply is on Panchayat Board.

Where the Panchayat Board has borrowed money from the plaintiff for any of the purposes enumerated in S. 3, Local Authorities Loans Act, without the previous sanction of the Local Government as required by the rules framed under the Act, the contract is void but the plaintiff is under S. 65, Contract Act, entitled to restoration of his money and can be permitted to amend his plaint so as to claim relief under S. 65, Contract Act: ('34) 21 AIR 1934 Mad 480; ('38) 25 AIR 1938 Mad 746; ('39) 26 AIR 1939 Mad 929 and ('27) 14 A I R 1927 Cal 465, *Rel. on :* ('21) 8 A I R 1921 Bom 147 and ('29) 16 AIR 1929 Bom 89, *Not applied.* [P 112*g*; P 113*c*]

Where however the purpose for which the loan was borrowed without the previous sanction of the Local Government does not fall under S. 3, Local Authorities Loans Act of 1914 the plaintiff is entitled to no equitable relief under S. 65, Contract Act : (1880) 5 Q B D 483 and (1910) 2 Ch 560, *Rel. on.* [P 113*b*]

The burden to show that S. 65, Contract Act, does not apply is on the Panchayat Board and that burden cannot be discharged merely by a reference to the provisions of Act of 1914 which prohibit the loan. [P 112*b*]

V. Viyanna — for Petitioner.

P. Satyanarayana Rao — for Respondent.

Order.—The petitioner brought the present suit in 1936 against the Panchayat Board of Venkatapuram to recover from it the balance said to be due upon an alleged loan of Rs. 400 made by him to the board in March 1933, which was to carry interest at Re. 1-9-0 per cent. per mensem. It is admitted by the petitioner that the board has not obtained any sanction from the Local Government to borrow the money, as it was bound to do under the rules framed by the Government under S. 4, Local Authorities Loans Act. The board accordingly contended that the contract was void and no suit to

enforce it would lie. Petitioner accepted this proposition of law, but pleaded that though he could not enforce the contract as such, he was entitled to the restoration of his money under S. 65, Contract Act. The learned Subordinate Judge of Masulipatam refused to allow petitioner to amend his plaint so as to found his claim upon S. 65, and also held that, even if the plaint were so amended such a claim was unsustainable. Whether that view of the law is right or wrong is the question which I have now to decide.

There is nothing in the language of S. 65 which prevents the petitioner from arguing that his claim falls within it, as that language is very wide and general, and the burden, it seems to me, is upon the respondent to show that S. 65 does not apply. That burden cannot be discharged by a mere reference to S. 7, Local Authorities Loans Act, which prohibits the present loan, as S. 65 deals necessarily with contracts that are void, and it is this very prohibition which makes the present contract void. Respondent has therefore fallen back upon the argument that the board in the matter of this contract occupies the same position in law as a minor or a lunatic; or in other words that it was "disqualified from contracting" in the words of S. 11. In 45 Bom 225,[1] it has been held that S. 65 cannot be invoked in the case of a contract which was void because one of the contracting parties was a minor; and in 53 Bom 309[2] the same principle has been followed in the case of a contract with a lunatic. To extend this principle to the case of a local body which enters into a contract which the law forbids would appear to be at first sight a simple and logical solution of the problem, but the current of authority in this country is against it. There are three cases in Madras in which municipalities have entered into contracts which infringe positive provisions of law, 58 Mad 65,[3] 47 M L W 668[4] and AIR 1939 Mad 929[5] and in all these cases S. 65 has been applied. And there is also one case in Calcutta, 54 Cal 189,[6] in which the section has been applied to a contract entered into by the Port Commissioners of Chittagong in contravention of the requirements of law.

It is argued for the respondent that these cases deal with mere formalities. For instance the only defect in the contracts in 47 M L W 668[4] and AIR 1939 Mad 929[5] was the failure by the Committee to whom the power to contract had been delegated by S. 68 (1), Madras District Municipalities Act, to obtain the previous sanction of the Council under S. 68 (2). In those cases there could never be any doubt as to the competency of the Council to contract. Here the defect is more serious as the Panchayat Board cannot borrow any money at all without the previous sanction of the Local Government. But if I am to hold that this is a contract void under S. 11, Contract Act, as one which the Board was disqualified by law from entering into, it is clear that the municipalities were equally disqualified in 47 M L W 668[4] and A I R 1939 Mad 929[5] from entering into the contracts there dealt with. I can see no difference in principle between those cases and this case. In all the cases the power to make the contract exists (as S. 3, Local Authorities Loans Act, gives power to borrow subject to the prescribed conditions), and all that has been done is failure to comply with the conditions laid down by the Act or rules. It is significant that in the judgment of the learned Subordinate Judge the word "formalities" is used more than once to describe the rule which the Board has in this case infringed. I am of opinion therefore that I am bound by the decisions above referred to hold that the petitioner in this case can be permitted to sue under S. 65, Contract Act.

My attention has been called to a number of very interesting cases decided in England in which the powers of a company or a corporation to borrow money have been very closely scrutinized and strictly construed. But there is no case in which it has been held that there is no right of recovery of money lent merely because some previous necessary sanction has not been obtained. In (1880) 5 Q B D 483[7] and (1910) 2 Ch 560,[8] the cases which come nearest in subject-matter

1. ('21) 8 AIR 1921 Bom 147 : 59 I C 245: 45 Bom 225 : 22 Bom L R 1195, Motilal Mansukram v. Manaklal Dayabhai.
2. ('29) 16 A I R 1929 Bom 89 : 117 I C 518 : 53 Bom 309 : 31 Bom L R 88, Punja Bai v. Bhagwandas Kisandas.
3. ('34) 21 AIR 1934 Mad 480: 151 I C 46: 58 Mad 65 : 67 M L J 38, Arunachala Nadar v. Srivilliputhur Municipal Council.
4. ('38) 25 A I R 1938 Mad 746 : 182 I C 299 : 47 M L W 668, Mohamad Rowther v. Tinnevelly Municipal Council.
5. ('39) 26 A I R 1939 Mad 929 : 189 I C 245 : ILR (1940) Mad 149, Ramakrishna Ranga Rao v. Suryaprakasa Rao Garu.
6. ('27) 14 A I R 1927 Cal 465 : 103 I C 2 : 54 Cal 189, Mahamad Ebrahim v. Commissioner for the Port of Chittagong.
7. (1880) 5 Q B D 483 : 49 L J Q B 600 : 42 L T 835 : 28 W R 787 : 44 J P 633, Queen v. Sir Charles Reed.
8. (1910) 2 Ch 560 : 80 L J Ch 105 : 103 L T 394 : 74 J P 406 : 26 T L R 683, Attorney-General v. West Ham Corporation.

to the case now before me, most stress was laid upon the fact that money was borrowed for purposes not sanctioned by law and that, as I shall show, is a matter concerned not with the exclusion of S. 65, but with the way in which it is to be interpreted.

I have now given reasons for holding that petitioner's suit cannot be dismissed out of hand on the ground that S. 65 can in no circumstances apply. The suit will therefore have to be remanded for disposal under S. 65 after a full consideration of all the facts. The Court below must find (i) whether the board has received any advantage or not under the contract and (ii) whether the petitioner has, in any way, disqualified himself from applying to the Court for the equitable remedy which S. 65 affords. In deciding both these issues, the consideration of the purpose for which the money was borrowed and applied will be of considerable importance. If such purpose does not fall within the purposes enumerated in S. 3, Local Authorities Loans Act, it is difficult to argue that the board has received any advantage; and if petitioner intended that the money should be used for a purpose not so enumerated he has deliberately lent the money in order to break the law and is entitled to no equitable relief. There was no serious objection before me to the amendment of petitioner's plaint on any other ground than those discussed. He will be permitted to amend it so as to claim relief under S. 65. The respondent will be permitted to file an additional written statement and the learned Subordinate Judge will then proceed to dispose of the suit in the light of this judgment. The question of what interest, if any, is to be allowed to the petitioner will of course be dealt with under S. 65 as there can be no question of enforcing the terms of the agreement as such. Costs of this revision will be costs in the cause.

C.R.K./G.N. *Order accordingly.*

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(29) A. I. R. 1942 Madras 113

LAKSHMANA RAO J.

Manickavasaga Nadar — Petitioner

v.

K. Krishnaswami Iyer — Respondent.

Criminal Revn. Case No. 384 of 1940 and Criminal Revn. Petn. No. 373 of 1940, Decided on 9th August 1940, to revise order of Sub-Divisional First Class Magistrate of Koilpatti, D/- 27th April 1940.

Criminal P. C. (1898), Ss. 140, 139 and 133 — Order under S. 133 not made absolute under S. 139 (1)—Further proceedings dropped under S. 139 (2)—S. 140 does not apply.

Where the order under S. 133 was not made absolute under S. 139 (1) and further proceedings had to be dropped as provided in S. 139 (2), Section 140 cannot apply to the case. [P 114*a*]

V. Rajagopalachari and D. Israel — for Petitioner.

G. Gopalaswami — for Respondent.

Public Prosecutor — for the Crown.

FACTS. — The Nadars of the village of Chintamani were contending that they were entitled to take the Mariamman deity in procession through the Brahmin street and the Brahmins were resisting the claim. In November 1939, the deity was taken in procession by the Nadars and at the entrance of the Brahmin street it was objected to. The police stopped the procession and dispersed the crowd and the deity and the chapram were left at the spot where they stood. The police applied for and obtained on 15th November 1939 an order under S. 133, Criminal P. C., and the said order was made absolute ex parte on 17th November. The petitioner who became aware of the ex parte order obtained from the Sub-divisional Magistrate an order under S. 138, Criminal P. C., by appointment of a jury under S. 135, Criminal P. C. The jury decided in favour of the petitioner that the deity should be allowed to go in procession through the Brahmin street, because the chapram and the deity should not be taken back. The Magistrate agreed with the jury but modified the jury's verdict by saying that the deity should go through the Brahmin street without the paraphernalia of a procession. In a revision filed by the Brahmins the High Court in Cr. R. C. No. 22 of 1940 ordered that the Sub-divisional Magistrate should have dropped the proceedings under Chap. 10 as required by S. 139, if he did not accept the jury's verdict and therefore set aside the order.

Subsequent to it on 7th April 1940 as a continuation of the order dated 17th November 1939 the Sub-divisional Magistrate passed an order directing the removal of the chapram and the deity within one week from receipt thereof on peril of being penalized under S. 188, Penal Code, for disobedience and this order was followed by another order on 27th April 1940 in similar terms only also containing directions as to the route through which the chapram and deity are to be taken. Against this order the present revision was filed by the Nadars on the ground that the proceedings under Chapter 10 having been dropped under S. 139 cl. 2, Criminal P. C., it was not competent to proceed under Chap. 10 and that no order could be passed under

a Ss. 137 and 140, Criminal P. C., under the circumstances.

Order.—The order under S. 133, Criminal P. C., was not made absolute under cl. (1) of S. 139, Criminal P. C., and further proceedings had to be dropped as provided in cl. (2) of S. 139, Criminal P. C. Section 140, Criminal P. C., is therefore inapplicable and the order of the Sub-divisional Magistrate cannot be sustained. The revision petition is therefore allowed and the order of the Sub-divisional Magistrate is set aside.

C.R.K./G.N. *Petition allowed.*

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b **(29) A. I. R. 1942 Madras 114**

WADSWORTH J.

Konda Boyan — Appellant

v.

Palaniswami Goundan — Respondent.

Second Appeal No. 979 of 1939, Decided on 21st January 1941, against decree of Sub-Judge, Coimbatore, D/- 8th September 1939.

Fraud — Decree obtained by perjury or on forged document—Decree cannot be set aside—Plaintiff executing pronote in defendant's favour — Defendant forging another pronote similar to genuine one and obtaining decrees on both by playing trick upon Court, also on debtor and witnesses to prevent truth being
c **discovered — Case held of fraud much wider than scope of matters decided in suit in which wrong decree was obtained—Decree on forged note held must be set aside.**

A decree will not be set aside merely on proof that it was obtained by perjury or that the document upon which it is based is a forged document. The questions whether there was perjury or forgery are matters which must be taken to have been decided in the suit itself and even if they have been decided wrongly and a decree has been given as the result of forgery or perjury or both, the Court in the interests of finality will refuse to reopen the matter in a subsequent suit between the same parties: ('16) 3 A I R 1916 Mad 364, *Rel. on.* [P 115*f*]

The defendant obtained two decrees against the plaintiff, who was in jail, one on the genuine promissory note executed by the plaintiff in his favour
d and the other on a forged pronote which was made to appear exactly similar to the genuine pronote except for one more attestor. The decree on the forged document was obtained by playing a trick upon the Court and also upon the debtor and the witnesses to prevent the truth being discovered:

Held that the decree on the forged pronote must be set aside as the case was one of fraud much wider than the scope of the matters decided in the actual suit wherein the wrong decree was obtained. [P 116*a*]

N. Swaminatha Ayyar — for Appellant.

K. S. Ramamurthi — for Respondent.

Judgment. — This appeal arises out of a suit brought for the cancellation of one of two decrees obtained by the present appellant, defendant 1 in the Court of first instance against the plaintiff. The facts which have been found by the Courts below make e out a very unusual story. The plaintiff was a convict in jail. He had executed a promissory note in favour of defendant 2 which promissory note had been transferred to defendant 1 and a small payment had been made to defendant 1 after the assignment. It has been found by the Courts below that defendant 1 evolved a very cunning conspiracy whereby his claim against the plaintiff was duplicated in such a way as not to arouse the suspicion of the plaintiff and to prevent him from defending the two suits, one filed upon a forged promissory note and the other filed upon the genuine promissory note. According to the findings of fact, de- f fendant 1, knowing that the plaintiff was in jail forged what is almost a duplicate of the genuine promissory note, making it of the same date for the same amount with the same attesting witnesses, together with one additional attestor, and transferred at the same time to the same defendant 1. It is found that, when the suit on the forged promissory note, EX. G, was filed, the summons was served upon the plaintiff in jail on 7th August 1935 and he, thinking that this was a suit on the genuine promissory note to which he had no defence, took no action to contest the suit. A decree followed on 7th g September 1935. About a fortnight before this decree a second suit, O. S. NO. 592 of 1935 was filed on the basis of EX. A, the genuine promissory note and the summons in the second suit was served on the present plaintiff in jail on 5th September 1935 that is to say, nearly a month after the previous summons and two days before the decree in the earlier suit. The present plaintiff not having the summons in the previous suit in his custody because of jail rules, was under the impression that the second summons was another summons in the first suit and did not notice the difference in the suit h number and the slight difference in the amount. Consequently, the plaintiff thought that no purpose would be served by doing anything about this second summons. The second suit was also decreed. It is found by the Courts below that the evidence upon which the second decree was obtained was the genuine evidence of the original promisee and the attesting witnesses who were quite innocent of any knowledge that a fraud had been played in the earlier suit. The decree in the earlier suit is found to have been obtained by putting forward some person unknown who impersonated the promisee and gave evidence in support of the forged

promissory note and also by putting forward another individual as the third attestor to the promissory note whose name and address did not correspond to those of any known person. An attempt was made on behalf of the defence to establish the fact that this third witness to the forged promissory note was an individual who had died shortly before the trial of the present suit. The Courts below have rejected this story and have refused to believe that the person alleged to have died in a place some seventeen miles away was the same person as the witness who is put forward as having signed this promissory note.

According to the findings, therefore, defendant 1 got two decrees, one on a forged note supported by two witnesses each of whom must have been personating some one else and the other on the true promissory note supported by three witnesses who were deliberately kept in ignorance of the earlier suit and the present plaintiff was hoodwinked into not defending either suit by the trick which was played upon him, of filing the suits and issuing notices in rapid succession so that in the circumstances in which he was placed he was led to believe that both notices related to the same suit. Having got these decrees, defendant 1 proceeded to execute the earlier decree and the plaintiff in jail hearing of this execution, still thinking that it was a decree to which he had no answer, instructed his relatives to satisfy the decree. After collecting the amount of this decree, defendant 1 proceeded then to execute the second decree obtained upon the true note and it was then the plaintiff received notice of execution in respect of a decree, which he thought was a single decree already fully satisfied, that he had inquiries made and learnt of the fraud and lodged the present suit.

It is not open to me sitting in second appeal to go into the correctness of the findings of fact reached in the Courts below. Both Courts are agreed that the promissory note in the first suit was a forgery, that the person who gave evidence in that suit in the name of the promisee, defendant 2 here, was some individual who impersonated defendant 2 and that the other witness was some unknown person whose name had been added in order to avoid the complication of having to examine the attestors to the genuine promissory note in both the suits. It has also been found as a fact that the promisee, defendant 2, was speaking the truth when he says that he took only one promissory note from the plaintiff and endorsed only one promissory note to defendant 1 and that he never gave evidence in the suit on the other promissory note and that the thumb prints appearing on that promissory note and also on the deposition in the suit on that promissory note are not his thumb prints. Taking all these findings of fact to be true, do they amount to a case of fraud extrinsic to the matters adjudicated upon in the earlier suit so as to justify the cancellation of that decree on the ground that it has been obtained by fraud? It is not necessary to set forth the authorities on the question of the nature of the fraud which must be established in order to set aside a decree. They are summarised in a decision in 38 Mad 203[1] which has been followed in many other cases. It is, I think, established that a decree will not be set aside merely on proof that it was obtained by perjury or that the document upon which it is based is a forged document. The questions whether there was perjury or forgery are matters which must be taken to have been decided in the suit itself and even if they have been decided wrongly and a decree has been given as the result of forgery or perjury or both, the Court in the interests of finality will refuse to reopen the matter in a subsequent suit between the same parties.

It has been urged by the appellant that the present case is nothing more than a case in which the Court is asked to set aside a decree on the basis of findings that the document on which the suit was based is a forgery and that the evidence with which the decree was obtained is perjured evidence. But, it seems to me that the case put forward by the plaintiff goes much further than this. The plaintiff alleges that there has been a deliberate conspiracy of a number of people not only to hoodwink the Court into passing a wrong decree, but also to deceive the defendant as to the nature of the suit and by a trick to prevent him from resisting that suit. It is not merely a case of an allegation of forgery or perjury but of an allegation that a suit on the forged promissory note was deliberately filed in such circumstances that it might be mistaken for the suit on the genuine promissory note and that the suit on the genuine promissory note was filed in such circumstances that the defendant would not be apprised of the trick which had been played upon him in the earlier suit, so that he might canvass the matter in appeal. It is

1. ('16) 3 AIR 1916 Mad 364 : 19 I C 579 : 38 Mad 203 : 25 M L J 288, Chinnayya v. Ramanna.

also alleged that the two main witnesses who supported the forged promissory note were both individuals who were impersonating the proper witnesses and that the whole scheme whereby these two suits were conducted was so devised that neither the debtor nor the true witnesses should realise the nature of the trick which was played. Such a case is to my mind a case of fraud much wider than the scope of the matters decided in the actual suit wherein the wrong decree was obtained and one in which a trick was played upon the Court and also upon the debtor and the witnesses to prevent the truth being discovered. In law therefore the decision of the Courts below is in my opinion correct.

I wish to make it clear in view of the criminal proceedings which are said to be pending that I express no opinion as to the correctness of the findings of the Courts below on the questions of fact upon which it is not open to me to give a contrary decision. In the result therefore the appeal is dismissed with costs of respondent 1. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 116

HORWILL J.

T. S. Alagappa Mudaliar — Appellant

v.

A. L. V. R. S. T. Veerappan Chettiar and another — Respondents.

Second Appeal No. 1068 of 1937, Decided on 27th September 1940, against decree of the Sub-Judge, Tinnevelly, in A. S. No. 2 of 1937.

(a) Workmen's Compensation Act (1923), Ss. 10 (1) and 22 — Word 'claim' in Ss. 10 (1) and 22—Meaning of.

The claim referred to in S. 10 (1) and S. 22 means a formal claim made before the commissioner and not a claim made of the employers : ('39) 26 A I R 1939 Pat 181, *Approved*; ('34) 21 A I R 1934 Cal 460 (SB), *Not approved*.

[P 117*c*, *d*]

(b) Workmen's Compensation Act (1923), Rules under, R. 19 and S. 22 — Claim for compensation—Omission to give particulars under S. 22 or file certificate under R. 19 is not fatal defect—Application held amounted to claim for compensation.

The Legislature did not intend that a claim should not be entertained or enquired into, or that no compensation should be granted, unless the application were in strict form. Consequently, an omission to give particulars mentioned in S. 22 in the claim for compensation or to file a certificate under R. 19 is not fatal. If those particulars and the certificate are necessary, the commissioner can obtain them after the claim is made. (Application to commissioner held constituted a claim for compensation.)

[P 118*c*, *e*]

(c) Workmen's Compensation Act (1923), Ss. 3 (5) (a) and 10 (1)—Construction of S. 10(1) —Claim even if rejected in limine is claim instituted within S. 3 (5) (a).

The whole of S. 10 (1) indicates that the claim for compensation is of the nature of a plaint without which no proceedings for the recovery of compensation are maintainable; so that unless there is a formal claim for compensation, the commissioner cannot make any enquiries or conduct any proceedings. A claim even if rejected in limine by the commissioner must be regarded as a claim instituted before the commissioner within the meaning of S. 3 (5) (a).

[P 118*f*, *g*]

(d) Workmen's Compensation Act (1923), S. 10 (1) — Commissioner condoning delay and rejecting claim as barred without going into merits—Rejection is illegal.

The rejection of a claim petition by the commissioner, after condoning the delay in filing the same, on the ground of its being time barred, without giving any decision on the merits of the petition, is illegal.

[P 118*g*, *h*]

D. Ramaswami Ayyangar — for Appellant.

S. Srinivasaraghavan — for Respondents.

Judgment.—On 13th August 1933 the appellant met with a serious accident in the respondents' mill, his leg being fractured by the falling of a beam on it. The employers (the respondents) assured him that they would look after him, pay his expenses while he was in the hospital, maintain him, re-employ him when he was discharged from the hospital, and see that he was looked after for the rest of his life. On the strength of this assurance he was persuaded to file a leave application, in which he said falsely that he fell into a channel and so wanted some leave. After his discharge from the hospital sometime in November, he was re-entertained. On 1st March 1934 he was dismissed from service, apparently because he was not able on account of his injury to perform his duties properly. Lawyer's notices were sent to the employers, who denied that the mill was open on the day of the accident and asserted that the appellant had been on leave. As no satisfactory reply was forthcoming, an application was made before the Labour Commissioner on 27th March 1934. Although this was beyond six months from the date of the accident, the application was entertained and treated as a claim for compensation, and some enquiry seems to have been made. On 23rd April 1934 the commissioner asked the appellant to furnish certain particulars and to furnish a medical certificate. Before that date, the Inspector of Factories, to whom the application for compensation was referred, received a letter from the respondents asserting that the day on which the accident was alleged to have taken place was a Sunday and that the mill

was not open on that day. They also referred to the leave application of the appellant in support of their contention. On 12th May 1934 the commissioner passed an order which seems to me very discreditable. Instead of dealing with the application on its merits after having apparently condoned the delay in filing the application, he dismissed the application on the technical ground that it was barred by time under S. 10 (1), Workmen's Compensation Act. Although the unfortunate appellant had engaged lawyers in connexion with this matter with regard to sending notices and so on, he was not advised to take this matter to the High Court, under S. 30 of the Act. Instead, he filed the present suit on 1st August 1934 before the District Munsif, Tinnevelly, for compensation and for damages for negligence. That suit has been dismissed on the ground that it is barred by S. 3 (5), Workmen's Compensation Act, and that decision was confirmed on appeal by the Subordinate Judge. It is first contended that if the letter to the commissioner was an application for compensation, it was not barred by time under S. 10 (1). Section 10 (1) reads :

> No proceedings for the recovery of compensation shall be maintainable before a commissioner unless notice of the accident has been given, in the manner hereinafter provided as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been instituted within six months of the occurrence of the accident . . .

There are certain provisos to this section which enable the commissioner to dispense with some of these limitations. It is contended that the 'claim for compensation' referred to in S. 10 (1) means a claim made of the employers and not a formal claim made before the commissioner. The section speaks of a claim being instituted. "Instituted" implies the formal making of a claim before some tribunal and is not the same as making a claim of the employer. Moreover, the words 'claim' and 'instituted' are referred to not only in S. 10 (1). Even proviso 3 to S. 10 (1), gives a clear indication of the meaning of the word 'claim' for it runs :

> Provided further that the commissioner may admit and decide any claim to compensation in any case notwithstanding that the notice has not been given or the claim has not been instituted in due time as provided in this sub-section (1) . . .

The word 'claim' must have the same meaning throughout and must be the claim made to the commissioner. In S. 3 (5) (a) it is clear that the instituting of the claim for compensation is before the commissioner, and it is difficult to believe that the instituting of the claim referred to in S. 3 (5) (a) is not the same instituting of the claim as is referred to in S. 10 (1). Section 22, which deals with the procedure to be adopted during the enquiry of the claim, refers to the 'claim,' and the 'claim' there clearly relates to a claim made before the commissioner. This was also the view of two learned Judges of the Patna High Court in 17 Pat 658.[1] There is, however, a decision of the Calcutta High Court to the contrary in 61 Cal 508.[2] The reasons given by the learned Judges were : (1) the Indian Legislature intended to follow the English Act and (2) the wording of S. 22, to which I have referred. With regard to the first point, with great deference to the learned Judges, it seems to me very unsafe to presume that the Indian Legislature knew and intended to adopt the interpretation put by the English Courts upon the corresponding English Act. I should have thought that there was little reason to suppose that the Indian Legislature had studied the corresponding English Act and wished to adopt it. No doubt a drafter may closely follow an English original, but I do not think there is any reason for assuming that the Legislature had a similar desire. Moreover, the Indian Act departs in many respects from the English Act and the Legislature have substituted for the word 'make' in the English Act the word 'instituted,' which has a very much more formal meaning and suggests the making of a claim before some tribunal. It has been pointed out by the learned advocate for the respondents that the Legislature has now amended the wording of S. 22 (1) because the Calcutta High Court had given to the section a meaning not intended by the Legislature. The second reason given by the Calcutta High Court, to use the words of the learned Chief Justice in 61 Cal 508,[2] is this :

> Section 22 relates to the initiation of proceedings before a commissioner and refers to an "application for the settlement of any matter by a commissioner" and prescribes certain particulars which are to be contained in the application, and among them, "in the case of a claim for compensation against an employer" certain details are to be given. I should find it difficult to hold that the words at the head of the section, "an application for the settlement of any matter by a commissioner" and the reference to a 'claim to compensation against an employer' both refer to exactly the same thing, namely that

1. ('39) 26 A I R 1939 Pat 181 : 181 I C 450 : 17 Pat 658, Abdul Matin v. Bidesi Bagwan.
2. ('34) 21 A I R 1934 Cal 460 : 149 I C 169 : 61 Cal 508 : 38 C W N 613 (S B), Abdul Karim v. Eastern Bengal Railway.

by which proceedings are initiated before the commissioner.

This is no doubt a weighty argument, but the learned advocate for the respondents points out that S. 22 does not deal only with claims for compensation. This is indicated by the fact that in S. 22 (2) (b) special reference is made to the form of application where it amounts to a claim for compensation against an employer, certain particulars being required in addition to those to be furnished in other applications for the settlement of any matter by a commissioner. This question does not however directly arise for decision here because, unfortunately for the appellant, he did not carry the matter to the High Court and contend that the order of the commissioner was wrong. Whether the decision of the commissioner was right or not, that decision is now final, and the only question here is whether a claim has been filed at all. It is argued that EX. L, which is the claim on which the commissioner acted, is a very loosely worded document and does not contain by any means all the particulars that are required by S. 22; nor does it contain the certificate referred to in R. 19 (2) of the Rules framed under the Act. A form (FORM F) under R. 19 has been prescribed, but this form the commissioner, if he thinks fit, may get the applicant to fill up and sign after the claim is made. It is no doubt true that several of the particulars required by S. 22 are not to be found in EX. L, the claim; but there can be no doubt, reading EX. L as a whole, that it was intended to be a claim for compensation. It would not have been the intention of the Legislature that a claim could not be entertained or enquired into, or that no compensation should be granted, unless the application were in strict form. If those particulars and that certificate were necessary, the commissioner could have obtained them; but he did not in fact do so, presumably because he did not think them necessary. In para. 4 of EX. L the appellant says :

> The mill agent has, the petitioner now understands, got such a letter (referring to the leave application) signed by the petitioner in order to avoid the penalties for negligence giving rise to injuries to the petitioner in the course of employment and to escape giving compensation to the petitioner.

The appellant at the end of his petition does not directly ask for compensation, but prays that the commissioner will be pleased 'to enquire into the matter and render justice.' This is the conventional ending of a petition; but the petitioner added, "N. B.— It is prayed that notice of the date of enquiry be given to the petitioner." He seems to have had in view the enquiry that is to take place in an ordinary claim for compensation. The application was treated as a claim for compensation by the commissioner. It was admitted and the commissioner made enquiries, called for particulars from the appellant in connection with his claim for compensation; and the appellant furnished those particulars. It is impossible to construe EX. L as anything but an application for a claim for compensation. If EX. L was a claim for compensation before the commissioner, then it is clear that the suit is barred by S. 3 (5) of the Act. It has been contended that a claim that has been rejected in limine would not be a claim instituted before the commissioner within the meaning of S. 3 (5) (a). The wording of S. 10 (1) :

> No proceedings for the recovery of compensation shall be maintainable before a commissioner . . . unless the claim for compensation with respect to such accident has been instituted within six months of the occurrence of the accident . . .

is referred to in support of that argument. The whole of S. 10 (1) however indicates that the claim for compensation is of the nature of a plaint without which no proceedings for the recovery of compensation are maintainable; so that the words relied on only mean that unless there is a formal claim for compensation, the commissioner cannot make any enquiries or conduct any proceedings. In the present case, proceedings did however take place and the claim for compensation was instituted and was admitted by the commissioner. Section 3 (5) (a) therefore clearly applies, and the lower Courts were right in holding that the suit was barred.

The appellant has suffered very greatly at the hands of the Labour Commissioner, who should have dealt with his application in accordance with the spirit as well as the letter of the Act. Although this question has not been argued, it seems to me that the commissioner acted illegally in rejecting the application after condoning the delay, without giving any decision on the merits of the application. The appellant was deceived by the respondents, who lulled him into a sense of security by promising to give him employment and to look after him, which security led him to prefer his claim before the commissioner out of time. This behaviour of the respondents was disgraceful. Nothing can be done for the appellant in this appeal; but the respondents have represented through their learned advocate that they do not wish to take advantage of the dismissal of this appeal by refusing relief to the appellant.

They promise to give compensation to him and I hope, for the sake of their reputation as employers, that they will do so. The respondents do not press for their costs. The appeal is dismissed without any order as to costs. The appellant will have to pay the court-fee due to Government.

C.R.K./G.N. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 119

WADSWORTH AND PATANJALI SASTRI JJ.

Nataraja Pillai and another — *Appellants*

v.

Rangaswami Karamundar — *Respondent.*

Appeal No. 325, Civil Revn. Petn. No. 1346 and Appeal No. 428 of 1939, Decided on 21st October 1940, against order of Sub-Judge, Tanjore, D/- 7th August 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 19—Decree-holder given leave to bid and set off but sale not confirmed—Decree is not satisfied and application under S. 19 can be filed.

Where, in execution of a decree, a sale is held and the decree-holder with leave of Court to bid and set off, purchases the property, the decree cannot be regarded as satisfied until the sale has been confirmed. Therefore, before confirmation of the sale, an application by the judgment-debtor under S. 19, Agriculturists Relief Act, lies as the decree is subsisting : 33 Bom 311 ; ('19) 6 A I R 1919 All 253 and ('33) 20 A I R 1933 P C 101, *Rel. on.*

[P 119*g*; P 120*a*]

Advocate General, C. A. Seshagiri Sastri and K. S. Desikan — for Appellants.

K. Rajah Ayyar and K. S. Rajagopalachari— for Respondent.

Wadsworth J. — These three matters all arise out of the same order which raises a question under S. 19, Madras Act, 4 of 1938. C. M. A. No. 325 and C. R. P. No. 1346 are alternative proceedings brought by defendant 1. C. M. A. No. 428 is an appeal against the same decision by the other defendants in the case. There was a decree passed on 31st January 1934 for a sum of Rs. 10,000, odd by the Tanjore Subordinate Judge's Court. In execution of that decree, a sale was held under the orders of the Subordinate Judge of Kumbakonam on 26th August 1937 and the property was purchased by the decree-holder for Rs. 11,328, which was a little more than the amount due under the execution petition. He was given leave to bid and set off, so that there was no actual payment of cash. Within one month of the sale, an application was filed by the defendants under O. 21, R. 90, Civil P. C., to set aside the sale on the ground of irregularity, etc. When that application was still pending, Madras Act, 4 of 1938 came into force and on 20th June 1938 applications were filed by the judgment-debtors to scale down the decree. These applications were rejected by the Court below on the ground that there was no subsisting decree in view of the fact that the purchaser was the decree-holder and had been allowed to bid and set off.

After the proceedings in this Court began, there was a consent order whereby the application under O. 21, R. 90, was terminated on conditions providing for the cancellation of the sale on payment of an amount which will depend on this Court's orders in the present proceedings. We have, therefore, to proceed with the matter as it stood when the applications under S. 19 were filed, at which time a sale had been held but its confirmation was held up owing to the application to set aside the sale.

It has been argued that by reason of O. 21, R. 72, Civil P. C., there is an immediate satisfaction of the decree in a case where the decree-holder has been given leave to set off the purchase money against his decree. This is a contention which it is difficult to maintain not only by reason of decisions to the contrary, but also in view of the provisions of R. 89 which enable the judgment-debtor to get such a sale set aside on payment of the amount due together with the solatium to the purchaser. It has not been contended that R. 89 does not apply to a sale to a decree-holder, and in such a case, it seems to follow that the decree cannot be regarded as satisfied so long as the judgment-debtor can proceed under R. 89. There are, moreover, decisions which to our minds show conclusively that the decree is not satisfied in such a case as this until the sale has been confirmed; for example, 33 Bom 311,[1] 41 ALL 526[2] and the decision of the Privy Council in 12 Pat 305,[3] which, though it relates to an income-tax matter, decide quite clearly on the basis of the Civil Procedure Code that the date on which the proceeds of the sale are received in such a case by the decree-holder is the date of the confirmation and not the date of the sale. In the face of these authorities, it is not very profitable to refer to cases of rateable distribution in which the

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1. ('09) 33 Bom 311 : 1 I C 106 : 11 Bom L R 26, Ganesh v. Purushottam.
2. ('19) 6 A I R 1919 All 253 : 50 I C 772 : 41 All 526 : 17 A L J 617, Khalil-ur-Rahman v. Gokul Prasad.
3. ('33) 20 A I R 1933 P C 101 : 142 I C 446 : 12 Pat 305 : 60 I A 133 (P C), Rajah Raghunandan Prasad Singh v. Commissioner of Income-tax, B & O.

Court is concerned merely with the date of the receipt of the assets by the Court and not the date of the satisfaction of the decree. We are of opinion that on the facts of the present case it must be held that at the time when the applications under S. 19 were filed, the decree was still unsatisfied and the applicants were entitled as judgment-debtors to ask that the decree be scaled down under the Act. We, therefore, allow the appeals and the revision petition, set aside the lower Court's order and remand the applications for disposal in the light of this judgment. There will be an order for costs in C. M. A. No. 325 of 1939.

C.R.K./K.S. *Appeals allowed.*

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(29) A. I. R. 1942 Madras 120

WADSWORTH J.

Koodallor Manakkal Narayanan Nambudiripad — Petitioner

v.

M. Achuthan Nayar and another — Respondents.

Civil Revn. Petns. Nos. 1638 and 1835 of 1939, Decided on 20th March 1941, to revise order of District Munsif, Ottapalam, D/- 9th March 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii), Proviso D— For purposes of S. 3 (ii), Proviso (D) total payments of land revenue by jenmi must be taken into consideration.

In S. 3 (ii), Proviso (D) the words, "is a jenmi under Malabar Tenancy Act, 1929, who pays any sum exceeding Rs. 500 as land revenue" do not refer only to the land revenue paid by the jenmi on his jenmam land but include land revenue paid by the jenmi in respect of other lands held on other tenures. Consequently, for the purpose of proviso (D) to S. 3 (ii) the total payments of land revenue paid by the jenmi not only in respect of his jenmam land but also in respect of ryotwari land or in respect of land held by him under kanom must be taken into consideration : ('41) 28 A I R 1941 Mad 305, *Rel. on.* [P 120*e*, *f*, *h*]

D. H. Nambudiripad — for Petitioner.

P. Govinda Menon — for Respondents.

Order. — Each of these petitions raises a question as to the effect of proviso (D) to S. 3 (ii) of Madras Act, 4 of 1938. The applicant whose case is dealt with in C. R. P. NO. 1638 of 1939, is a jenmi who paid as jenmi just over Rs. 400 land revenue. But he also paid a similar sum as a kanomdar under contracts whereby the obligation to pay land revenue was undertaken by him. It does not appear that there had been any registration under S. 14, Malabar Land Registration Act, so as to make this obligation to pay the land revenue statutory in respect of the kanom land. The applicant in the case covered by C. R. P. NO. 1835 of 1939 is a jenmi who paid as a jenmi Rs. 430, but also was liable to ryotwari assessment amounting to about Rs. 300. The question is whether in proviso (D) the words, "is a jenmi under Malabar Tenancy Act, 1929, who pays any sum exceeding Rs. 500 as land revenue" should be taken to refer only to the land revenue paid by the jenmi on his jenmam land and not to include land revenue paid by the jenmi in respect of other lands held on other tenures. So far as C. R. P. NO. 1835 is concerned, the matter is covered by a decision of King J., in (1940) 2 M L J 934,[1] where the learned Judge held that for the purpose of proviso (D) the total payments of land revenue paid by the jenmi not only in respect of his jenmam land but also in respect of ryotwari land, must be taken into consideration.

The position in C. R. P. NO. 1638 is rather different, for the lands in respect of which the appellant pays land revenue under the kanom contract are lands in respect of which some other jenmi is under a liability to the Government to pay land revenue, and it would follow if the same principle is to be applied that the land revenue payable by the kanomdar who happens also to be a jenmi might disqualify both him and his own jenmi from the benefits of the Act. But there is no particular reason why if the criterion laid down in the Act is based purely on the amount of land revenue paid, two persons each liable for the same land revenue should not be equally disqualified by the payment of that land revenue to enjoy the benefits of the Act. It is true that in respect of the kanom lands, the tenant, in the absence of registration, is not under a statutory liability to pay the land revenue to the Government. But when he makes the payment he does so by virtue of the contract not merely as an agent of his mortgagor but under his contractual obligations and to protect his own interests as well as that of the mortgagor. It cannot be held that one who pays land revenue under a kanom deed does not pay land revenue for himself merely because the payment enures for the benefit of his jenmi. Turning to the words of proviso (D), we find with reference to the jenmi no such qualifying words as are found with reference to the other classes of landholders enumerated. The clause does not restrict the disqualification of a jenmi by saying that a person who pays as a jenmi Rs. 500 is disqualified, or a person who pays in respect of his jenmam land Rs. 500 is disqualified. The

1. ('41) 28 AIR 1941 Mad 305 : (1940) 2 MLJ 934, Nalupurapathi Mammad v. Narayana Pattar.

plain words of the proviso apply to any jenmi who pays more than Rs. 500 as land revenue.

I do not think we are entitled to speculate as to the possible intention of the Legislature to make the criterion not payment of land revenue, but payment of land revenue in the capacity of a jenmi. The words as they stand are plain, and even if there were an ambiguity, on the principle that ambiguities in this measure are to be solved in favour of the person expropriated and not in favour of the expropriator, the decision would have to be such as to give the widest range to the exception contained in that proviso. I am therefore of opinion that the decision of King J., is correct and that the same principle covers also the case of the jenmi who pays land revenue exceeding Rs. 500 partly in respect of his jenmam land and partly in respect of land held under kanom. Both the revision petitions are allowed with costs in both Courts and the orders of the Courts below are set aside.

C.R.K./G.N. *Petitions allowed.*

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(29) A. I. R. 1942 Madras 121

CHANDRASEKHARA AYYAR J.

Mangineddi Varadia Chetty — *Appellant*

v.

Province of Madras represented by District Collector, Chittoor — *Respondent.*

Second Appeal No. 342 of 1939, Decided on 19th August 1941, against decree of Dist. Court, Chittoor, in A. S. No. 70 of 1938.

Madras Revenue Board's Standing Orders, O. 15, sub-r. (18) — Communal land not to be granted on darkhast — Tahsildar granting it believing that it was not required for communal purposes — Collector can cancel grant under revisional powers under O. 15, sub-rule (18)— Civil Court cannot review orders of Revenue Officers acting within scope of their authority even if wrong.

Communal land or land required for communal purposes cannot be granted on darkhast. If the Tahsildar grants the same on darkhast believing that it was not required for communal purposes, while really it was, it would be a case of the order being passed under a mistake of fact, and the Collector cannot be said to have exceeded his powers in revision under O. 15, sub-rule (18) in cancelling the assignment on the ground that the land was in fact required for communal purposes. Civil Courts have clearly no jurisdiction in such matters and the orders of the Revenue Officers acting within the scope of their authority and jurisdiction cannot be reviewed by the civil Courts, even though the orders may be wrong, or can be shown to be wrong : 26 Mad 268, *Rel. on.* (P 121*g,h* ; P 122*a*)

N. C. Vijayaraghavachariar — for Appellant.

Government Pleader — for Respondent.

Judgment. — The plaintiff challenges the act of the Collector of Chittoor cancelling a darkhast assignment made in his favour by the Tahsildar. He says that the cancellation was illegal and ultra vires of the powers of the Collector. Having lost in both the Courts below, he has preferred this second appeal. The contention advanced for him is that the revisional power vested in the Collector under Board's standing Order 15, sub-r. (18) can be exercised by him only if certain conditions therein specified are satisfied but that in this case he exceeded his revisional jurisdiction because no such conditions were satisfied as a matter of fact. After the tahsildar had granted the land on darkhast to the appellant, a petition is said to have been filed by some of the villagers objecting to the assignment and stating that the land was required for communal purposes. The Revenue Divisional Officer made a local inspection and found the objection to be well-founded. The Collector took the report of the Revenue Divisional Officer under consideration and apparently gave notice to the appellant asking him to show cause why the darkhast should not be cancelled, for the order speaks of a petition dated 20th January 1937 from the appellant which is later than the report of the Revenue Divisional Officer. He also heard the appellant's pleader and ultimately made the order complained against which is in these terms :

> On inspection the Revenue Divisional Officer, Chittoor, has found the assignment of Survey No. 9/1 Diguvamasapella village in Chittoor Taluk objectionable as it is required for communal purposes. The assignment is therefore cancelled.

In other words, he accepted the Revenue Divisional Officer's report and acted on it, being satisfied that the land was required for such purposes. Communal land or land required for communal purposes cannot be granted on darkhast. Such a grant made by the tahsildar can certainly be described as inequitable or exceeding the powers of the tahsildar. If the tahsildar believed that it was not required for communal purposes while really it was, it would be a case of the order being passed under a mistake of fact. These are some of the conditions specified in sub-r. (18) of standing Order 15; and it is futile to say that the Collector exceeded his powers in revision in cancelling this assignment for the reasons mentioned by him. Civil Courts have clearly no jurisdiction in such matters and the orders of the revenue officers acting within the scope of their authority and jurisdiction cannot be reviewed by civil Courts, even though the orders may be wrong, or can b

shown to be wrong. This was laid down even in 26 Mad 268,[1] which is frequently relied on by parties in the position of the present plaintiff. The view taken in 26 Mad 268[1] was really responsible for the change in the Board's standing orders conferring revisional jurisdiction on the Collector. The second appeal is dismissed with costs. (Leave to appeal is refused.)

C.R.K./G.N. *Appeal dismissed.*

1. ('03) 26 Mad 268 : 12 M L J 453, Secretary of State v. Kasturi Reddi.

(29) A. I. R. 1942 Madras 122

SOMAYYA J.

Thekke Mannengath Ittichiri alias Ammu Poduvalssiar — Appellant

v.

Vengalur Naduvilepat Poozhi Kunnath Karnavan Appu Menon and others — Respondents.

Second Appeal No. 309 of 1938, Decided on 18th July 1941, against decree of Sub-Judge, Ottapalam, in A. S. No. 35 of 1936.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 76 — S. 76 applies to voluntary transfers — It does not apply to compulsory renewal under S. 19 and Ss. 22 to 25, Malabar Tenancy Act.

Section 76 applies to voluntary transfers by the trustees or persons in charge of public religious institution. The bar as to the previous sanction of the Religious Endowments Board or the committee of the temple enacted in S. 76, Madras Act, 2 of 1927, cannot apply to the case of a compulsory renewal under S. 19 and Ss. 22 to 25, Malabar Tenancy Act, or to the case of a forced sale in execution of a money decree against the temple. [P 123 *c,e*]

(b) Malabar Tenancy Act (14 of 1930), Ss. 22 and 25 — Renewal application by kanomdar under S. 22—Both jenmi and melkanom-holder made parties — Court granting renewal — Renewal is binding on melkanom-holder.

Under S. 25 it is the Court that grants the renewal, which means that the Court does it on behalf of the person who is bound to grant the renewal. Where in an application for renewal by the konamdar both the jenmi and the melkanom-holder that is the immediate landlord are made parties a renewal granted by the Court is binding on the melkanom-holder under S. 25(3) for a period of 12 years so as to preclude him from suing for redemption during that period. [P 123 *g,h*; P 124*a*]

(c) Malabar Tenancy Act (14 of 1930), Ss. 20 and 22 — Redemption suit by melkanom-holder against kanomdar — Kanomdar pleading suit to be incompetent by reason of renewal under S. 22 — Further claim that even if suit was barred, plaintiff as melkanom-holder was entitled to claim certain arrears from kanomdar held could not be allowed to be raised for first time in second appeal.

Where in a redemption suit against the kanomdar by the melkanomdar, the kanomdar pleads that the suit was incompetent by reason of a renewal obtained by him under S. 22, the plaintiff cannot be allowed to set up a further claim, that even if the suit was barred he as melkanomdar was entitled to claim certain arrears of rent, for the first time in second appeal. [P 124*d,e*]

D. A. Krishna Variar and Ravi Varma — for Appellant.

P. Govinda Menon and D. H. Nambudiripad — for Respondents.

Judgment. — The appellant brought the suit out of which this appeal arises for redemption of a kanom and for other reliefs. Defendant 1 is the kanomdar whose mortgage was sought to be redeemed. He died after the action and his legal representative is respondent 1 in this appeal. The property in suit is trust property and defendants 2 and 9 in the action were the urallars or the trustees of the devasvom. The main defence is that in proceedings under the Malabar Tenancy Act defendant 1 got a renewal under S. 25 of the Act, that the renewal which he obtained was still subsisting and that therefore the suit for redemption was premature. Both the lower Courts upheld this contention and dismissed the plaintiff's suit. Hence this appeal.

It appears that the jenmis, that is defendants 2 to 9 as representing the devasvom of which they are the urallars, filed O. S. No. 556 of 1931 for redemption of the mortgages of both the present plaintiff and of the present defendant 1. In that suit the present plaintiff, the melcharthdar, was defendant 2 and present defendant 1 was defendant 3. The present defendant 1 filed an application under S. 22, Malabar Tenancy Act, asking for a renewal of his kanom. Notice was given to the other parties and the Court registered this application as an independent application, I. A. No. 884 of 1932, and passed an order, EX. 4, on 5th January 1934 upholding the applicant's right to obtain a renewal. Time was granted for the payment of certain monies which had to be paid under S. 24 of the Act and the matter was adjourned to the 26th of that month. The money was paid a few days beyond the time fixed but the Court evidently excused that delay and accepted the deposit made by the applicant and passed an order under S. 25 directing the execution of a renewal deed, the effect of which under sub-s. (3) of S. 25 is that the tenant shall be entitled to enjoy the holding for 12 years. In this case the Court directed that the renewal should operate for a period of 12 years from the 1st of Vrichigam 1103 which corresponds to 16th November 1927. If this order is binding on the plaintiff it is clear that the renewal in favour of defendant 1 was operative till 1939 at any rate,

and the present suit filed in 1931 is liable to be dismissed.

Mr. Krishna Variar, the learned advocate for the appellant, urges two objections against the validity of the proceedings in O. S. No. 556 of 1931 just mentioned. The chief objection is that a renewal which under S. 25, Malabar Tenancy Act, is to operate for 12 years is either a mortgage or a lease for over five years and that therefore it is bad under S. 76, Hindu Religious Endowments Act, 2 of 1927. That section provides :

> No exchange, sale or mortgage and no lease for a term exceeding five years of any immoveable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the committee in the case of other temples.

So the point urged is that, as the suit property is property belonging to a public temple and is therefore governed by S. 76, Hindu Religious Endowments Act, 2 of 1927, a renewal which is a lease for a term exceeding five years or a mortgage is invalid because admittedly the sanction of the Board or of the temple committee was not sought or obtained in this case. The wording of S. 76 appears to my mind to apply to voluntary transfers by the trustees or persons in charge of public religious institution. It cannot, for instance, apply to the case of a forced sale in execution of a money decree against the temple. In the present case, S. 17, Malabar Tenancy Act, confers a right upon the kanomdar to call upon his immediate landlord for a renewal for 12 years on conditions and the landlord is bound to grant such a renewal. The section says :

> A kanomdar shall on the expiry of the kanom under which he holds be entitled to claim and his immediate landlord shall be bound to grant a renewal enuring for a period of 12 years . . . .

If the jenmi or the immediate landlord does not grant the renewal which he is bound to do under S. 17, the kanomdar is given the right of applying to the Court under S. 22 of the Act, and on receipt of that application the Court calls upon the landlord to state in writing what objections he has. Under S. 24 the Court determines the amount payable as renewal fee and under cl. (2) of that section it makes an order for deposit within a time to be fixed in the said order, of the amount directed to be paid and also of all arrears as interest thereupon at the contract rate. Under S. 25, if the amount ordered under S. 24 is deposited, then the Court has to execute a renewal deed containing such terms as it determines to be the terms of the expiring transaction and as are in accordance with law. It is obvious that in such a case the immediate landlord or the jenmi has no option but to grant a renewal ; else he will be mulcted with costs as provided by S. 25 (2) (iii). It therefore appears to me that the bar enacted in S. 76, Madras Act 2 of 1927, cannot apply to the case of a compulsory renewal under S. 19 and Ss. 22 to 25, Malabar Tenancy Act.

There are some other minor points raised in this connexion that the person from whom the renewal was to be obtained was the immediate landlord and not the original landlord. It is said that the present plaintiff who had obtained a melcharth was the immediate landlord. In the present case, in the application under S. 22, both the original jenmi, that is the temple represented by its trustees, and the present plaintiff, the melcharthdar, were all made parties and defendant 1 asked for a renewal in accordance with the provisions of the Act. In fact para. 4 of EX. P, the petition filed under S. 22, refers to the melkanom demise granted in favour of the present plaintiff. The present plaintiff was respondent 3 in that application. Paragraph 12 stated that respondent 3 was impleaded as she was the melkanom holder and prayer (b) in that application is "directing that, on the petitioner paying the fees by the time fixed, a renewed demise be executed to him and got registered by the Court in accordance with law on the terms of the prior demise;" and ultimately the demise was actually executed by the Court. Respondent 3 having been made a party and the order under S. 25 made in her presence she is bound by the order and she is not entitled to go behind that order now. If an order was not made in her favour allowing her to draw the amount deposited by the present defendant 1 but the Court allowed the jenmi to take it away, that is a matter with which we are not now concerned. What is important is that in a proceeding under S. 22 to which the present plaintiff was also a party a request was made that a proper renewal should be executed in accordance with law and under S. 25 it is the Court that grants the renewal, which means that the Court does it on behalf of the person who is bound to grant the renewal. If, as Mr. Variar contends, the present plaintiff is the person who was entitled to grant the renewal, then the Court, in executing the renewal under S. 25 of the Act, must be taken to have done so on behalf of the present plaintiff. So far as the grantee, defendant 1, is

concerned there is a valid renewal obtained in the presence of the plaintiff. The suit for redemption therefore fails. In the view taken by me on this question the other points discussed by the lower appellate Court become immaterial.

Mr. Variar then says that his clients paid certain arrears of rent due on the property when his client took the melcharth and that his client is entitled to all the rent that was unpaid. He says that the melcharth in his favour operates at least as an assignment of a right to recover rent payable by defendant 1, that defendant 1 did not pay the rents for certain years and that his clients should be given a decree for that amount. This right is not part of the redemption which the plaintiff sought in the present suit. It is a right which is now put forward as an alternative or additional right, that is, even if the renewal in favour of defendant 1 is right and therefore a suit for redemption does not lie, still, as the assignee of the right to collect certain rents, the plaintiff is entitled to claim those arrears in the suit. I do not find this question mooted in the Court below. The lower appellate Court does not say anything about it. In fact when the appeal examiners pointed out that court-fee had to be paid on the arrears of rent that was claimed by the plaintiff, the plaintiff took up the stand that there was only one claim, namely redemption, and that the claim for arrears of rent and for accounts were part of the redemption right. It is not admitted on the other side that there were any arrears unpaid. In fact, Mr. Govinda Menon says that his client paid up all the arrears which were payable in respect of this holding, which, he points out, is a condition precedent for his obtaining the renewal. On the other hand, Mr. Variar says that what the jenmi claimed in the other suit was the arrear outstanding after giving credit to the amount paid by the present plaintiff and that the present plaintiff was therefore entitled to recover from defendant 1 what he, defendant 1, did not pay to the jenmi. These are questions of fact which ought to have been investigated and would have been investigated if a proper claim had been made for such arrears. The claim made is one for arrears and right through it was treated as one for redemption and when the appeal examiners pointed out that it was more than a suit for redemption the position was contested and the Court agreed with the plaintiff in saying that it is only a suit for redemption. In these circumstances I do not think it right to allow the plaintiff to advance this claim at this stage. If she has any such right, she is of course entitled to claim the same in a separate suit. This appeal is therefore dismissed with costs, one set to be divided among all the respondents. Leave to appeal is refused.

C.R.K./G.N. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 124

LAKSHMANA RAO J.

V. S. Sharma — Petitioner

v.

J. Dharma Rao, Proprietor, M. C. Appaswamy Chetty & Co. — Respondent.

Criminal Revn. Case No. 856 and Petn. No. 809 of 1940, Decided on 17th January 1941, to revise order of the Second Presidency Magistrate, George Town, Madras, D/- 15th July 1940.

Copyright Act (1914), Ss. 7, 8 — Scope.

The complainant alleged in his complaint that certain pictures were entrusted to the accused for the preparation of blocks and printing them, that he clandestinely used the said blocks for printing more pictures and that he did not return the blocks:

***Held* that complaint disclosed an offence under Ss. 7 and 8 and its dismissal on the ground that the dispute is of a civil nature could not be sustained. [P 124*h*]**

T. R. Venkataraman — for Petitioner.

P. Srinivasa Iyengar — for Respondent.

Crown Prosecutor — for the Crown.

FACTS.—The complaint by the petitioner was the accused-respondent infringed his copyright in blocks relating to certain pictures entrusted to him for the preparation of blocks and printing them, the respondent was clandestinely using the said blocks for printing more pictures and that he did not return the blocks. The Presidency Magistrate dismissed the complaint under S. 203, Criminal P. C., as being of civil nature. Against the order the complainant preferred the revision petition.

Order. — The complaint discloses an offence under Ss. 7 and 8, Copyright Act, and its dismissal on the ground that the dispute is of a civil nature cannot be sustained. The order of dismissal is therefore set aside and there will be further inquiry into the complaint in accordance with law by the Chief Presidency Magistrate or such other Magistrate as he may direct.

C.R.K./K.S. *Order set aside.*

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a *** (29) A. I. R. 1942 Madras 125**

PATANJALI SASTRI J.

Vedangi Veera Raghava Rao — *Appellant*

v.

Vedangi Gopalarao — *Respondent.*

Second Appeal No. 925 of 1938, Decided on 9th September 1941, against decree of Sub Judge, Narasapur, in A. S. No. 161 of 1936.

(a) Hindu law — Partition — Partition deed allotting properties to each member and each member to have full rights of enjoyment, alienation, etc., and pay Government taxes himself— Partition held final and required registration even though parties contemplated execution of b **another more comprehensive partition later on.**

A document allotting certain properties to each of the members of joint Hindu family provided as follows : "Each of us should with full rights, enjoy the trees and fruit trees which are in his lands, that each should pay circar taxes for the lands, pertaining to (his) respective shares and that each should enjoy his respective share with rights of alienation by way of gift and sale" and the document as a whole was signed by all the brothers and attested by two witnesses and the writer :

Held that the document purported to effect a partition of properties comprised therein between the brothers and that the allotment of the immovable properties under the deed was intended to be final and the mere fact that the parties contemplated the execution of a more comprehensive partition deed later on did not make the deed any the c less operative to create interests in the immovable properties comprised therein. Therefore, it required registration under S. 17, Registration Act.

[P 125*h*; P 126*a*,*b*]

***(b) Hindu law—Joint family—Partition deed which ought to have been registered not registered and as such inadmissible — Person in possession of property allotted on such partition — Trespass into such land by another member of family — Ejectment suit on basis of possessory title does not lie.**

A mere previous possession cannot be made the basis of a decree in ejectment against co-owners.

[P 126*g*]

A partition deed allotting certain properties to each of the members of a Hindu family was not registered. One of the members who was in posses- d sion of the property allotted to him was disturbed by another member trespassing upon it. Thereupon, he filed a suit for ejectment. As the partition deed was not registered it was inadmissible to prove the partition, whereupon he based his suit for ejectment on his possessory title :

Held that the finding that the partition deed was inadmissible to show what property fell to each cosharer must result in the conclusion that each cosharer enjoyed an undivided share in each item of the properties. In such circumstances, even if one cosharer happened to be in sole enjoyment of a particular piece of property, he could not sue in ejectment if another co-owner disturbed such enjoyment. He could only bring a suit for partition of all the properties owned in common or for joint possession with his co-owners : ('30) 17 A I R 1930 Mad 883, *Rel. on* ; ('27) 14 A I R 1927 Mad 830, *Not foll.*

[P 126*f*]

(c) Transfer of Property Act (1882), S. 53A— Scope — It cannot be used by person who has e **lost possession to sue for recovery of it.**

Section 53A only entitles a person in possession to invoke the doctrine as a shield to protect such possession if the conditions therein referred to are satisfied and does not enable a person who has lost possession to sue for recovery of it. [P 126*h*; P 127*a*]

P. Satyanarayana Rao — for Appellant.

P. Somasundaram and P. Suryanarayana — for Respondent.

Judgment. — This is an appeal by the defendant against a decree directing his ejectment from the suit property and the delivery thereof to the respondent. The appellant and the respondent are two out of five brothers who originally formed a joint f Hindu family. Two of the brothers separated in June 1930, and the appellant and the respondent and one Subba Rao continued joint till 20th May 1932 on which date the properties held by them jointly till then were divided between them under the document marked as EX. A. The respondent's case was that the property in suit was among the properties allotted to his share under this document and that the appellant unlawfully trespassed upon it shortly before the suit. The document which is described as "list of shares of immovable property equally divided on 20th May 1932 among these three g individuals, viz., etc.," recites :

We, viz., our five brothers effected partition previously, i. e., on 16th June 1930 and we were keeping our three shares jointly up till now and managing the same. We have now mixed the property pertaining to our three shares together and have again effected division of the same with reference to good and bad qualities through mediators as follows.

Then follow the lists of properties allotted to each sharer who has signed at the end of his list. A "remark" at the end provides

that each of us should with full rights, enjoy the trees and fruit trees which are in his lands, that each should pay circar taxes for the lands pertaining to (his) respective shares and that each should enjoy his respective share with rights of alienation h by way of gift and sale,

and the document as a whole is signed by all the three brothers and attested by two witnesses and the writer. It is thus clear that the document purports to effect a partition of the properties comprised therein between the three brothers and it is admitted by the appellant's own witnesses that the allotment under it was intended to be final. It was argued for the appellant that this document (EX. A) not having been registered, was inadmissible to prove the allotment of the suit property to the respondent, and that as the latter based his title only on Exhibit A, his suit was bound to fail.

a The Court below has repelled this contention on two grounds. First, it has held relying upon the oral evidence in the case that it was intended that there should be another comprehensive partition deed executed subsequently when the moveables and outstandings belonging to the family were to be divided, incorporating therein the allotment of the immovable properties made under EX. A, and that therefore the partition under EX. A could not be treated as a final partition and did not require registration. This view cannot be accepted, for, as already observed, it is not disputed that the allotment of the immovable properties under b EX. A was intended to be final. The mere fact that the parties contemplated the execution of a more comprehensive partition deed later on does not make EX. A any the less operative to create interests in the immovable properties comprised therein. It cannot therefore be said that EX. A does not require registration. It clearly falls within S. 17, Registration Act, and being unregistered, it must be held to be inadmissible in evidence.

It is, however, argued by Mr. Somasundaram for the respondent that even if this partition deed is put aside as inadmissible c in evidence, it is still open to the Court to take into consideration the subsequent conduct of the parties, and as both the Courts have found that the respondent was in exclusive possession for about two years after the partition till the appellant trespassed upon the suit property in 1934, the decision of the Court below can be supported on the ground of the respondent's possessory title. Mr. Somasundaram placed reliance upon a decision of Ramesam J., in A I R 1927 Mad 830,[1] which to some extent appears to support his contention. That was a case where the plaintiff sued to recover certain properties alleging that her deceased husband and his d brothers divided certain properties in 1910, that in such division the properties claimed fell to her husband's share and were enjoyed by him till 1918 when he died and that her husband's brothers thereupon trespassed upon those properties. The learned Judge held that the partition of 1910 being unregistered was not admissible in evidence and could not therefore be relied on to show what properties fell to the share of the plaintiff's husband. The learned Judge, however, proceeded to hold that this did not prevent the Court from finding that the properties there in question were enjoyed by e the plaintiff's deceased husband as his separate properties at the time of his death, and passing a decree in favour of the plaintiff on the strength of such possessory title which had devolved on her. With due respect, I find it difficult to follow this reasoning. If the partition deed could be used as evidence of only a division in status and could not be relied on to show that the properties there in question were allotted to the share of the plaintiff's husband as held by the learned Judge, the position would be that the plaintiff's husband and his brothers were tenants in common of the family properties. As pointed out in 54 Mad 27[2] at p. 53 f the finding that the partition deed was inadmissible to show what property fell to each cosharer must result in the conclusion that each cosharer enjoyed an undivided share in each item of the properties. In such circumstances, even if one cosharer happened to be in sole enjoyment of a particular piece of property, he could not, as it seems to me, sue in ejectment if another co-owner disturbed such enjoyment. He could only bring a suit for partition of all the properties owned in common or, according to some decisions, for joint possession with his co-owners. Mr. Somasundaram was unable to g cite any authority binding on me holding that a possessory title, that is to say, mere previous possession can be made the basis of a decree in ejectment against co-owners. I have to hold therefore that the appellant being unable to establish his exclusive title to the property in suit on the basis of its allotment to his share at a valid partition, is not entitled to the relief claimed by him in the suit.

The next ground relied on by the lower Court in support of the conclusion that the plaintiff was entitled to a decree for possession is that the doctrine of part performance h is applicable to the circumstances of the case, as the appellant was found to have been in possession of the property in pursuance of the partition till the respondent disturbed such possession in 1934, and reliance was placed on certain decisions which were, however, cases decided before the Transfer of Property Amendment Act of 1929. The limits of the application of the doctrine of part performance have now been defined in S. 53A of the Act and it is plain that that provision only entitles a person in possession

1. ('27) 14 A I R 1927 Mad 830 : 103 I C 281, Abobilachariar v. Thulasi Ammal.

2. ('30) 17 A I R 1930 Mad 883 : 128 I C 561 : 54 Mad 27 : 59 M L J 558, Subba Rao v. Mahalakshamamma.

a to invoke the doctrine as a shield to protect such possession if the conditions therein referred to are satisfied and does not enable a person who has lost possession to sue for recovery of it. Mr. Somasundaram frankly admitted that he could not invoke that docrine in the circumstances of this case. In the result, the second appeal is allowed and the plaintiff's suit is dismissed with costs throughout. Leave to appeal is granted.

C.R.K./K.S. *Appeal allowed.*

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(29) A. I. R. 1942 Madras 127

b

SOMAYYA J.

Sasala Raminaidu — Appellant

v.

Secretary of State represented by Collector of Vizagapatam — Respondent.

Second Appeal No. 1052 of 1938, Decided on 8th August 1941, against decree of Sub-Judge, Chicacole, in A. S. No. 8 of 1937.

Madras Hereditary Village Offices Act (3 of 1895), Ss. 7, 23—Suit by dismissed village headman that order of dismissal is ultra vires on ground that rules had not been followed does not lie.

When a right is given by a special statute and a
c remedy is provided for the violation of the right in that very statute, ordinarily the person whose right is violated is bound to follow the remedy provided in that Act. [P 128*d*]

A village headman who has been dismissed has under S. 23 of the Act a right of appeal to the District Collector and a further appeal to the Board of Revenue. Therefore, he has no right of separate suit in a civil Court that the order of dismissal is ultra vires on the ground that the rules have not been strictly followed : ('41) 28 AIR 1941 Mad 530 (FB), *Rel. on.* [P 128*c*, *d*, *e*]

R. Sundaralingam and S. Seshadri — for Appellant.

K. S. Desikan — for Respondent.

Judgment. — The appellant brought the
d suit out of which this second appeal arises for a declaration that the order of the Sub-Collector, Vizianagaram, dated 16th June 1926 dismissing him from the hereditary office of village headman of Veeraghattam is ultra vires and illegal. Both the lower Courts dismissed the suit holding that the order of the Sub-Collector was not ultra vires of his powers. What happened in this case was that there were several complaints against the appellant, none of which was taken serious note of by the authorities. But when complaints persisted to pour in action was ultimately taken in the year 1926 and the Sub-Collector of the place asked the tahsildar to hold an inquiry and submit a report. The tahsildar examined certain witnesses, framed
e some charges in addition to those that had been framed by the Sub-Collector and called upon the appellant to submit his explanation. He submitted an explanation on 3rd May 1926 and the matter was considered by the Sub-Collector who held that the appellant should not remain the village headman of the place. "The village Munsif," he says: was warned in December last not to identify himself with the factions in the village; and it is clear that he has paid no heed to the warning. Matters have no doubt reached a point when he could hardly do so if he wished. But it is quite clear that to have as a village Munsif a man who is the leader of a party in his village is prejudicial alike to the peace and good order of the village. I therefore
f dismiss the village Munsif.

This order was taken on appeal under S. 23 of Madras Act, 3 of 1895. It was confirmed and a further appeal to the Board of Revenue proved infructuous. The present suit was filed in 1933 for a declaration that the order of the Sub-Collector was ultra vires for the reason that the Sub-Collector did not observe the procedure laid down by the Act before dismissing a village officer. Section 7 of the Act, so far as it is material to this case, runs thus:

> The Collector may, of his own motion or on complaint and after inquiry . . . dismiss the holder of any of the offices forming class (1) in S. 3, for
g misconduct or for neglect of duty or incapacity or for non-residence in the village or for any other sufficient cause and shall make a record of his reasons for so doing in writing.

The expression "Collector" obviously includes "Sub-Collector." Under S. 23 of the Act, from every order passed by a Collector under S. 7, an appeal lies to the District Collector and thereafter to the Board of Revenue within three months from the order of the District Collector on appeal. In this case it cannot be said that the provisions of S. 7 were not complied with. There was an inquiry and the Sub-Collector has recorded what he considers to be a sufficient cause
h why the appellant should not be allowed to continue as the village headman. What is said, however, is that the provisions of the Board's standing Order 147, R. 8 have not been followed. That rule provides that in the case of charges preferred against a village officer the witnesses shall be examined in the presence of the accused. In this case it is said that no evidence was recorded by the Sub-Collector and that the examination of the witnesses was not made in the presence of the village officer. This matter has not received the attention that it deserves in the Courts below. What appears is that the tahsildar examined certain witnesses on a

requisition by the Sub-Collector. The Sub-Collector had framed certain charges; the tahsildar framed some more. After evidence was taken by the tahsildar, a notice was sent to the village officer to submit his explanation, which he did. The explanation was considered by the Sub-Collector, who deemed it insufficient and dismissed the village officer. The matter was taken up on appeal under S. 23 to the District Collector, who confirmed the order of the Sub-Collector. A further appeal to the Board of Revenue proved infructuous. It is said that Rr. 7 and 8 in the appendix to the Board's standing Order 147 printed on p. 873 of Vol. 3 of Board's standing orders were made under the power conferred by the Legislature under S. 20 of Madras Act, 3 of 1895, that therefore the rules made are a part of the Act itself and that a violation of the rules would be a violation of the provisions of the Act.

It is to be observed that there is no specific finding that the evidence which was recorded by the tahsildar was in the absence of the village officer, but it does appear that the inquiry was made by the tahsildar. This is said to be irregular for the reason that S. 7 and the rules made under S. 20 embodied in the standing orders contemplate an inquiry by the Sub-Collector himself. Assuming that the rules were not strictly followed, the question is whether there is a right of separate suit. The right of the village officer to have a charge framed and then to have the witnesses examined in his presence by the Collector and the right to cross-examine the witnesses are all given under S. 7 of the Act. If any of these rights conferred upon village officers under the Act is infringed, there is a special remedy provided by the Act, namely, the right of appeal under S. 23 to the District Collector and from an order passed by the District Collector a further appeal to the Board of Revenue, and it is said that the order of the Board of Revenue or of the District Collector, shall be final. When a right is given by a special statute and a remedy is provided for the violation of the right in that very statute, ordinarily the person whose right is violated is bound to follow the remedy provided in that Act. In this case S. 23 provides the remedy for the violation of this right and the plaintiff is bound to follow the remedy granted under S. 23, namely, the right of appeal. The plaintiff did prefer an appeal under S. 23 to the District Collector and a further appeal to the Board of Revenue and failed. The recent decision of a Full Bench of this Court in 54 M L W 7[1] makes the position clear. In the result the second appeal fails and is dismissed with costs. Leave to appeal is refused.

C.R.K./K.S. *Appeal dismissed.*

1. ('41) 28 AIR 1941 Mad 530: 196 I C 353: (1941) 2 M L J 47: 54 M L W 7 (FB), Secretary of State v. Jagannadham.

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(29) A. I. R. 1942 Madras 128

KING J.

Pethuraju Kone — Appellant

v.

Thenirkulam Muthuswami Ayyar and others — Respondents.

Second Appeal No. 805 of 1938, Decided on 5th August 1941, against decree of the Sub-Judge, Tinnevelly, in A. S. No. 6 of 1938.

(a) Civil P. C. (1908), S. 11—Land, and crops on that land are different subject-matters — Decision on claim as to latter is not res judicata as to former.

The subject-matter of the claim order, that is the crops on the land, is not identical with the land itself and hence a decision in a previous claim for crops under O. 21, R. 58 does not operate as res judicata in a subsequent suit with respect to the land : ('17) 4 AIR 1917 Cal 669, *Rel. on.* [P 129*b*]

(b) Civil P. C. (1908), S. 11 and O. 21, R. 63 — Decree-holder in claim suit is not representative of judgment-debtor.

A decree-holder can never, in a suit under O. 21, R. 63, be the representative of his judgment-debtors. In so far as the judgment-debtors take any interest in the case at all they have their own point of view to put forward, which almost invariably is in opposition to that of the decree-holder : ('37) 24 A I R 1937 Mad 651 and 15 Mad 477, *Rel. on.* [P 129*d*]

(c) Transfer of Property Act (1882 as amended in 1929), S. 53 — Claim under O. 21, R. 58 — Resistance by creditor is not in representative character.

A suit by a creditor to set aside an adverse claim order may in certain circumstances be in essence a suit under S. 53, but when one creditor merely resists a claim by a claimant his resistance in those summary proceedings cannot be deemed to be on behalf of all the creditors : 18 All 413, *Foll.* [P 129*e*, *f*]

A. Swaminatha Iyer and S. Thayagaraja Iyer — for Appellant.

S. Nagaraja Iyer — for Respondents.

Judgment. — This appeal arises out of a suit under O. 21, R. 63 to vacate an order on a claim petition. Plaintiff is the attaching creditor; defendant 1 is the claimant; defendants 2 to 4 are the judgment-debtors. Defendant 1's title is based upon two sale deeds, Ex. 4 by defendants 2 to 4 to one Muthukrishna Ayyar in 1927 and Ex. 1 by Muthukrishna Ayyar to himself in 1932. It has been held as a question of fact that defendant 1 was a bona fide purchaser for consi-

deration under Ex. 1 and plaintiff's suit has been dismissed. In this appeal plaintiff contends that the issue between himself and defendant 1 is res judicata in his favour. This contention is based upon the following facts : One T. V. Krishna Ayyar, another creditor of defendants 2 to 4, attached in execution of his decree against them the crops standing on the land now in dispute. Muthukrishna Ayyar claimed under Ex. 4 to be the owner of the land and the crops. His claim was dismissed. Against that order of dismissal he filed no suit. Muthukrishna Ayyar was, of course, the predecessor-in-title of defendant 1, and it is now argued that plaintiff represents the interests of defendants 2 to 4. What therefore was res judicata between Muthukrishna Iyer and defendants 2 to 4 is res judicata between defendant 1 and plaintiff and defendant 1 cannot claim title to the subject-matter of this suit. The argument, as was thus put forward, was not considered by the learned Subordinate Judge, who has dismissed the plea of res judicata, on the ground that the subject-matter of the claim order, that is the crops on the land, is not identical with the subject-matter of the present suit that is the land itself. In view of the decision in 44 Cal 698[1] I think this reasoning is sound, and of itself sufficient for rejecting the plaintiff's plea, but as the general question of the status of the plaintiff in his relationship to defendants 2 to 4 has also been argued I proceed briefly to discuss it.

The statement that plaintiff is now the representative of defendants 2 to 4 is a legal fiction, and though it may derive support from some observations in (1937) 1 M L J 575,[2] that is a case in which in fact the judgment-debtors had unsuccessfully resisted the future claimant and I find myself quite unable to act in the circumstances of this case, where defendants 2 to 4 are never shown to have pleaded anything upon a legal fiction which, it is universally known, is almost always in direct conflict with the actual facts. In the strict sense of the word a decree-holder can never, in a suit of this kind, be the representative of his judgment-debtors. In so far as the judgment-debtors take any interest in the case at all they have their own point of view to put forward which almost invariably is in opposition to that of the decree-holder. As is stated very clearly in 15 Mad 477[3] at p. 480, the attachment by a decree-holder is not effected by him as the privy or representative of the judgment-debtors, but "by virtue of a right inherent in him to attach what was really their property at the date of the attachment." I have not been shown any authority in which this proposition has been overruled and being the decision of a Bench of this Court it is binding upon me.

Finally appellant's learned advocate falls back upon the position that he as one of the creditors of defendants 2 to 4 can take advantage of an adjudication obtained by another of those creditors. This position is directly negatived by 18 ALL 413[4] but it is now contended that since the date of that decision S. 53, T. P. Act, has been amended so as to make all suits under that section representative suits. Now, of course a suit by a creditor to set aside an adverse claim order may well in certain circumstances be in essence a suit under S. 53, but it cannot possibly be argued, I think, that when one creditor merely resists a claim by a claimant his resistance in those summary proceedings should be deemed to be on behalf of all the creditors. I see no reason therefore why I should not still follow 18 ALL 413.[4] The plea of res judicata must therefore fail at all points, and there being no other question of law in this appeal, it is dismissed with the costs of respondent 1. Leave refused.

C.R.K./R.K. *Appeal dismissed.*

1. ('17) 4 A I R 1917 Cal 669 : 37 I C 887 : 44 Cal 698 : 21 C W N 222, Asna Bibi v. Awaljadi Bibi.
2. ('37) 24 AIR 1937 Mad 651: 171 I C 369: (1937) 1 M L J 575, Venkatachariar v. South Indian Bank.
3. ('92) 15 Mad 477 : 2 M L J 212, Gnanambal v. Parvati.
4. ('96) 18 All 413: 1896 A W N 129, Jagannath v. Ganesh.

(29) A. I. R. 1942 Madras 129

ABDUR RAHMAN J.

T. P. Manicka Mudaliar — Appellant

v.

Ammakannu alias Venkalakshmi Ammal — Respondent.

Second Appeal No. 41 of 1939, Decided on 8th August 1941, against decree of Dist. Court, Salem, D/- 26th October 1938.

(a) Pleadings—Pure question of fact such as married couple had no access to each other not definitely raised in pleadings—It should not be allowed to be raised in course of arguments even in trial Court much less in appeal.

A pure question of fact such as that the husband could not have had access to his legally married wife if not definitely raised in the pleadings should not be permitted to be raised during the course of arguments even in the trial Court much less so in a Court of appeal. [P 130*h*]

(b) Evidence Act (1872), S. 112 — Child born in lawful wedlock — Onus to prove that parties to marriage had no access to each other is on person alleging illegitimacy — Method of proof — It is for him to show that strained feelings were not reconciled before child could have been begotten—That feelings continued to be strained cannot be presumed.

Since every assumption is to be made in favour of legitimacy of a child who is found to have been born in lawful wedlock, the onus of proving non-access that is the parties had no opportunity for sexual intercourse at any time as a result of which the child could have been begotten or that of illegitimacy is on the party who alleges the same: ('34) 21 A I R 1934 P C 49, *Rel. on*; ('32) 19 A I R 1932 Mad 44 and (1831-46) 7 E R 365, *Approved*; ('32) 19 A I R 1932 Mad 39, *Not approved.* [P 133*a*,*b*]

It is for the person alleging intimacy to show that the relations between them were strained and continued to be so without any reconciliation before the child could have been begotten. The continuance of the strained and bitter feelings cannot be assumed in the absence of a divorce or such other circumstances as may lead to that inference. The mere fact that the parties are living separately in two different houses is insufficient to establish non-access. The non-access has to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character but unless such evidence is forthcoming, it will not be possible for a Court "to believe it to be probable that there was no access." The fact that the father took no interest in the child by itself is not of much value in establishing illegitimacy nor can the fact whether the father did or did not perform the funeral obsequies of his wife be of very great assistance either. [P 131*d*,*e*; P 132*e*; P 133*b*,*c*]

(c) Evidence Act (1872), S. 35—Birth register — Entry in, is relevant to show date of birth — Legitimacy of child—Mother's name appearing in register but not of father—Evidentiary value.

The entry in the birth register may be relevant under S. 35 to show the date of birth; but how far the fact that the name of the mother was given and not that of the father by the informant would bear on the question of the child's legitimacy depends, even if assumed to be relevant largely on the means that the informant may be shown to have possessed of the knowledge in connection with the child's birth. If the informant happens to be a stranger, who did not know the father the statement may be, even if relevant, wholly unimportant. The entry becomes of no value when the informant was not examined and no explanation has been given for the omission to do so: ('34) 21 AIR 1934 Mad 318 and ('34) 21 A I R 1934 Mad 630, *Ref.* [P 131*g*,*h*]

(d) Evidence Act (1872), Ss. 41 and 13 — Guardianship proceedings for custody of child—Father not made party — Parentage of child in issue in subsequent suit—Orders in guardianship proceedings are not admissible.

Where the father was not made a party to the guardianship proceedings for the custody of his child, the orders passed in those proceedings, which were not proceedings in rem, are inadmissible under S. 41 in subsequent suit involving the issue of the parentage of the child. Nor can the order recognising the right of guardianship be relevant in the subsequent suit under S. 13. Those proceedings might be of value if the father had been notified and failed to allege that he was the father of the child. [P 132*b*,*c*]

V. V. Srinivasa Ayyangar and V. V. Ramadurai — for Appellant.

K. Umamaheswaran and P. S. Raghavarama Sastri — for Respondent.

Judgment. — Whether Madurai Naicken was the legitimate son of Narayanaswami Mudali is the only question that falls to be determined in this appeal. Both Narayanaswami and Vanajakshi were members of the Naick community and were alleged by the plaintiff to have been married. The marriage was found to have been established by the trial Court and from the manner in which the judgment of the lower appellate Court proceeds, it may be assumed that this finding was affirmed. In spite of this, however, their conclusions on the question of Madurai's legitimacy were conflicting. The District Munsif's finding is in para. 20 of his judgment. It is in the following words:

> I am of opinion that there is no evidence worth the name, or even any attempt to prove non-access as between the married husband and wife.

The District Judge on the other hand, found that the presumption raised by S. 112, Evidence Act, had been effectively rebutted. This inference was drawn from certain circumstances which will have to be considered by me in due course. But before I do so, let me see, as contended for by learned counsel for the respondent, if the allegation of fact to the effect that in the event of Narayanaswami's marriage having been established, he could not have had access to Vanajakshi at any time when Madurai could have been begotten was made by the defendant. This is important as a question like this, which is purely one of fact, if not definitely raised in the pleadings should not, in my opinion, be permitted to be raised during the course of arguments even in the trial Court much less so in a Court of appeal. The relevant portion of the written statement filed on behalf of defendant 1 reads as follows:

> She, (Vanajakshi) remaining unmarried, was following the dancing girl's profession till her lifetime. Narayanaswami Mudali is not her husband nor is he the father of the minor Madurainayakam Mudali nor heir. The suit house never belonged to Narayanaswami Mudali at any time after the death of Madurainayakam Mudali, nor was it in his possession.

If I understand this plea correctly, it only meant to deny the marriage between Vanajakshi and Narayanaswami. There was no allegation in this written statement that even if these two persons were found to have been married to each other, they were living separately and they did not have any access or could not have had any access to each

other and hence Madurai could not have been an offspring of this marriage. That is why no attempt was made by the contesting defendant, according to the trial Court, "to prove non-access as between the married husband and wife." In the absence of any specific plea on that point, as urged by learned counsel for the appellant, this aspect of the case ought not to have been permitted to be raised or discussed by the lower appellate Court and much less to have formed the sole basis of its judgment. This would be sufficient to dispose of the appeal. But, since the circumstances which have led the lower appellate Court to come to the conclusion that the parties to the marriage have had no access to each other have been considered in the judgment under appeal at some length, it appears to be preferable to consider them with the object of testing the inference drawn from them. Had I been even of the opinion that one could have legitimately arrived at the conclusion which the lower appellate Court has drawn from the circumstances mentioned in its judgment, I would have had either to set aside the same on the ground that no such case was ever put forward on behalf of defendant 1 or at any rate remanded the case for further evidence and a fresh decision. But since I am of opinion that even if held to have been established, they are inconclusive, such a contingency does not arise in this case. These circumstances, may, at the most, show that the parties were not living in one house but are wholly insufficient to establish that Narayanaswami could not have had any access to Vanajakshi when both of them were living in the same city.

The first circumstance on which reliance was placed by the learned District Judge was that a will EX. J executed by Vanajakshi in 1902 under which a bequest of her property was made by her to her husband Narayanaswami was revoked by her on 20th May 1903 (EX. 9). There is undoubtedly a reference in this exhibit to certain grievances, which Vanajakshi had against her husband at the time when the will was revoked; but this does not show that the relations between them continued to remain as strained in the following four years as they were in 1903. The lower appellate Court observes after this that there was no reliable evidence showing reconciliation. But who was to show that there was no reconciliation or that they were not on visiting terms? The burden of proving that there was no access lay clearly on defendant 1 who alleged Madurai Naicken to be illegitimate and it was for her to show that they were not reconciled before Madurai could have been begotten or that the feelings between the two continued to remain as bitter and strained as they were in 1903. It is a matter of common knowledge that husbands and wives very often fall out but these differences are made up more often than not and in the absence of a divorce or such other circumstances that may lead me to draw an inference of their continuance, it will be wholly unsafe to assume that they continued to do so. The third circumstance on which a great deal of reliance was placed was an entry in the birth register in which the name of the father was given by one Varathappa Naicken in the first instance as Chinnaswami but that statement was withdrawn at once and the name of the mother was substituted instead — the father's name not having been disclosed at all.

Learned counsel for the respondent has not placed any reliance on the entry which was scored off, although he laid considerable stress on the fact that the name of the mother appeared in the entry and not that of the father. Reliance was placed in this connexion on the decision of a learned Judge of this Court in A I R 1934 Mad 318,[1] in which an entry in the birth register was considered to be relevant. The entry in the birth register may be relevant under S. 35 to show the date of the birth; but how far would the fact that the name of the mother was given and not that of the father by the informant bear on the question of the child's legitimacy depends, even if assumed to be relevant in regard to which I have grave doubts, largely on the means that the informant may be shown to have possessed of the knowledge in connexion with the child's birth. If the informant happens to be a stranger, who did not know the father as a reference to Chinnaswami would seem to point, the statement may be, even if relevant, wholly unimportant. The entry becomes of no value when I find that the informant was not examined and no explanation has been given for the omission to do so. Moreover, in a decision appearing in the same volume in A I R 1934 Mad 630,[2] the relevancy of such a document was doubted by Varadachariar J.

On the death of Vanajakshi certain applications were made by defendant 1 for

1. ('34) 21 AIR 1934 Mad 318 : 149 I C 953 : 66 M L J 283, Sivakami Ammal v. Kooliyandi Chettiar.
2. ('34) 21 A I R 1934 Mad 630 : 155 I C 708 : 67 M L J 389, Guruswami Nadar v. Irulappa Konar.

Madurai's guardianship in 1910. But Narayanaswami was not even referred to in those applications. No notice of those applications was ever given to him. In fact, in those applications Vanajakshi was described as a dancing woman and the petitioner in those applications, who is now defendant 1 in the case, asked for the custody of the child. The lower appellate Court appears to have attached considerable importance to those proceedings. But I cannot understand how various orders in those proceedings are relevant in this case, particularly when Narayanaswami was not even made a party or no notice of the application was given to him. The petitioner in that case was not interested in disclosing Vanajakshi's husband's name, as Narayanaswami has now been found to be, and the omission of his name from those proceedings is very significant and makes the orders passed in those proceedings, which were not proceedings in rem, irrelevant. Section 41, Evidence Act, to which reference was made by learned counsel for the respondent has absolutely no application. Nor could an order like this be relevant under S. 13 of the Act as the right that may be taken to have been recognized in that case was that of the guardianship claimed by defendant 1 and had nothing to do with the parentage of the child which is in issue now. These proceedings might have been of value if Narayanaswami had been notified and failed to allege that he was the father of the boy.

A reference was made by the lower appellate Court to EX. E, an order passed by the Court in connexion with the application for guardianship, whereby defendant 1 was permitted to take possession of the property which had devolved on the minor on the death of his mother. This property happened to be in the possession of certain members of the community. But it cannot be forgotten that the plaintiff's case was that the property was entrusted to them by Narayanaswami himself. Whatever may be the truth, the fact that the persons who got the property did not raise objection to the order of delivery of possession passed by the Court, cannot raise the assumption that Narayanaswami had not delivered possession of the property to them as he had become an ascetic (a fact which was to some extent found by the learned District Judge to have been established) and did not want to deal with the property himself.

A reference to the sale deed by Narayanaswami in favour of the plaintiff in 1925 and the plaintiff's delay in filing the present suit after a notice had been given by him in 1925 appear to my mind to be entirely irrelevant to show what the defendant was required to establish that Narayanaswami could not have had access to Vanajakshi. A great deal of emphasis was laid by learned counsel for the respondent on Narayanaswami's conduct towards the child. But the only finding on that point is that there was no evidence on the record that he took any interest in that child. This by itself could not be of much value. The fact whether Narayanaswami did or did not perform the funeral obsequies of his wife would not be of very great assistance either although there appears to be evidence on the record that he did perform them. In the end, adverse conclusion appears to have been drawn against the plaintiff by the fact that Narayanaswami himself was not examined. But he was summoned by the plaintiff and could not be served. For this the plaintiff could not have been blamed. The oral evidence of the plaintiff, it is true, has not been accepted by the lower appellate Court and the evidence of the defendant's witnesses 2 and 3 has been accepted on the point that Vanajakshi was leading the life of a dancing girl. But neither the rejection of the plaintiff's witnesses nor the acceptance of the statements of D. Ws. 2 and 3 on this point could have any bearing on the question that the Court was called upon to decide. There was no allegation that the marriage that had come into existence between the parties could have been and was ever dissolved and in the absence of any such allegation the only thing that the defendant should have proved was, in the words of the section, that the parties had no access or, as their Lordships of the Privy Council interpreted that word in 66 M L J 288[3] to mean, had no opportunity for sexual intercourse at any time as a result of which Madurai could have been begotten. That she has definitely failed to do and it is impossible to deduce that conclusion from the circumstances detailed in the lower appellate Court's judgment.

My attention was drawn by learned counsel for the respondent to the decisions in 61 M L J 874[4] and in 61 M L J 878[5] and to

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3. ('34) 21 A I R 1934 P C 49 : 147 I C 891 : 12 Rang 243 : 66 M L J 288 (P C), Karapayya Servai v. Mayandi.

4. ('32) 19 A I R 1932 Mad 44 : 135 I C 580 : 55 Mad 292 : 61 M L J 874, Mayandi Asari v. Sami Asari.

5. ('32) 19 A I R 1932 Mad 39: 136 I C 36: 55 Mad 243: 61 M L J 878, Jagannath Mudali v. Chinnaswami Chetti.

(1831-46) 7 E R 365.[6] But the law was not laid down in those decisions in any way differently except to the extent that the definition of the word "access" given in the second of these was not the same. This was not accepted by their Lordships of the Privy Council in 66 M L J 288.[3] When a child is born during lawful wedlock and that is how S. 112 has been drafted, he will have to be assumed to be the child of the man who was at the time the husband of the mother unless it is shown that they had no opportunity of sexual intercourse in consequence of which the child could have been begotten. Since every assumption is to be made in favour of legitimacy of a child who is found to have been born in lawful wedlock, the onus of proving non-access or that of illegitimacy has been laid on the party who alleges the same. The law requires, in such cases the positive proof of a negative fact, that is, non-access as between the parties to the marriage and the mere fact that they are living separately in two different houses is insufficient to establish non-access. The non-access has to be proved like any other physical fact and may be established both by direct and circumstantial evidence of an unambiguous character but unless such evidence is forthcoming, it will not be possible for a Court "to believe it to be probable that there was no access." For the above reasons, the appeal must be accepted and the order of the first Court restored. The plaintiff will have his costs in this Court and in the lower appellate Court. (Leave to appeal refused.)

C.R.K./G.N. *Appeal accepted.*

6. (1831-46) 7 E R 365, Morris v. Davies.

(29) A. I. R. 1942 Madras 133

WADSWORTH AND PATANJALI SASTRI JJ.

Narayanan Chettiar — Petitioner

v.

Ottu Veeru Goundar and another — Respondents.

Civil Revn. Petn. No. 1905 of 1940 (and Appeal No. 72 of 1939 converted into a Civil Revn. Petn.), Decided on 15th October 1940, to revise order of Sub-Judge, Dindigul, D/- 25th August 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), Ss. 19, 8, 9 — Promissory note dated 4-1-1931 and letter of guarantee dated 7-8-1933 —Decree against both executants — Remedy of each for scaling down explained.

In a suit on a promissory note dated 4th January 1931 executed by defendants 1 and 2 and guaranteed by defendants 2 to 5 by letter of guarantee dated 7th August 1933, a decree was passed. Defendants 1 and 5 applied for scaling down of the debt under Section 19:

Held that in an application under S. 19, the Court was entitled only to proceed in accordance with the provisions of that Act, and defendant 5 was entitled to have his liability scaled down with reference to S. 9 and not with reference to S. 8 inasmuch as his liability arose after 1st October 1932. [P 134*b*,*c*]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 19 — Execution—Plea by surety that full amount due from judgment-debtor has been paid cannot be adjudicated.

It may be that under the general law he, the surety, will have a right to resist execution on the ground that the full amount due from the principal debtor has been paid. But an adjudication on such plea cannot form part of proceedings under S. 19 of the Act. [P 134*c*]

(c) Madras Agriculturists Relief Act (4 of 1938), S. 19—Compromise decree can be scaled down with reference to original principal.

A decree on a compromise is substantially the same as a decree on any other contract and to the extent to which the compromise is a renewal of a pre-existing debt the decree has to be scaled down with reference to the original principal : ('41) 28 A I R 1941 Mad 56, *Rel. on.* [P 134*d*]

(d) Madras Agriculturists Relief Act (4 of 1938), S. 19 Proviso—Proviso relates only to costs originally decreed — Compromise decree not separately allocating payments towards costs—Court cannot reopen compromise and act under proviso.

Where the compromise did not separately allocate any portion of the payment towards the cost in the suit it is not proper for the Court to reopen the compromise, tax the cost and treat the payment of the sum so taxed as the amount first to be provided for with reference to S. 19 of the Act. The proviso relates only to costs as originally decreed to the creditor: ('40) 27 A I R 1940 Mad 925 and ('41) 28 A I R 1941 Mad 62, *Rel. on.* [P 134*e*,*f*]

T. P. Gopalakrishnan—for Petitioner.

C. A. Seshagiri Sastri—for Respondents.

Wadsworth J. — This matter has been brought before us as a civil miscellaneous appeal but owing to the doubt regarding the existence of a right of appeal against an order under S. 19 of Madras Act 4 of 1938 we have treated the appeal as a revision petition. The appellant was the decree-holder in a suit on a promissory note. There were five defendants. Defendants 1 and 2 were impleaded as promisors. Defendants 3 to 5 were impleaded as liable under a letter of guarantee. The date of the promissory note was 4th January 1931. The date of the letter of guarantee was 7th August 1933. The suit ended in a compromise decree whereunder an amount of Rs. 5000 and odd was agreed to be due for the debt including interest and costs. There were two applications before the lower Court, one by defendant 1 and the other by defendant 5. There were no applications by defendants 2 to 4 nor was any evidence adduced that they were entitled to the benefits of the Act. The plain-

a tiff asks us to hold that the defendants 2 to 4 are not entitled to the benefit of the scaling down operation. As we read the order of the lower Court, that order purports only to scale down the decree so far as the two applicants are concerned. Had it expressly conferred any benefit on defendants 2 to 4, it would obviously have been necessary to implead those defendants in the appeal before that benefit was taken away; but we do not find that any benefit was in fact conferred under this order upon those defendants who were not parties to the applications. Secondly the plaintiff contends that defendant 5 became liable only on 7th b August 1933 and that his liability under the decree must therefore be scaled down under S. 9 of the Act and not under S. 8, though the principal debtor's liability has to be scaled down under S. 8. It is objected that the liability of the surety must be co-extensive with the liability of the principal debtor with reference to S. 128, Contract Act, and that the order of the lower Court treating both the principal and surety in the same way is therefore correct. It seems to us that in applications under S. 19 of Madras Act, 4 of 1938 the Court is entitled only to proceed in accordance with the provisions of c that Act. In accordance with the provisions of that Act, defendant 5 is entitled to have his liability scaled down with reference to S. 9 and not with reference to S. 8 of the Act. It may be that under the general law he will have a right to resist execution on the ground that the full amount due from the principal debtor has been paid. But that is a plea the adjudication on which cannot properly form part of proceedings under S. 19 of this special Act. We therefore leave it open to defendant 5 in execution to raise any contention which may be available to him with reference to S. 128, Contract Act. d We do not think it necessary to say anything on the further contention of the plaintiff that the decree on the compromise is to be the starting point in the scaling down operation. We have made it clear in our decision reported in 52 M L W 262[1] that a decree on a compromise is substantially the same as a decree on any other contract and that to the extent to which the compromise is a renewal of a pre-existing debt the decree has to be scaled down with reference to the original principal. It has not been shown before us that the decision of the lower Court treating this compromise as a renewal e of the pre-existing liability under the promissory note is out of harmony with the principles just referred to.

It has been brought to our notice by the respondents that the lower Court has gone wrong in regard to its treatment of costs. The compromise did not separately allocate any portion of the payment towards the costs in the suit. In accordance with the decision in 52 M L W 403,[2] it is not proper for the Court to reopen the compromise, tax the costs and treat the payment of the sum so taxed as the amount first to be provided for with reference to the proviso to S. 19 of the Act. This proviso relates only to costs f as originally decreed to the creditor. There is no decree for costs as such. Similarly, it has been settled by a decision of this Bench (*vide* 52 M L W 607[3]) that the proviso applies only to costs as decreed and not to costs in execution. The lower Court is therefore wrong in directing payment to be made towards execution costs before the scaling down process was to start. In the result therefore the appeal, treated as a revision petition, is allowed and the case is remitted to the trial Court for fresh disposal in the light of this judgment. Defendant 1 will be entitled to his costs as against the plaintiff. g The plaintiff and defendant 5 will bear their own costs. The appellant will pay the deficient court-fee.

C.R.K./K.S. *Appeal allowed.*

1. ('41) 28 A I R 1941 Mad 56: 195 I C 752: I L R (1940) Mad 947: (1940) 2 M L J 293: 52 M L W 262, Ramamurthi v. Sitaramayya.

2. ('40) 27 A I R 1940 Mad 925 : (1940) 2 M L J 476: 52 M L W 403, Syama Rao v. Hanumantha Rao.

3. ('41) 28 A I R 1941 Mad 62 : (1940) 2 M L J 685: 52 M L W 607, Venkatammal v. Ramaswami Iyer.

(29) A. I. R. 1942 Madras 134

WADSWORTH AND PATANJALI SASTRI JJ.

Gopala Maller — *Petitioner* h

v.

Vallithokuvayil Velloth Krishnan and another — *Respondents.*

Civil Revn. Petn. No. 250 of 1939, Decided on 25th March 1941, to revise decree of Court of Sub-Judge, Tellicherry, D/- 15th August 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 8, explanation—Debt due by *A* renewed by later debt due jointly and severally by *A* and *B* — *B's* liability is not renewal of antecedent debt though *A's* liability is.

When a debt due by *A* is renewed by a later debt due jointly and severally by *A* and *B*, *B* cannot claim that his liability under the later debt is a renewal of an antecedent debt though *A* can put forward such a claim: ('42) 29 A I R 1942 Mad

133, *Rel. on*; ('41) 28 A I R 1941 Mad 58 and ('41) 28 A I R 1941 Mad 202, *Ref.* [P 135*g*]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 8—Court dealing with actual proceedings in suit — Defences are open not merely under Act but also under general law.

Where the Court under the Act deals with actual proceedings in a suit, defences are open not merely under the Act but also under the general law. [P 135*h*]

(c) Contract — Consideration — Validity — Decree against *A* alone — *A* and *B* executing pronote for decretal amount—Abandonment of decree by promisee against *A* is sufficient consideration for *B*'s liability under pronote.

Where *A* and *B* execute a pronote for the amount due under a decree against *A* alone, the abandonment by the promisee of his decree against *A* is a sufficient consideration for *B*'s liability under the pronote. [P 136*b*]

(d) Contract Act (1872), S. 132—*A* and *B* executing pronote and making themselves jointly and severally liable — Mere knowledge by promisee that *B* was only surety for *A* cannot affect liability of promisors under pronote — Nor can *B* let in parole evidence to vary terms of pronote.

Where *A* and *B* execute a pronote and make themselves jointly and severally liable a mere knowledge by the promisee that *B* was only a surety for *A* cannot affect the liability of the promisors to the promisee under the pronote. Nor is it open to *B* to let in parole evidence to vary the terms of the pronote and whittle down his liability by reason of any private arrangement with *A* to which the promisee was not a party: 18 I C 696 (Mad), *Rel. on.* [P 136*b*,*c*]

O. T. G. Nambiar — for Petitioner.
P. Govinda Menon — for Respondents.

Wadsworth J. — This civil revision petition arises out of an order under S. 19 of Madras Act, 4 of 1938. There is no serious dispute as to the facts. Defendant 1 here and another person were indebted under a contract which was anterior to 1932. That debt ripened into a decree of 1933. To discharge that decree a fresh promissory note was executed by defendant 1 (one of the two judgment-debtors) and by defendant 2 who was not apparently concerned in the earlier debt. Both the defendants are agriculturists and they applied under S. 19 to scale down the debt. The lower Court has scaled down the debt as against both the defendants on the basis of its being a renewal of the original liability. The plaintiff decree-holder has filed the present revision petition in which he contests firstly the validity of Act 4 of 1938 and secondly the propriety of the scaling down order. It is conceded now that the question of the validity of the Act is settled by the Full Bench decision and that so far as defendant 1 is concerned, the scaling down is correct. It is however contended that defendant 2 is not entitled to any relief on the basis of the explanation to S. 8 and that the most that he can claim is the relief under S. 9 in the matter of interest on the promissory note which discharged the decree of 1933.

We have held in (1940) 2 M L J 517[1] that in order to claim the benefit of the explanation to S. 8 the debtor must be the same debtor who incurred the antecedent liability. In (1940) 2 M L J 786,[2] we recognized that there might be cases in which there was a substantial identity of the debtor though in form the debt appeared to have been incurred by different individuals. That was a case of a joint family debt incurred by certain coparceners along with strangers and renewed by different coparceners from those who executed the earlier note. In C. R. P. No. 1905 of 1940[3] we had to deal with an application under S. 19 to scale down a decree against two judgment-debtors one of whom claimed that his liability was only that of a surety, the other judgment-debtor being the person who was liable under the earlier debts to which the decree could be traced back. We held that whereas the judgment-debtor who was a party to the earlier debts could claim that his liability was a renewal of a pre-existing liability, so far as the alleged surety was concerned he could not by any proceeding under Act 4 of 1938 claim that his debt was to be scaled down with reference to the amount for which the principal judgment-debtor was found liable and that if the surety was entitled to relief having regard to the terms of S. 128, Contract Act, he must claim that relief in separate proceedings and not in proceedings under Act 4 of 1938. From this decision it follows that when there is a debt due by A which is renewed by a later debt due jointly and severally by A and B, B cannot claim that his liability under the later debt is a renewal of an antecedent debt, though A can put forward such a claim.

In the present case we are dealing with actual proceedings in a suit so that defences are open not merely under Act 4 of 1938 but also under the general law. It is not denied that defendant 1 is entitled to the benefit under Act 4 which the lower Court has awarded. It is however contended that defendant 2 was liable only as a surety and that by virtue of S. 128, Contract Act, the liability of the principal debtor having been reduced,

1. ('41) 28 A I R 1941 Mad 58 : 193 I C 171: I L R (1941) Mad 128 : (1940) 2 M L J 517, Neelappa Reddiar v. Sulaimuthu Udayan.
2. ('41) 28 A I R 1941 Mad 202 : (1940) 2 M L J 786, Periakaruppan Chettiar v. Appaji Naidu.
3. *Reported in* ('42) 29 A I R 1942 Mad 133, Narayanan Chettiar v. Veeru Goundar.

the surety's liability should be proportionately reduced on the ground that it must be co-extensive with that of the principal debtor. This contention cannot succeed, for in the first place, it is not established that defendant 2 was a surety, strictly speaking. The promissory note EX. A makes it clear that both the defendants bound themselves jointly and severally to pay the amount of the debt to the promisee in consideration for the satisfaction of the decree debt against defendant 1. The lower Court infers from this fact that defendant 2 was a mere surety. But the contract itself makes defendant 2 liable as a principal and for that liability the abandonment by the promisee of his decree against defendant 1 is a sufficient consideration. By the terms of S. 132, Contract Act, a mere knowledge by the promisee that defendant 2 was only a surety for defendant 1 would not affect the liability of the promisors to the promisee under the contract. Nor is it open to defendant 2 to let in parole evidence to vary the terms of the contract EX. A : *vide* 24 M L J 91.[4] By the terms of a written contract both the defendants are jointly and severally liable for the full amount of the debt. There is sufficient consideration as regards both the defendants for this contract and it is not in our opinion open to defendant 2 to try and whittle down his liability by reason of any private arrangement with defendant 1 to which the promisee was not a party. It follows therefore that the decree of the lower Court is correct so far as it relates to defendant 1 but the plaintiff is entitled to a decree as against defendant 2 for the principal amount of the promissory note with interest at 5 per cent. from the date of the note to 22nd March 1938 and thereafter at 6 per cent. and proportionate costs. The petitioner (plaintiff) will pay the costs of defendant 1 in revision and will receive his costs from defendant 2.

C.R.K./G.N. *Order accordingly.*

4. ('13) 18 I C 696 : 24 M L J 91, Narasimham v. Ramaswami.

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(29) A. I. R. 1942 Madras 136

VENKATARAMANA RAO J.

S. M. Enayatullah Saheb — Appellant

v.

S. A. K. Jeelanee Saheb and another — Respondents.

City Civil Court Appeal No. 4 of 1940, Decided on 5th August 1941, against decree of City Civil Court, Madras D/- 25th October 1939.

(a) Married Women's Property Act (1874), S. 6—S. 6 applies to policy effected by Mahomedan male before 1913.

Section 6 governs a policy effected by a Mahomedan male for the benefit of his children even before 1913 : ('14) 1 A I R 1914 Mad 595 (FB) and ('29) 16 AIR 1929 Mad 825, *Rel. on*; ('33) 20 A I R 1933 Mad 764; 37 Bom 471 and ('15) 2 A I R 1915 Cal 9, *Not foll.* [P 138*b*]

Consequently under S. 6 a trust is created in favour of the children for whose benefit the policies were effected though the interest taken by them is contingent : (1926) Ch 48, *Rel. on.* [P 138*c*, *d*]

(b) Married Women's Property Act (1874), S. 6—Whether "object" in S. 6 means beneficiary *(Quære)*.

Whether the word "object" in S. 6 means the beneficiary or purpose. [P 138*f*]

(c) Married Women's Property Act (1874), S. 6 — Trust under S. 6 can be revoked by beneficiary—Beneficiary can transfer or release his interest — Beneficiary not party to release deed is not bound thereby.

A trust under S. 6 can be revoked by the beneficiary by reason of S. 78 (a), Trusts Act : (1933) Ch 126, *Rel. on.* [P 138*g*]

The interest taken by the beneficiary under the policies though contingent can be transferred by reason of S. 58, Trusts Act, because the right created under the policies is not in the nature of a mere right to sue : ('30) 17 A I R 1930 P C 17, *Rel. on.* [P 138*h*]

Since the beneficiary is capable of transferring his interest, he can also release it, the effect of the deed of release being to put an end to the trust. Once the trust is put an end to, the assured becomes the owner of the policies and the moneys payable thereunder. But a beneficiary who was not a party to the release deed is not bound thereby. [P 139*a*, *b*]

Rafiudeen Ahmed — for Appellant.

O. K. Nambiar and Short Bewes & Co. — for Respondents.

Judgment. — This appeal raises a question of some importance touching the applicability of S. 6, Married Women's Property Act, to policies of life insurance effected in 1905 by a Mahomedan on his own life for the benefit of his children. The subject-matter of the suit out of which this appeal arises relates to five policies being Nos. 65284 to 65288. The plaintiff is the father, defendants 2 and 4 to 9 are his sons and defendants 10 and 11 are his daughters. Policy No. 65284 was effected for the benefit of defendant 2, No. 65285 for the benefit of defendant 4, No. 65286 for the benefit of defendant 8, No. 65287 for the benefit of one of his daughters who is not a party to the suit and No. 65288 for the benefit of defendant 10. Defendant 1 is the Oriental Life Assurance Company with whom the policies were effected. Defendant 3 is the Official Assignee of Madras representing the estate of defendant 2. The suit is for a declaration that the plaintiff is the owner of the said policies and that none of the several defendants for whose benefit the policies were effected are entitled

to claim any rights thereunder. The basis of the claim is that the Married Women's Property Act does not apply to Mahomedans and therefore under S. 6 of the Act none of the children for whose benefit the plaintiff effected the policies will obtain any benefit thereunder; that even assuming they obtained such benefit, it was released or transferred in favour of the plaintiff in pursuance of a family arrangement by a release deed dated 31st July 1935. Defendant 1 company has contended that the policies were effected in Bombay and that the Married Women's Property Act is not applicable to the policies in question as they were effected long before 1923.

The contention on behalf of defendants 3 and 4 was that under S. 6, Married Women's Property Act, a trust was created in favour of the several beneficiaries for whose benefit the policies were effected, that there was no family arrangement, that the deed of release on which reliance was placed by the plaintiff could not put an end to the trust in their favour and therefore the plaintiff is not entitled to any declaration. The parties did not adduce any oral evidence and contented themselves with filing certain documents. The learned City Civil Judge came to the conclusion that the Married Women's Property Act applied to the policies in question, that there was a family arrangement by which the parties surrendered their rights in favour of the plaintiff and the trust was therefore put an end to. On these findings he gave a declaration in favour of the plaintiff. Defendant 4 has preferred this appeal. Defendant 1 has filed a memorandum of objections raising a contention that the Married Women's Property Act would not apply to these policies and that in any event defendant 2 not being a party to the deed of release it would not bind him. The first question which arises for decision is whether S. 6, Married Women's Property Act, governs the policies in question. In 37 Mad 483[1] the applicability of S. 6, Married Women's Property Act, to a policy of insurance effected by a Hindu male on his own life for the benefit of his wife and children came for decision and it was held that S. 6 of the Act applied to the policy in question. This decision would govern a similar policy effected by a Mahomedan male. The Bombay High Court in 37 Bom 471[2] took a different view on a claim made by a widow in respect of a policy effected by her husband for her benefit and it was held that as the Act of 1874 did not apply to Hindus, she could not claim the benefit of its provisions. This view was followed in 18 C W N 1335[3] and the learned Judges were of the opinion that

> although S. 2 of the Act expressly provides that nothing in the Act applies to any married woman who at the time of her marriage professed the Hindu amongst other religions, or whose husband at the time of such marriage professed that religion and does not expressly exempt their children from the operation of the Act, the intention of the Legislature taking the Act as a whole, is to exclude the children also from the benefits of S. 6 of the Act.

They dissented from the decision in 37 Mad 483.[1] Apparently, in consequence of this conflict of views, the Married Women's Property Act was amended in 1923 by an amending Act and the following proviso was introduced to S. 6 :

> Notwithstanding anything contained in S. 2 the provisions of sub-s. (1) shall apply in the case of any policy of insurance such as is referred to therein which is effected by any Hindu, Mohamedan, Sikh or Jain in Madras, after the 31st day of December 1913 or in any other part of British India after the 1st day of April 1923.

After this amending Act came into force, the question of the applicability of the Act to life policies effected before 1913 came up for consideration in our High Court, and it was contended before Venkatasubba Rao and Madhavan Nair JJ. (52 Mad 936[4]) who were dealing with the matter that the amendment of S. 6 introduced by the Amending Act of 1923 clearly implied that the Full Bench decision was wrong. The contention was that as the proviso says :

> The provisions of sub-s. (1) shall apply in the case of any policy of insurance such as is referred to therein which is effected by any Hindu, Mahomedan, Sikh or Jain in Madras after the 31st December 1913.

It indicates that the Act would not apply to a policy effected before that date. This contention was repelled and the learned Judges held that the Full Bench decision governed the case and that all the policies effected before 1923 would be governed by the Act of 1874 as it stood before the amendment. Subsequent to this decision a question arose with reference to a claim made by a widow of a Hindu male on a policy effected in Calcutta by her husband for her benefit and the learned Judges, the Chief Justice

1. ('14) 1 A I R 1914 Mad 595: 20 I C 934: 37 Mad 483: 25 M L J 65 (FB), Balamba v. Krishnayya.
2. ('13) 37 Bom 471: 19 I C 736: 15 Bom L R 320, Shanker Viswanath v. Umabai Sadashiv.
3. ('15) 2 A I R 1915 Cal 9 : 25 I C 236 : 20 C L J 44: 18 C W N 1335, Ishani Dasi v. Gopal Chandra.
4. ('29) 16 A I R 1929 Mad 825 : 121 I C 496 : 52 Mad 936: 57 M L J 793, Rama Rao v. Kristnamma.

and Bardswell J. in 65 M L J 455[5] made the following observations :

> The point to be considered by us here is, where was this policy of insurance effected ? If it was effected in Madras, then a trust has been created in favour of the assured's wife and the policy money has to be paid to the Official Trustee of Madras ; and that is by reason of S. 6, Married Women's Property Act. If, on the other hand, the policy was effected in Calcutta, it having been effected in 1919, that is to say, before 1923, there is no trust and letters of administration will have to be taken out by the widow of the assured for the purpose of obtaining the policy money.

Neither the Full Bench decision in 37 Mad 483[1] nor the decision in 52 Mad 936[4] was noticed and considered. So far as this High Court is concerned, the Full Bench decision in 37 Mad 483[1] is a clear authority for the position that S. 6, Married Women's Property Act, would govern a policy effected by a Mahomedan male for the benefit of his children. No doubt it may be contended, as it was contended in 52 Mad 936[4] that the mention of date "December 1913" in the proviso introduced by the Amending Act was made with reference to the Full Bench decision in 37 Mad 483[1] and it was the intention of the Legislature to make it plain that having regard to the interpretation placed on S. 6 in 37 Mad 483[1] all policies effected after 1913 should be governed by the Act though the Act was passed in April 1923. But the proviso cannot be construed as a declaratory enactment declaring what the previous law was and therefore from the positive nature of the enactment that from a particular date the Act should apply, it does not arise by necessary implication that the Act would not apply to a policy effected before that date. Whatever it is, so long as the Full Bench decision in 37 Mad 483[1] stands, it must be treated as the governing law so far as our Court is concerned. If S. 6 of the Act were to apply there can be no doubt that a trust was created in favour of the several defendants for whose benefit the suit policies were effected though the interest taken by them was contingent. Tomlin J. in dealing with a similar policy in (1926) Ch 48[6] at page 53 observed thus :

> It is true it is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think therefore that the policy creates a trust in favour of the wife, but only in the terms of the trust.

The next question is what is the effect of the family arrangement and the consequent execution of the release deed by the defendants who executed it. It is contended before me that such a release is invalid and inoperative having regard to the express language of S. 6 of the Act which says that so long as the object of the trust remains it can never become the property of the plaintiff. It is contended that the expression "object" in the section means the beneficiary and so long as the beneficiary is alive, it must be taken that the object of the trust remains. This section is borrowed from the provisions of the English Act (S. 10, Married Women's Property Act, 1870) and there is a conflict in English law as to what the expression 'object' means. According to one view the expression 'object' means beneficiary; according to another view, it means purpose : *vide* (1930) 2 Ch 37[7] and (1933) Ch 126.[8] It seems to me that it is not necessary to deal with this conflict in the view I am taking of the effect of the deed of release. Section 6, Married Women's Property Act, provides that the policy money should not form part of the estate of the insured only so long as the object of the trust remains. But if the performance of the trust becomes impossible or the trust fails or otherwise is satisfied or comes to an end, the policy money will form part of the estate of the insured. In (1933) Ch 126[8] at p. 139 Romer L. J. in construing S. 11, Married Women's Property Act, 1882—corresponding to S. 6 of the Indian Act — observed that the proviso meant that

> the policy moneys shall not form part of the estate of the insured or be subject to his or her debts until the trusts have come to an end.

Therefore the trust can come to an end by revocation of it. Section 78 (a), Trusts Act, provides that a trust can be revoked where all the beneficiaries are competent to contract by their consent. It was therefore perfectly competent to the several defendants to revoke the trust created by the policies in their favour. Under S. 58, Trusts Act, it is also clear that it is competent for a beneficiary to transfer his interest. The interest taken by the several defendants under the policies though contingent can be transferred because the right created under the policies is not in the nature of a mere right

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5. ('33) 20 A I R 1933 Mad 764 : 145 I C 998 : 65 M L J 455, National Insurance Co. Ltd., Calcutta v. Seethammal.
6. (1926) 1926 Ch 48 : 95 L J Ch 195 : 1926 W C & I Rep 1 : 135 L T 374, Fleetwood's Policy In re.
7. (1930) 2 Ch 37 : 99 L J Ch 241 : 143 L T 329 : (1929-30) B & C R 173, In re Collier.
8. (1933) 1933 Ch 126 : 102 L J Ch 114 : 1933 W C & I Rep 164 : 148 L T 101 : 49 T L R 12, Cousins v. Sun Life Assurance Society.

to sue: *vide* 8 Rang 8.[9] If the beneficiary is capable of transferring his interest, he can also release it. The effect of the deed of release therefore is to put an end to the trust. Once the trust is put an end to, the plaintiff becomes the owner of the policies and the moneys payable thereunder. Defendant 4 was a party to the deed of release and he was competent to contract on that date. On his own admission the deed of release was executed on account of the family arrangement by which the plaintiff settled his own property on his children. I would therefore dismiss the appeal of defendant 4 with costs, one set to be shared between respondents 1 and 2. In regard to the memorandum of objections, it must be noticed that defendant 2 was not a party to the release deed. The finding of the learned City Civil Judge as to the existence of the family arrangement was based on the admission made in the deed of release and as defendant 2 was not a party to it, it will not be open to the Court to bind him by the said document. Therefore the declaration so far as defendant 2 is concerned must be set aside. The memorandum of objections is allowed only so far as defendant 2 is concerned. I may point out that defendant 1 company stated before the learned City Civil Judge that they did not dispute the jurisdiction of the Court to deal with the case and before me too, the question of jurisdiction was not raised. As defendant 1 company have partly failed and partly succeeded, I direct the company to bear their own costs in the memorandum of objections.

C.R.K./G.N. *Order accordingly.*

9. ('30) 17 AIR 1930 P C 17 : 121 I C 225 : 8 Rang 8 : 57 I A 10 (P C), Mayait v. Official Assignee.

(29) A. I. R. 1942 Madras 139

LEACH C. J. AND
VENKATARAMANA RAO J.

Messrs. Sha. Moolchand Kesarimull by its partner Mita Lal — Appellant

v.

Messrs. Associated Agencies, Firm of Merchants — Respondent.

Appeal No. 22 of 1940, Decided on 24th April 1941, against judgment and decree of Gentle J., in C. S. No. 215 of 1939, D/- 30th January 1940.

(a) Contract — C. I. F. contract — Effects of stated — Breach — Cancellation of contract — Validity — Test — Contract partly typed and partly printed — *A* agreeing to purchase and *B* agreeing to sell 60 bottles of quicksilver to be imported from Italy, half quantity to be shipped in July 1939 and remaining half in August 1939 — Typed portion mentioning terms as "Document against sight payment" — Printed portion providing that on arrival of steamer by which goods were shipped indentor should take up documents which would be delivered against payment only — On receipt of bill of lading and other documents relating to first consignment *B* presenting same to *A* and on *A's* refusal to pay for same cancelling whole contract and refusing to give delivery of second consignment when received — Contract held lawfully cancelled by *B* — *A* held not entitled to delivery of second consignment.

The tender of the goods under a C. I. F. contract is effected by the tender of the bill of lading and accompanied in case the goods have been lost in transit, by the policy of marine insurance, which it is the seller's duty to take out for the protection of the buyer. In the absence of any stipulation with regard to the time for payment, the payment must be made when the bill of lading and other necessary shipping documents are presented to the buyer, provided, of course, that the goods have been shipped within the stipulated period and the documents are presented at a reasonable time. [P 141*d*, *e*]

Under a contract which was partly typewritten and partly printed in a form commonly used by *B*, a firm of merchants, *A* agreed to buy and *B* agreed to sell 60 bottles of quicksilver to be obtained from Italy and it was stipulated that there should be a shipment of half the quantity in July and half in August 1939. The typewritten portion of the document included these terms: "Price: £16-12-0 per steel bottle, c. i. f. Madras. Terms: Document against sight payment." The document also contained a printed clause that "on arrival of the steamer by which the goods have been shipped, the indentor shall take up the documents. The documents shall be delivered against payment only." It was contended by *A* that the printed clause gave him liberty to refuse to pay until the goods had actually arrived in Madras and that he was not liable to pay for each consignment as soon as the bill of lading and the other shipping documents were presented to him, irrespective of the arrival of the goods. The goods comprising first consignment were duly shipped from Italy, but the ship never arrived in Madras due to outbreak of the war. On receipt of the relevant shipping documents with regard to the first consignment *B* forwarded the same to *A* on 23rd August and on his failure to pay the amount due wrote to *A* on 8th September 1939 demanding payment within 24 hours and informing him that on his failure to comply with the demand, the contract would stand cancelled and he would be held responsible for the damages which might be incurred as the result of his non-compliance with the demand. This letter brought a reply from *A* in which he stated that he would make arrangements for payment to the bank as soon as the steamer had arrived in port. When second consignment arrived on 19th September 1939, *A* wrote to *B* claiming that delivery should be given to him, but *B* refused to do so on the ground that the contract had been cancelled by reason of *A's* breach in respect of the first consignment:

Held that (1) the contract was a C. I. F. contract. There being a direct conflict between the typed portion and the printed portion, the typed portion prevailed and entitled *B* to present the bill of lading and other documents to *A* when he did and that the presentation required *A* to pay then and there for the goods represented by the documents. *A* having refused to pay the price of the goods comprised

in the first consignment when the documents were presented and payment demanded broke the contract and therefore could have no claim in respect of that consignment. [P 141*c*; P 142*c*,*d*,*e*]

(2) In deciding whether there had been a repudiation of the contract, regard must be had first, to the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that the breach will be repeated. Since the reason given by *A* for refusing the first consignment was a breach which *B* might well expect to be repeated with regard to the second half of the consignment and the breach which took place when *A* refused to pay for the first consignment was a refusal to perform the contract to the extent of one-half, the contract was lawfully cancelled by *B* and consequently *A* had no claim to the goods which comprised the second consignment : (1934) 1 K B 148 and (1882) 50 L J Q B 529, *Rel. on*; (1884) 9 A C 434, *Disting.*

[P 142*e*,*f*,*g*]

(b) Contract—Construction — Contract partly typed and partly printed — If both portions can be read together effect must be given to all provisions — Printed portion not reconcilable with typed one — Typed portion must prevail.

If the typewritten and the printed portions of a contract can be read together, effect must, of course, be given to all the provisions, but if the printed portion cannot be reconciled with the typewritten portion the typewritten portion must prevail : (1803) 4 East 130; (1864) 33 L J Q B 97; (1893) A C 351; 30 Bom 1 and ('28) 15 AIR 1928 Bom 170, *Rel. on.*

[P 141*e*]

(c) Deed—Construction — Intention must be gathered from words used — Surrounding circumstances are not to be ignored.

The intention of the parties to a document must be gathered from the words used, but, in deciding what was the intention the Court is not called upon to ignore the surrounding circumstances. [P 142*a*]

K. Rajah Ayyar, K. S. Raja Gopalachariar and P. V. Subramaniam — for Appellant.

T. A. Rangachari — for Respondent.

Leach C. J.—The appellant sued on the original side of this Court to recover a sum of Rs. 7920 claimed as damages for breach of contract. The appellant also asked for an order directing specific performance of part of the contract and put his claim for damages here in the alternative. The nature of the contract, however, precludes any decree for specific performance being granted and the claim for damages alone calls for consideration. Gentle J., who tried the suit came to the conclusion that there had been no breach of the contract by the respondents, but the appellant himself had broken it. The contract is partly typewritten and partly printed, and is dated 5th July 1939. A printed form commonly used by the respondents, who are a firm of merchants, carrying on business in Madras was used, but the main provisions were inserted by means of a typewriter at the beginning of the document. By the typewritten portion, the appellant agreed to buy and the respondents agreed to sell 60 bottles of quicksilver, each bottle to contain 34·5 kilograms net. The quicksilver had to be obtained from Italy and it was stipulated that there should be a shipment of half the quantity in July and half in August 1939. The typewritten portion of the document includes these terms :

Price.—£16-12-0 per steel bottle, C. I. F. Madras.
Terms.—Document against sight payment.

It is a C. I. F. contract and if the document had stopped at the end of the typewritten portion there could be no doubt that the appellant would have made himself liable to pay for each consignment as soon as the bill of lading and the other shipping documents were presented to him, irrespective of the arrival of the goods. Mr. Rajah Iyer on behalf of the appellant has rightly conceded this, but he relies on the following statement in para. 3 of the printed conditions:

On arrival of the steamer by which the goods have been shipped, the indentor shall take up the documents. The documents shall be delivered against payment only.

He says that this clause gave him liberty to refuse to pay until the goods had actually arrived in Madras. The case for the respondents is that the printed clause is in direct conflict with the typewritten portion of the document and that the typewritten portion must prevail. The goods comprising the first consignment were duly shipped from Italy, but the ship never arrived in Madras. The goods were placed on board a German vessel and was at sea when the present war broke out on 3rd September 1939. The vessel was apparently in the vicinity of Mormagao in Portugese territory on the out-break of hostilities and sought refuge there. The August portion of the contract was duly shipped on a Dutch vessel and arrived in Madras on 19th September 1939. On 18th August 1939 the respondents wrote to the appellant informing him that they had received the relevant shipping documents with regard to the first consignment and they would be sending their invoice for the amount due in respect of the goods in the course of the week. The invoice and the relative shipping documents were forwarded to the appellant the next day and on 23rd August the respondents wrote to the appellant enclosing a copy of the invoice which had been certified by the customs and asked him to pay the amount into the Eastern Bank Ltd., Madras. On the same day, the manager of the Eastern Bank Ltd., wrote to the appellant informing him that he had received instructions to collect the amount and requested him to make arrangements for pay-

ment. The appellant took no notice of these communications. On 8th September 1939, the respondents wrote to him demanding payment within 24 hours and informing him that on his failure to comply with the demand, the contract would stand cancelled and he would be held responsible for the damages which might be incurred as the result of his non-compliance with the demand. This letter brought a reply from the appellant two days later, in which he stated that he would make arrangements for payment to the bank as soon as the steamer had arrived in port. He did not challenge the validity of the respondents' demand for immediate payment.

When the second consignment arrived on 19th September 1939 the appellant, through an advocate, wrote to the respondents claiming that delivery should be given to him, but the respondents refused to do so on the ground that the contract had been cancelled by reason of the appellant's breach in respect of the first consignment. Thereupon the appellant filed this suit. He maintained that he was fully justified in refusing to pay for the first consignment until the ship carrying the goods had reached Madras, and that as there had been no breach of contract on his part he was entitled to delivery of the goods which had been consigned in August and had arrived here in September. He also averred that even if there had been a breach of the agreement on his part, the breach was not of a nature which warranted the respondents cancelling the contract, and therefore he was entitled in law to delivery of the second consignment. The learned Judge decided against the appellant on all his contentions.

The contract is a C. I. F. contract, whether it is to be construed in the way the appellant would have it construed or in the respondents' way. The effects of a C. I. F. contract are fully stated in the judgment of Kennedy L. J. in (1911) 1 K B 934[1] which received the approval of the House of Lords, (1912) A C 18.[2] The tender of the goods under a C. I. F. contract is effected by the tender of the bill of lading and accompanied, in case the goods have been lost in transit, by the policy of marine insurance, which it is the seller's duty to take out for the protection of the buyer. As the result of the decision in (1911) 1 K B 934[1] it is now settled law that in the absence of any stipulation with regard to the time for payment, the payment must be made when the bill of lading and other necessary shipping documents are presented to the buyer, provided, of course, that the goods have been shipped within the stipulated period and the documents are presented at a reasonable time. If the typewritten and printed portions of the contract can be read together, effect must, of course, be given to all the provisions but if the printed portion cannot be reconciled with the typewritten portion the typewritten portion must prevail : *see* (1864) 33 L J Q B 97[3] and (1893) A C 351.[4] In (1893) A C 351,[4] the House of Lords had to construe a charter party, and in his judgment in this case Lord Herschell said :

> Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent.

Lord Halsbury agreed and in so doing laid stress on the principle stated by Lord Ellenborough in (1803) 4 East 130[5] at p. 135, where Lord Ellenborough said :

> The words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning and the printed words are a general formality adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.

The same principle has been accepted in India: *see* 30 Bom 1[6] and 30 Bom L R 415.[7] Therefore cl. (3) of the printed terms of this contract must be given effect to if this can be done without doing violence to the typewritten portion, but not otherwise. Before turning to examine in detail the two portions of the document, I would mention that this contract was entered into at a time

1. (1911) 1 K B 934, Biddell Bros. v. Clemens Horst Co.
2. (1912) 1912 A C 18: 81 L J K B 42: 105 L T 563: 17 Com Cas 55: 12 Asp M C 80: 56 S J 50: 28 T L R 42, Clemens Horst Co. v. Biddell Bros.
3. (1864) 33 L J Q B 97 : 4 B & S 680 : 129 R R 890, Gumm v. Tyril.
4. (1893) 1893 A C 351 : 62 L J Q B 466 : 1 R 193 : 69 L T 1 : 7 Asp M C 366, Glynn v. Margeston & Co.
5. (1803) 4 East 130 : 4 Esp 246 : 7 R R 535, Robertson v. French.
6. ('06) 30 Bom 1 : 6 Bom L R 948, Paul Beir v. Chotilal Javerdas.
7. ('28) 15 AIR 1928 Bom 170 : 109 I C 470 : 30 Bom L R 415, Mohanlal Kashinath v. Krishna Premji & Co.

when war clouds were gathering. The goods had to be obtained from Italy, a direction from which some of the war clouds were coming. The printed form represented the usual conditions on which the respondents did business in normal times. Therefore it can be well understood that in entering into the contract the sellers insisted that the buyer should pay the price as soon as the bill of lading and other relevant documents were presented to him. The intention of the parties must be gathered from the words used, but in deciding what was the intention the Court is not called upon to ignore the surrounding circumstances.

I have already indicated that in my opinion the typewritten portion of the document if read alone entitled the respondents to present the bill of lading and other documents to the appellants when they did and that the presentation required him to pay then and there for the goods represented by the documents. Reading the typewritten portion in conjunction with the printed portion I am of opinion that there is a direct conflict. The expression "at sight" means on demand, and therefore the words "documents against sight payment" can only mean that the appellant was to pay when the documents were presented to him. The printed portion relied upon by the appellant stipulates that the appellant should only be required to pay after the arrival of the steamer in Madras. Mr. Rajah Iyer has suggested that the two portions can be reconciled by reading them as embodying these conditions : (1) the appellant should not be required to pay until the goods arrived; (2) after arrival the appellant should pay as soon as the shipping documents were presented to him. I cannot accept this construction. In the typewritten portion of the document, which is the governing portion, there is an unqualified statement to the effect that goods must be paid for at sight, that is whenever the shipping documents were presented. The subsequent printed condition is a negation of this condition. The learned Judge has read the contract in this way and I am in full agreement with what he has said. The parties could, of course, have contracted that payment should not be demanded until after the arrival of the goods, but this they have not done, and no doubt the war clouds were responsible for the respondents refusing to do business in these goods on the condition to be found in cl. (3) of their printed form. The appellant having refused to pay the price of the goods comprised in the first consignment when the documents were presented to him and payment demanded means that he broke the contract and therefore can have no claim in respect of that consignment.

It remains to decide whether the appellant had the right of demanding that delivery should be made of the goods consigned in August 1939. In (1934) 1 K B 148[8] Lord Hewart C. J. in delivering the judgment of the Court of Appeal pointed out that in deciding whether there has been a repudiation of the contract, regard must be had first, to the ratio quantitatively which the breach bears to the contract as a whole, and secondly the degree of probability or improbability that the breach will be repeated. In the present case Gentle J. considered that the reasons given by the appellant for refusing the first consignment was a breach which the respondents might well expect to be repeated with regard to the second half of the consignment and I see no reason for dissent from this opinion. The first consideration referred to by Lord Hewart C. J. also applies here. The breach which took place when the appellant refused to pay for the first consignment was a refusal to perform the contract to the extent of one half. When there is a contract for the sale of goods to be delivered in two instalments and the buyer wrongly refuses to take delivery of the first instalment the breach of contract is so extensive that the seller is entitled to cancel the contract and be compensated for any loss suffered by him. In (1882) 50 L J Q B 529[9] the Court of Appeal held that a seller was entitled to cancel a contract when the buyer had refused to take delivery of goods representing one-third of the total sold under the contract. The considerations which applied in (1884) 9 A C 434[10] do not arise here, but (1882) 50 L J Q B 529[9] has direct bearing. I hold that the contract was lawfully cancelled by the respondents and consequently the appellant had no claim to the goods which comprised the second consignment. For these reasons I would dismiss the appeal with costs. I also consider that there should be a certificate for two counsel.

Venkataramana Rao J.—I agree with my Lord the Chief Justice that the view of

8. (1934) 1 K B 148 : 103 L J K B 513 : 150 L T 69 : 39 Com Cas 89 : 50 T L R 58, Maple Flock Co. v. Universal Furniture Products (Wembley), Ltd.
9. (1882) 50 L J Q B 529 : 7 Q B D 92 : 45 L T 202 : 29 W R 830, Honck v. Muller.
10. (1884) 9 A C 434 : 53 L J Q B 497 : 51 L T 637 : 32 W R 989, Mersey Steal & Iron Co., Ltd. v. Naylor, Benzon & Co.

a Gentle J. on both the points is correct and the appeal should be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 143

WADSWORTH AND PATANJALI SASTRI JJ.

Sri Chitturi Narayanamma—Appellant

v.

Vankina Venkatachalam and another — Respondents.

Appeal No. 71 of 1939, Decided on 2nd September 1941, against decree of Sub-Judge, Ellore, D/- 31st August 1938.

(a) Madras Agriculturists Relief Act (4 of b **1938), Ss. 3 (v), 8 Expl.—Creditor does not include person beneficially entitled to amount lent.**

The definition of the word 'creditor' in S. 3 (v) though it expressly includes the creditor's heirs, legal representatives and assigns, does not include the person beneficially entitled to the amount lent. Therefore where a debt in favour of *A* is discharged by a debt in favour of *B*, it will not be open to the debtor to let in evidence to show that the money which he owes to *B* is really the money of *A* so as to bring into force the explanation to S. 8: ('41) 28 A I R 1941 Mad 321, *Ref.* [P143*g*; P 144*f*,*g*,*h*]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 8 Expl. — Promissory notes executed by father — The debts allotted to son on partition and son executing fresh document — Son cannot claim to scale down debts.

c Where certain promissory notes have been executed by a father and the debts thereunder are allotted to the son on partition and the son executes fresh document, the son cannot claim to scale down the debts : ('41) 28 A I R 1941 Mad 663, *Rel. on*; ('41) 28 A I R 1941 Mad 356, *Expl., and Disting.* [P 144*c*]

A. Lakshmayya — for Appellant.

V. Govindarajachari — for Respondents.

Wadsworth J. — The plaintiff appeals against the reduction of her claim on the basis of a defence under Madras Act, 4 of 1938. The suit was on a mortgage (Ex. A) dated 10th January 1931 executed by defendant 1 in favour of the plaintiff for the sum of Rupees d 20,000. The mortgage deed recites four previous debts, the discharge of which provided the consideration for the document. They are as follows: (1) Ex. B, a promissory note for Rs. 3000 dated 18th August 1928 executed by defendant 1's father in favour of P. W. 4, the husband of the plaintiff; (2) Ex. D, a promissory note for Rs. 2025 dated 30th September 1929 between the same parties, i. e., defendant 1's father and the plaintiff's husband; (3) Ex. C, a promissory note for Rs. 5429-5-0 executed on 11th February 1930 by defendant 1 himself in favour of the plaintiff's husband. This promissory note recites the discharge of an earlier promissory note debt incurred by defendant 1's father, which debt had been allotted to defendant 1 in the division effected between him and his father; (4) Ex. E, a pro- e missory note for Rs. 6000 executed on 18th August 1928 by defendant 1's father in favour of the plaintiff herself. The learned Subordinate Judge went at some length into the evidence whether the plaintiff was really a benamidar for her husband and whether the monies advanced to defendant 1's father, which debts become consolidated in the suit mortgage, were the monies of the plaintiff herself or those of her husband. At the time when this case was decided, the Courts had not the benefit of the decisions which have helped to elucidate Act 4 of 1938 and it was not realised that in order to claim the bene- f fit of the explanation to S. 8, there must be a substantial identity of both parties to the debt, with the parties to the prior debts of which it is alleged to be a renewal.

We held in I L R (1941) Mad 248[1] that when there was a mortgage debt which was claimed to be a renewal of an antecedent promissory note debt in favour of a different person, it was not open to the petitioner to contend that the creditor under the promissory note was some one other than the promisee whose name appears in the note. That conclusion was based upon the provi- g sions of the Negotiable Instruments Act, but we point out incidentally that the definition of the word 'creditor' in S. 3 (v) of Act 4 of 1938, though it expressly includes the creditor's heirs, legal representatives and assigns, does not include the person beneficially entitled to the amount lent. In (1941) 1 M L J 773[2] we had to deal with the position where a joint family owed a debt and at the partition of the family this debt was allotted to one of the former coparceners who executed a fresh document in favour of the creditor. We held that the contract executed by the individual debtor in substi- tution for the earlier debt owed by the joint h family was not a debt renewed or included in a fresh document in favour of the same creditor, holding the view that there must be a substantial identity of the debtor as well as the creditor. We have, of course, held that where there is a joint family debt for which one coparcener has signed, which is renewed by another joint family debt for which a different coparcener signs, there is a sub-

1. ('41) 28 A I R 1941 Mad 321 : 195 I C 776 : I L R (1941) Mad 248 : (1940) 2 M L J 664, Varadarajam v. Krishnamurthi.

2. ('41) 28 A I R 1941 Mad 663 : 196 I C 474 : (1941) 1 M L J 773, Karuppanna Goundan v. Marutha Pillai.

a stantial identity of the debtor sufficient to satisfy the criterion which we have laid down. In one case, (1941) 1 M L J 39,[3] we had to deal with the rather peculiar circumstances of a debt due by a joint family consisting of four brothers, one of whom executed a release deed and went out of the family whereafter the other three brothers, who continued to form the joint family, renewed the debt in their own names. We held in the special circumstances of the case that there continued to be a debt due by the same family as that which had originally incurred the debt.

b Now, applying these decisions to the facts of the present case, the four debts superseded by EX. A may be classified as follows. Those evidenced by EXS. B and D are debts in which neither of the parties is a party to the suit debt, the debtor being the father of defendant 1 and the creditor being the husband of the plaintiff. In each of the two transactions evidenced by EXS. C and E there is one party common to EX. A though the other party is different. In EX. C the debtor is defendant 1 himself but the creditor is the plaintiff's husband, while in EX. E the debtor is defendant 1's father and the creditor is the plaintiff herself. It seems clear from the
c recitals in EX. C that there was a regular partition between defendant 1 and his father, the date of which must have been some time between September 1929 and February 1930 judging from the recitals in EXS. D and C. It follows that there is a different debtor in each of the antecedent debts evidenced by EXS. B, D and E and on the strength of our decisions defendant 1 cannot claim to scale down the suit debt with reference to antecedent debts of the joint family allotted to him at the partition in respect of which he has executed fresh documents.

d With reference to EX. C, the debtor is the same. The promisee under EX. C is the plaintiff's husband, whereas under the later mortgage the creditor in the document is the plaintiff herself. But it was found by the lower Court that the plaintiff took this mortgage as a benamidar for her husband. In the view we take of the law it is unnecessary for us to decide whether the lower Court's decision on the facts is correct or not. We are unable to accept the view that the debtor can scale down the debt under EX. A on the basis that the real creditor under EX. A is the promisee under the earlier note EX. C.

3. ('41) 28 AIR 1941 Mad 356 : (1941) 1 M L J 39, Ramasubbier v. Rama Iyer.

e Our decisions have already gone so far as to make it impossible for the debtor to contend that the promisee under EX. C is a benamidar for the later mortgagee. But we have not so far held in a case where the debt is neither due under a negotiable instrument nor under a decree, that the plea of benami cannot be called in aid in order to establish the identity of the creditor under the later debt with the creditor under the earlier debt. The observation already referred to at p. 254 in I L R (1941) Mad 248[1] does contain an indication of the view which we are now setting forth. When we have to decide whether one creditor is the same person as another creditor, we f are entitled to look to the definition in the Act and when that definition expressly includes heirs, legal representatives and assigns, there is much to be said for the view that the non-mention of beneficiaries must justify an inference that they are not included in the definition of "creditor." Ordinarily speaking, when we speak of a creditor, we mean the person with whom the debtor has contracted and to whom he looks for his discharge; we do not mean the person to whom the money will eventually go after it has been collected. In order to justify the interpretation of the term "creditor" as including a beneficiary who will eventually be g entitled to the proceeds of the debt, there ought to be some express indication in the enactment which we do not find.

On the other hand, the explanation to S. 8 seems clearly to indicate that we must look to the document ordinarily to find out who is the creditor. The words "where a debt has been renewed or included in a fresh document in favour of the same creditor" do seem to indicate that in order to ascertain whether the latter creditor is the same as the earlier creditor, we must look to the writing. No doubt in the special case of one creditor who can be shown to be an assign h or a legal representative or a heir of the previous creditor, the Act comes to the debtor's aid and, provided he can prove that this relationship exists between the two, the identity of the creditors will be established. But ordinarily speaking, when we have a debt in favour of A discharged by a debt in favour of B, it will not in our opinion be open to the debtor to let in evidence to show that the money which he owes to B is really the money of A so as to bring into force the explanation to S. 8. It follows therefore that the lower Court was wrong in scaling down the debt under EX. A on the basis that it was a renewal of previous debts between the

same parties. The debt under EX. A was contracted in January 1931. It therefore falls under cl. (1) of S. 8 and the plaintiff will be entitled to a decree for the principal sum of Rs. 20,000, with interest at 6¼ per cent. per annum from 1st October 1937 till the date fixed for redemption, which will be three months hence, and subsequent interest at 6 per cent. The plaintiff will have full costs in the trial Court and also the costs in the appeal.

C.R.K./K.S. *Appeal allowed.*

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* (29) A. I. R. 1942 Madras 145

WADSWORTH AND PATANJALI SASTRI JJ.

Al. Sp. S. Rm. Subramanian Chettiar — Petitioner

v.

Chinnamuthu Batcha Rowther and another — Respondents.

Civil Revn. Petn. No. 199 of 1941, Decided on 28th August 1941, to revise decree of Dist. Munsif, Periyakulam, D/- 17th September 1940.

*** Contract Act (1872), Ss. 128, 134 — Discharge of principal debtor by operation of law does not discharge surety — Surety cannot take advantage of partial discharge which principal debtor gets by Madras Agriculturists Relief Act.**

A discharge of the principal debtor by operation of law does not discharge the surety : (1875) 10 Ch A 211; (1905) 1 K B 462 and ('21) 8 AIR 1921 Mad 236, *Rel. on.* [P 146*b*]

Therefore when a new statutory provision (like the Madras Agriculturists Relief Act) has had the effect of granting a partial discharge to the principal debtor and the creditor has taken no part in releasing the principal debtor from his liability, the remedy of the creditor against the guarantor will not be affected. Hence his relief against the guarantor should not be restricted to the amount of the debt as scaled down in the Act. [P 146*c*]

T. P. Gopalakrishna Ayyar — for Petitioner.

C. A. Mohamed Ibrahim and T. S. Santhanam — for Respondents.

Wadsworth J.—This civil revision petition arises out of a small cause suit on a promissory note executed by defendant 1, an agriculturist and guaranteed by defendant 2, a non-agriculturist. The letter of guarantee is in the following terms :

Please get a pronote from S. Chinnamuthu Batcha Rowther, the bearer of this letter and give Rs. 300. In the event of his not discharging it by paying principal and interest, I also shall be liable and pay the amount.

The debt of defendant 1 was only partially discharged and the suit was filed. Against defendant 1, the plaintiff gave effect to the defences open to him as an agriculturist and claimed only Rs. 95-9-0. Against defendant 2 the plaintiff claimed Rs. 157-14-4, the full amount due under the contract. In the lower Court defendant 2 successfully claimed that he was entitled to the benefit of the reduction of the principal debtor's liability by reason of the terms of S. 128, Contract Act. It is contended in the revision petition that this decision is wrong. Section 128, Contract Act, provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. It cannot be contended that there is any special provision in the present contract making the liability of the guarantor different from the liability of the principal debtor. It is, however, argued that S. 128, Contract Act, lays down only the general principle governing the interpretation of contracts of guarantee and does not purport to govern the relations between the parties as a result of subsequent events after the contract has been entered into. Those, it is contended, are governed by the later sections such as Ss. 133, 134 and 135 and so on. It is also contended that though the release of the principal debtor by the act or omission of the creditor has the legal consequence of discharging the surety under S. 134, Contract Act, no such result follows when the discharge of the principal debtor is by operation of law. In support of this proposition reliance is placed on the leading case in (1875) 10 Ch A 211[1] where it was held that where the acceptor of a bill of exchange presents a petition for liquidation or composition under the Bankruptcy Act, 1869, and the creditors pass a resolution for liquidation or composition, the acceptor must be considered as discharged by operation of law, and the drawer is not thereby discharged from his liability. The rule enunciated in this decision has been set forth very clearly in another case in (1905) 1 K B 462,[2] where Bigham J., says :

I think in this case that the creditor is entitled to prove for the value of the guarantee that the debtor has given. It is said that because the principal debt is gone, therefore the liability under the guarantee to pay the interest on the debenture is also gone. I do not agree with that view. The principal debt is gone no doubt, but not by any act of the creditor. It is gone by operation of law. The principal debt will never be repaid, but in my opinion the obligation of the debtor to pay interest under his guarantee remains.

The same principle is laid down in Rowlett on Principal and Surety at p. 272. That the rule enunciated in (1875) 10 Ch A 211[1] applies to India has been recognized by a

1. (1875) 10 Ch A 211 : 44 L J Bk 34 : 31 L T 745 : 23 W R 251, Ex parte Jacobs.
2. (1905) 1 K B 462 : 74 L J K B 322 : 92 L T 206 : 53 W R 384 : 12 Manson 14, In re Fitz George.

Bench of this Court in 44 Mad 381,[3] and it may be said that the principle underlying that rule is recognized in the two Insolvency Acts. Section 44, Provincial Insolvency Act, which is similar in its terms on this point to S. 45, Presidency Towns Insolvency Act, enacts that :

> An order of discharge shall not release any person who at the date of the presentation of the petition was a partner or co-trustee with the insolvent, or was jointly bound or had made any joint contract with him or any person who was surety for him.

This provision seems to involve the assumption that notwithstanding the disappearance of the debt of the principal debtor, the liability of the surety continues and consequently it seems in effect to recognize the principle that a discharge of the principal debtor by operation of law does not discharge the surety. It is unnecessary to quote cases relating to guarantors of minor's debts and cases relating to debts barred as against the principal debtor but alive as against the surety. Though these cases may serve as indications that S. 128, Contract Act, is not intended to govern all future changes in the liabilities of the parties, yet the continuance of the guarantor's liability in such cases may be justified on special grounds. It is sufficient for the purpose of this case to hold that, when a new statutory provision has had the effect of granting a partial discharge to the principal debtor and the creditor has taken no part in releasing the principal debtor from his liability, the remedy of the creditor against the guarantor will not be affected.

It follows that the lower Court was wrong in restricting the relief as against defendant 2 to the amount of the debt as scaled down in the Act. The lower Court has also found that even if the view taken on the effect of S. 128, Contract Act, is wrong, defendant 2 can be made liable only for interest at 15 per cent. by reason of the terms of the Madras Debtors Protection Act. This finding is not questioned before us. In the result the revision petition is allowed with costs and the plaintiff will get a decree as against defendant 2 for the principal sum due with interest at 15 per cent. upto the date of the plaint and proportionate costs, with subsequent interest at six per cent., till realization. The decree as against defendant 1 stands.

C.R.K./K.S. *Petition allowed.*

3. ('21) 8 A I R 1921 Mad 236 : 63 I C 173 : 44 Mad 381 : 40 M L J 404, Bombay Co. Ltd. v. Official Assignee of Madras.

(29) A. I. R. 1942 Madras 146

WADSWORTH AND PATANJALI SASTRI JJ.

Dosapati Ramayya — Defendant — Petitioner

v.

Pattam Anjayya — Plaintiff — Respondent.

Civil Revn. Petn. No. 146 of 1941, Decided on 30th September 1941, to revise decree of Dist. Munsif, Repalle, in S. C. S. No. 340 of 1939.

Limitation Act (1908), Ss. 19 and 20— Pronote —Endorsement on—Amount paid towards pronote — Endorsement not valid under S. 20 but sufficient acknowledgment under S. 19.

Where a debtor pays a sum as a part payment of an interest bearing debt, without indicating whether the payment is towards interest or principal, in order to obtain a fresh period of limitation under S. 20, it is incumbent upon the creditor to appropriate the sum paid towards the principal before the expiration of the prescribed period of limitation. An unappropriated payment cannot avail the creditor under S. 20 as a payment towards interest as such or towards principal saving limitation. But when there is a part payment endorsed in such terms as to make it ineffective for the purposes of S. 20, it may by implication amount to an acknowledgment so as to save limitation under S. 19 : *Case-law discussed.* [P 147*a*, *b*]

The endorsement on a pronote was in the following words : "Paid on 15-9-1938 towards this promissory note Rs. 2":

Held that the endorsement though not valid under S. 20, saved limitation under S. 19. [P 147*c*; P 148*b*]

S. Sitaraman and V. Rangachari — for Petitioner.

M. S. Ramachandra Rao and Y. G. Krishnamurti — for Respondent.

Wadsworth J. — This civil revision petition is preferred by the defendant against a decree in a small cause suit based on a promissory note. Two questions were raised in revision, one relating to the scaling down of the decree under Madras Act, 4 of 1938 and the other relating to limitation. On the first point, it seems to us clear that the two earlier payments amounting to Rs. 125 must be treated as unappropriated payments available in reduction of principal as on 1st October 1937, so that the decree should have been one for Rs. 75 with interest at 6¼ per cent. from 1st October 1937, credit being given as on 15th September 1938 to the payment of Rs. 2.

Turning to the more difficult question relating to limitation, it is common ground that the suit filed on 11th November 1939 would have been barred by limitation unless limitation was saved by the endorsement of Rs. 2 on 15th September 1938. The promissory note was for a sum of Rs. 271-8-6 and the previously endorsed payments were for an amount of Rs. 125. Quite clearly there-

fore at the time when this payment of Rs. 2 was made a very considerable balance was due on the note. It is argued that the decision of the Privy Council in 21 Lah 470[1] governs the present case. The endorsement was in the following words: "Paid on 15-9-1938 towards this promissory note Rs. 2." The original Telugu word translated as 'towards' is 'kintha' which literally means 'under.' Now, the Privy Council decided in the case just referred to that where a debtor pays a sum as a part payment of an interest bearing debt, without indicating whether the payment is towards interest or principal, in order to obtain a fresh period of limitation under S. 20, Limitation Act, it is incumbent upon the creditor to appropriate the sum paid towards the principal before the expiration of the prescribed period of limitation. This decision is clearly authority for the view that an unappropriated payment, such as the payment of Rs. 2 in the present case, cannot avail the creditor under S. 20, Limitation Act, as a payment towards interest as such or towards principal saving limitation and all previous decisions which took a contrary view must be deemed to have been overruled.

It is, however, contended for the respondent that though this endorsement may not save limitation under S. 20, it can be deemed to be a sufficient acknowledgment of the debt so as to save limitation under S. 19. Their Lordships of the Privy Council in the case just quoted, though they referred to S. 19 in order to discuss its relation to S. 20, were not dealing with a case in which there was any pleading that the writing would be a sufficient acknowledgment under S. 19, even though the payment was not a payment falling under S. 20, and their Lordships do not consider whether such an alternative plea would have been open to the creditor in the case before them, had it been taken. We are therefore of opinion that the decision in 21 Lah 470[1] is authority neither for nor against the view that when there is a part payment endorsed in such terms as to make it ineffective for the purpose of S. 20, Limitation Act, it may by implication amount to such an acknowledgment as would save limitation under S. 19.

Now, there is a clear line of authority of this High Court for the view that when, as in the present case, there is a bond under which it can be seen by the words and the tenor of the document and the endorsements of payment that a considerable sum is due and when the debtor makes towards that bond a payment which is clearly less than the balance due, accompanying that payment with an endorsement to the effect that it is towards the debt in the bond or towards the note, it is legitimate to read the words of that endorsement together with the substance of the document upon which the endorsement was made and infer from the circumstances the fact that the writing of this endorsement is an acknowledgment of the subsistence of the debt after the payment endorsed. No doubt, a contrary view was taken in the very early case in 5 M H C R 90.[2] That decision was followed upon by the first Court in a case which came on appeal before a Bench, *vide* 17 M L T 80.[3] The learned Judges, who had to deal with a simple endorsement that a certain sum was paid in respect of the promissory note, held, following the decision at p. 78 of the same Vol. 17 M L T 78[4] that the endorsement signed by the promisor contained a sufficient acknowledgment of liability under the promissory note. This decision was followed by a single Judge in 17 M L T 139[5] and it has been followed more recently in 40 Mad 698.[6] It is true that in the last case there was an additional circumstance that the debtor endorsed two successive payments on the same day, the first of which must necessarily have been made with a knowledge that a balance was due, but the learned Judges expressly approved the earlier decisions and purported to follow the same principle. The decision in 40 Mad 698[6] has also been followed in Bombay in A I R 1939 Bom 252.[7] Against this line of authority, the only Madras decision to the contrary quoted before us, besides the early case in 5 M H C R 90[2] already referred to, is a very brief judgment in 9 M L T 216[8] which does not set forth the precise nature of the endorsement

1. ('40) 27 AIR 1940 P C 63 : 187 I C 233 : I L R (1940) Kar P C 134 : 67 I A 160 : I L R (1940) 21 Lah 470 (P C), Rama Sah v. Lal Chand.

2. ('70) 5 M H C R 90, Latchuman Chetty v. Mutta Iburaki Marakayar.

3. ('16) 3 A I R 1916 Mad 624: 27 I C 747: 17 M L T 80, Jagannatha Sahu v. Rama Sahu.

4. ('16) 3 A I R 1916 Mad 638: 27 I C 744: 17 M L T 78, Viswanatha Santhasinga Rao v. Ramachandra Mardraja Deo.

5. ('16) 3 A I R 1916 Mad 138: 28 I C 15: 17 M L T 139, Ramakrishna Chetty v. Venkatasubbiah Chetty.

6. ('17) 4 A I R 1917 Mad 805: 36 I C 240: 40 Mad 698, Venkatakrishniah v. Subbarayadu.

7. ('39) 26 A I R 1939 Bom 252: 182 I C 965: 41 Bom L R 455, Tayarali v. Garabad Sadu.

8. ('11) 9 M L T 216: 8 I C 349, Lakshminarasimham v. Bharatha Mahanty.

and does not contain any detailed discussion of the question.

No doubt where the matter is res integra, it might be contended that the endorsement of payment towards the promissory note on which according to the tenor of the document much more than the amount paid was outstanding at the time of payment would not necessarily imply an acknowledgment that the debt continued to subsist after the payment. It might be argued that the payment was made without a calculation of the balance due or it might be argued that the document might have been otherwise discharged by unendorsed payments. But it does not seem to us, in view of the authorities just cited, that these general arguments are now open to us. We are bound by the previous decisions and we must hold that the suit in the present case was not barred by limitation, having regard to the endorsement of 15th September 1938, which was expressly pleaded in the plaint as an acknowledgment saving limitation. The result, therefore, is that the civil revision petition is allowed to the extent that the decree will be modified as already indicated. The petitioner is entitled to half his costs in revision.

C.R.K./R.K. *Revision allowed.*

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(29) A. I. R. 1942 Madras 148

WADSWORTH J.

Rajah Saheb Meharban I Dosthan Sree Rajah Ravu Venkatakumara Mahipathi Surya Rao Bahadur Garu, Sardar Rajahmundry Circar and Maharajah of Pithapuram — *Petitioner*

v.

Yedlapalli Mangamma and others — *Respondents.*

Civil Revn. Petn. No. 1209 of 1939, Decided on 19th November 1940, to revise decree of Sub-Judge, Amalapuram, in S. C. S. No. 124 of 1936.

Madras Estates Land Act (1 of 1908, as amended by Act 8 of 1934), Ss. 124, 163 and 163A — Landlord purchasing ryoti holding at rent sale and subsequently obtaining possession — Suit for mesne profits against person in occupation between sale and delivery of possession—Procedure under S. 163 alone is available — Civil suit for different remedy with enhanced period of limitation is not maintainable — Nor is separate suit merely for mesne profits tenable.

Section 163 is intended to cover the usual case in which a person cultivates ryoti land on the implied understanding that he will, when asked to do so, pay the rent for it. Section 163A does not provide a machinery for collecting mesne profits from unauthorized occupants except as an incident of their eviction by suit. [P 149*a*,*b*]

Where the landlord purchases a ryoti holding at a revenue sale he can get delivery without suit by proceedings under S. 124. If he refrains from taking those proceedings, he must be taken to be prepared to accept the rent and damages which can be claimed under S. 163 from the actual occupant during the interval between the sale and delivery. A special remedy having been provided by the Act, whereby the landlord can recover compensation for unauthorized occupation of ryoti lands in cases where a suit for eviction is unnecessary, it is not possible to claim in the ordinary civil Courts a different remedy with an enhanced period of limitation for the same wrong or to bring a separate suit merely for mesne profits after having got possession without a suit. [P 149*c*,*d*,*e*]

Ch. Raghava Rao — for Petitioner.

K. Bhimasankaran — for Respondents.

Order.—This revision petition arises out of the dismissal of a suit filed for mesne profits alleged to be due on land admittedly ryoti, situated within an estate under the Madras Estates Land Act, forming part of a holding which has been sold for arrears of rent. The facts are not very clear, but from the plaint it appears that defendants 1 to 8 in the suit were the pattadars and that there was a default and the plaintiff applied for sale and bought the land in revenue Court auction in two sales, one on 12th September 1931 and the other on 3rd June 1932. From the date of the sales defendants 9 to 17 were alleged to be cultivating the land and it is stated that this cultivation was without permission from the plaintiff. The landlord got possession of part of the land on 25th April 1933 and of the rest on 20th June 1933. Having got possession, the plaintiff waited for approximately three years and then filed the present suit in the civil Court claiming mesne profits from all the defendants for the period intervening between the sales and the deliveries. When objection was taken to the jurisdiction of the Court, the plaintiff appears to have given up the suit against all the other defendants and asked leave to confine his suit to the claim against defendant 17, whose legal representatives are the respondents here. Apparently, the idea was that this plaint, which clearly is based on the termination of a tenancy and a demand for mesne profits from the tenants and other persons in occupation, should be treated as having been ab initio based on the assertion of an unauthorized entry at some unknown date by one only of the defendants in circumstances entirely unconnected with the tenancy, so as to enable the plaintiff to treat him as a person whose occupation had never been either recognized or acquiesced in. Section 163, Madras Estates Land Act, provides the ordinary machinery whereby a

landlord can recover rent and damages for unauthorized occupation of ryoti land. This section, though not very explicit, appears to be intended to cover the usual case in which a person cultivates ryoti land on the implied understanding that he will, when asked to do so, pay the rent for it. In the vast majority of cases, on such cultivation, the landlord's officials collect the usual rent and unless action is taken with reference to Expln. 3 to S. 6 (1), the occupant in time acquires occupancy rights. If, however, the landlord does not desire that the occupant should continue in occupation of this land, he may treat him as a trespasser, in which case, a machinery is provided under S. 163 (A) whereby a suit may be filed and the landlord may claim mesne profits and also damages which are to be assessed on the basis given in S. 163 and, therefore, must not exceed one year's rent, subject to the proviso that in respect of any year for which rent has actually been paid damages would not be payable.

As I read S. 163 (A), it is not intended to provide a machinery for collecting mesne profits from unauthorized occupants except as an incident of their eviction by suit. When, as in the present case, the landlord has bought in the property at a revenue sale either himself or through his agent, a machinery is provided whereby he can get delivery without suit, namely, by proceedings under S. 124. If he refrains from taking those proceedings, it is a reasonable inference that he is prepared to accept the rent and damages which can be claimed under S. 163 from the actual occupant during the interval between the sale and the delivery. I doubt very much whether he can abstain from taking action either under S. 124 or under S. 163 and file a suit under S. 163 (A), after possession has been surrendered, for, this section only relates to the eviction of persons who have not been admitted as ryots whereas, the ordinary case of a sale under the Estates Land Act would relate to a person who has been admitted as a ryot. Still less is it clear that the landlord, instead of recovering the rent and damages as laid down under S. 163, can treat S. 163 (A) as if it were split into two parts and having got possession without a suit can bring a separate suit merely for mesne profits. As I understand these sections, the underlying idea is that a person who has unauthorizedly occupied ryoti land and has not been evicted by a suit shall be liable to pay such sums as can be claimed under S. 163. A special remedy having been provided by the Act, whereby the landlord can recover compensation for unauthorized occupation of ryoti lands in cases where a suit for eviction is unnecessary, it is not to my mind possible to claim in the ordinary civil Courts a different remedy with an enhanced period of limitation for the same wrong. In any case, the present plaint, based as it is on an allegation of a terminated tenancy and a joint trespass by a large number of people, including the former tenants, does not contain such averments as would suffice to establish a claim of separate trespass by one only of these people under such circumstances as to take him out of the provisions of S. 163. The civil revision petition is, therefore, dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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* (29) A. I. R. 1942 Madras 149

WADSWORTH AND PATANJALI SASTRI JJ.

Yeddula Kothapalle Muthyalu —

Petitioner

v.

Bolla Chinnayya and others —

Respondents.

Civil Revn. Petn. No. 2318 of 1939, Decided on 25th September 1941, to revise order of District Munsif, Gooty, D/- 21st August 1939.

*** Madras Agriculturists Relief Act (4 of 1938), Ss. 19, 9 — Agriculturist surety is entitled to benefit of procedure under S. 19 with reference to date on which his liability was incurred.**

Since the surety is, for the purposes of execution, in the position of a judgment-debtor, there is no reason why he should not be given the benefit of the procedure laid down in S. 19 for agriculturist judgment-debtors to the limited extent of the reduction or scaling down of interest under the decree with reference to the appropriate section of the Act having regard to the date on which the liability of the surety himself was incurred: C. R. P. No. 1869 of 1939, *Disting.*; C. R. P. No. 1965 of 1939, *Expl., and commented upon.* [P 150*g*,*h*]

T. R. Arunachalam — for Petitioner.

K. S. Jayaram — for Respondents.

Wadsworth J. — The question in this civil revision petition is whether the petitioner, who gave a surety bond undertaking to satisfy any decree which might be passed against respondents 2 and 3, can be deemed to be a judgment-debtor entitled to scale down the decree which was ultimately passed, by the procedure laid down in S. 19, Madras Act, 4 of 1938. The matter arises out of a suit brought by respondent 1 against respondents 2 and 3 on two promissory notes, one dated 31st July 1929 and the other dated 27th June 1931. A decree was passed ex parte and subsequently there was an application

to set aside the ex parte decree. The defendants were required to give security as a condition precedent to the setting aside of the decree and the present petitioner gave a bond on 4th July 1934 in which he undertook to satisfy any decree which might be passed against respondents 2 and 3. The ex parte decree was therefore set aside and the suit reopened and on 10th September 1934 a compromise decree was passed in favour of respondent 1 against respondents 2 and 3 for a sum of Rs. 603-10-0 with interest at 12 per cent. on Rs. 500 from the date of the plaint to the date of the decree and Rs. 83 costs and subsequent interest at 6 per cent. After this compromise decree was obtained, the decree-holder proceeded to execute the decree against the surety. The surety contended that he was not bound to satisfy the decree because it was based on a compromise. This contention was overruled both in the executing Court and in two appellate Courts. After the appeals had failed, the surety filed applications under Ss. 19 and 20 of Act 4 of 1938. The application under S. 19 was dismissed in limine on the ground that the surety was not a judgment-debtor entitled to maintain the application. Against this order the civil revision petition is preferred.

It is contended that by reason of S. 145, Civil P. C., the decree becomes executable against the surety and for purposes of execution he is in fact in exactly the same position as a judgment-debtor and that there is no reason why to the extent to which he is an agriculturist entitled to relief under Act 4 of 1938, he should not claim that relief by asking that the decree be scaled down under S. 19. Now it seems to us quite manifest that the surety, assuming that he is entitled to take proceedings under S. 19, must be limited to the relief which he can get with reference to the actual decree debt. But he cannot treat that decree as a renewal or inclusion in a fresh document of a previous debt due from himself and therefore there is no occasion for going into the origin of the two promissory notes upon which the decree was passed. The surety executed his bond in 1934 and it was in 1934 that the liability against him first became crystallised in the form of the decree which he had undertaken to satisfy. The liability of the surety therefore falls under S. 9 of Act 4 of 1938 and the proviso to that section has no bearing on the case.

Under S. 7, all debts payable by an agriculturist at the commencement of the Act must be scaled down in accordance with the provisions of the chapter, notwithstanding any law, custom, contract or decree of Court to the contrary. From this it follows that on the admission that the surety is an agriculturist, he is entitled to a remission of interest on the decree debt to the extent laid down in part 1 of S. 9. The only question is, what is the procedure by which the relief shall be given. Two courses might be open. It might be possible for the surety to plead in bar of execution the statutory relief to which he has become entitled; or it might be open to the surety to claim to be treated as a judgment-debtor and to get the decree amended under S. 19 by the Court which passed the decree, by the reduction of interest in accordance with S. 9. The respondents here have relied upon two judgments of a single Judge which seem to suggest that the proper procedure is by pleading the Act in bar of execution. The two cases are C. R. Ps. Nos. 1965 of 1939 and 1869 of 1939. We think the latter case has no bearing because it was a case in which the surety was a non-agriculturist. The former case does contain an observation that the surety cannot apply to have the decree amended under S. 19 though he might have a right to a reduction of interest on the amount treating it as a debt under S. 9. But the question really agitated in that case was not the procedure whereby the surety could get the decree for interest reduced, but the right of the surety to apply under S. 19 to get the substantive liability scaled down on the basis of the antecedent debt. To the extent to which the observations in C. R. P. No. 1965 of 1939 appear to indicate that the procedure under S. 19 is not available to an agriculturist-surety, against whom a decree is being executed, to get the interest embodied in the decree reduced, we are of opinion that they are misleading. Since the surety is, for the purposes of execution, in the position of a judgment-debtor, we see no reason why he should not be given the benefit of the procedure laid down in S. 19 for agriculturist judgment-debtors to the limited extent of the reduction or scaling down of interest under the decree with reference to the appropriate section of the Act having regard to the date on which the liability of the surety himself was incurred. In the present case, the matter is simple. Both the bond and the decree came into being in the course of 1934. It follows that the surety is entitled to the benefit of part 1 of S. 9; that is to say, the amount of the debt both for costs and for the substantive portion of the decree will bear interest not at the rate of 6 per cent. as laid down in the decree but at

a the rate of 5 per cent. with effect from the date of the decree to 22nd March 1938, subsequent interest being at the decree rate of 6 per cent.

The decree will be amended accordingly. As the petitioner has failed in his attempt to go behind the decree and scale down his liability with reference to the original notes, we think it proper to order that each party should bear his own costs.

C.R.K./K.S. *Order accordingly.*

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(29) A. I. R. 1942 Madras 151

b VENKATARAMANA RAO J.

Athiappa Chettiar — Appellant

v.

Ibramsa Rulavar — Respondent.

Second Appeal No. 257 of 1939, Decided on 21st August 1941, against decree of Dist. Court, Madura, D/- 31st August 1938.

Provincial Insolvency Act (1920), Ss. 44 (2), 34 (2), 28 (6) and 47 — Personal liability under mortgage is debt provable in insolvency within S. 44 (2).

The personal liability under a mortgage is a debt provable in insolvency within the meaning of S. 44 (2) and therefore by the order of absolute discharge this liability if not proved in insolvency is discharged : ('40) 27 A I R 1940 Nag 252 and ('38) c 25 A I R 1938 Lah 217, *Rel. on*; ('32) 19 A I R 1932 All 336 and ('39) 26 A I R 1939 All 401, *Dissent.*

[P 151*e*; P 152*a*]

T. L. Venkatarama Iyer and M. V. Ganapathi —for Appellant.

R. Ramasubbu Iyer—for Respondent.

Judgment. — This second appeal arises out of an application made by a mortgagee-decree-holder for a personal decree under O. 34, R. 6, Civil P. C., against defendant 2. The relevant facts are these. The appellant who is the mortgagee obtained a preliminary decree for sale of the property mortgaged to him on 16th August 1929. A final decree was d also passed on 10th December 1930. The mortgaged property was brought to sale on 27th August 1934 and the sale was confirmed on 29th September 1934. But defendant 2 who was adjudicated insolvent on 21st July 1933 after the final decree was passed obtained an order of absolute discharge on 10th August 1934. This application for a personal decree against defendant 2 was made on 28th September 1937. Both the lower Courts have taken the view that the order of absolute discharge precludes any relief being granted to the appellant. The question is whether this view is sound. On this point there is a conflict between Lahore and Nagpur High Courts on the one hand and Allahabad High Court on the other. In A I R 1938 Lah 217[1] e it was held that the personal liability under a mortgage is a debt provable in insolvency within the meaning of S. 44 (2), Provincial Insolvency Act, and therefore by the order of absolute discharge this liability has been discharged. This view has been followed by the Nagpur High Court in I L R (1940) Nag 512.[2] But the Allahabad High Court has taken a different view. In 54 ALL 428[3] the reason for the view is thus stated :

> The order of discharge has no more effect upon the right of the secured creditor than the order of adjudication. Under S. 45 (2) (of the Presidency Towns Insolvency Act, 3 of 1909 corresponding to S. 44 (2) of the Provincial Insolvency Act) an order of discharge shall release the insolvent from all f debts provable in insolvency. The debt due to a secured creditor is not a debt provable in insolvency. The order of adjudication and the subsequent order of discharge cannot affect the rights of the secured creditor which flow from the mortgage contract.

This view has been again followed in I L R (1939) ALL 492.[4] With due respect to the learned Judges, I am not able to agree with this view. Under S. 34 (2), Provincial Insolvency Act, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date g of such adjudication, shall be deemed to be debts provable under this Act. Therefore, the liability to pay the deficit arising after the sale of the property mortgaged in virtue of the personal covenant or obligation which the mortgagor enters into under the deed of mortgage will be a debt provable within the meaning of S. 34 (2). It was a liability to which defendant 2 will become subject by reason of the obligation incurred before the date of his adjudication. That such a liability is a debt provable in insolvency is clear from S. 47 of the Act. Under that section, it is open to a secured creditor to adopt any of the three courses specified therein, namely, h (1) he can realise the security and prove for the balance due to him; (2) he can relinquish the security and prove for the whole debt; and (3) he can value the security at a particular amount and then prove for the balance.

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1. ('38) 25 A I R 1938 Lah 217 : 178 I C 272 : 40 P L R 514, Haveli Shah v. Mt. Hussaina Jan.
2. ('40) 27 A I R 1940 Nag 252 : 192 IC 572 : ILR (1940) Nag 512, Khubchand Nathmal v. Rajeswar Shanker.
3. ('32) 19 A I R 1932 All 336 : 138 I C 361 : 54 All 428 : 1932 A L J 237, Niaz Ahmed v. Phul Kunwar.
4. ('39) 26 A I R 1939 All 401 : 184 I C 868 : ILR (1939) All 492 : 1939 A L J 238, Sunderlal v. Benarsidas.

This therefore clearly indicates that the liability of a mortgagor under a deed of mortgage is a debt which the mortgagee can prove in insolvency. It is open to him, as S. 47 (1) provides, to wait until the security is realised and prove for the balance when it is ascertained, but he takes the risk of not getting any dividend if the insolvent obtains an order of discharge by that date, by reason of the liability being extinguished under S. 44 (2). If he wants to avoid this risk he ought to take advantage of cls. (2) and (3). I am therefore inclined to follow the view of the Lahore and Nagpur High Courts in preference to that of the Allahabad High Court.

Mr. Venkatarama Ayyar contends that by virtue of S. 28 (6) the rights of the secured creditor are not affected by the order of adjudication and one of such rights is to get a personal decree for the balance due under a personal covenant in the deed of security and therefore his right to get such a decree remains unaffected by the order of discharge. All that S. 28 (6) says is that the right of a secured creditor to realise the moneys due to him from and out of the security is not affected. But the liability due under the deed of mortgage is nevertheless a debt in respect whereof the secured creditor has to adopt the procedure in insolvency before he can get any dividend and in respect whereof he is subject to the other provisions of the Insolvency Act. Stone C. J. in I L R (1940) Nag 512[2] at p. 516 after mentioning the three courses open to secured creditors under S. 47 observed thus :

> If instead of taking one or the other of these courses he simply ignores the insolvency, then, as above observed, he is limited to his security, the reason being that a mortgagee with a mortgage containing a personal covenant is a secured creditor so far as the mortgage transaction is concerned and an ordinary creditor so far as the personal covenant is concerned.

I respectfully agree with this observation. In the result the appeal fails and is dismissed with costs. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

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(29) A. I. R. 1942 Madras 152

VENKATARAMANA RAO J.

In re Vinaitheerthal Achi — Appellant.

Stamp Register No. 29885 of 1939, Decided on 23rd October 1940, against decree of Court of Sub-Judge, Devakottai in O. S. No. 69 of 1939.

Court-fees Act (1870), Sch. 2, Art. 17 — Suit for Rs. 18,000 and first charge on property—Suit decreed but charge refused—Appeal for having charge—Property valued at Rs. 9500—Court-fee held payable on Rs. 9500 i. e., on value placed on property.

P sued to recover a sum of Rs. 18,897-0-9 from *D* as a first charge from and out of the properties possessed by him. The lower Court gave a decree for the amount claimed but declined to give a first charge as prayed for. *P* preferred an appeal against the decree disallowing prayer in respect of the first charge and sought in the appeal to get a charge on the assets which he valued in the memorandum of appeal at Rs. 9500 :

Held that court-fee was payable on the sum of Rs. 9500, the value which *P* placed on the assets : ('37) 24 AIR 1937 Mad 840, *Disting.*; 30 Mad 96 (F B), *Rel. on.* [P 153*e*]

K. Rajah Ayyar — for Appellant.

T. Krishna Rao for Government Pleader — for the Crown.

Order. — This is a reference made to me on the correct court-fee payable on the memorandum of appeal presented against the decree of the Subordinate Judge of Devakottai in O. S. No. 69 of 1939 on his file. The plaintiff sued to recover a sum of Rupees 18,897-0-9 from the defendant as a first charge from and out of the properties possessed by him namely the separate properties inherited by his father and the joint family properties which he and his father possessed and which on the death of his father he got by survivorship. The defendant is the minor son of the plaintiff. Her case was that her stridhanam property was entrusted by her father to her husband, the defendant's father, on trust, that he agreed to hold such property in trust for her, to improve it and return it to her when she was in need of it, that he mixed it with his own assets both separate and joint family and that therefore the defendant was bound to return her money from and out of the said assets and that she has got a first charge on them. The learned Subordinate Judge gave a decree for the amount claimed but declined to give a first charge as prayed for. The plaintiff has preferred this memorandum of appeal against the decree disallowing her prayer in respect of the first charge and seeks in this appeal to get a charge on the said assets which she has valued in the memorandum of appeal at Rs. 9500.

The appellant has paid a court-fee of Rs. 100 on the memorandum of appeal on the ground that the relief is incapable of valuation. The Office and the Taxing Master felt a doubt as to whether the relief can be said to be incapable of valuation and accordingly referred the matter to me. Before the Taxing Master reliance was placed on a decision of mine in 1937 M W N 672 (same as A I R 1937 Mad 840)[1] and Mr. Rajah Iyer who appeared for the appellant relied on the same decision

1. ('37) 24 AIR 1937 Mad 840 : 174 I C 665 : I L R (1938) Mad 253 : 1937 M W N 672, In re Subbiah Pandaram.

before me. The contention of Mr. Rajah Iyer is that under S. 23, Trusts Act, his client is entitled to get a charge on the assets, both separate and joint family property of the father which had come into the hands of the defendant, that the decree that has been given by the lower Court is admittedly executable against the said assets, that there is no dispute as to the amount payable to the plaintiff nor as to the liability of the said assets in the hands of the defendant but that the plaintiff is only seeking to establish her preferential right to be paid out of the said assets and that that right is incapable of valuation. After listening to his arguments I am of opinion that his contention is not sound. It cannot be said that the relief is incapable of valuation. The plaintiff is seeking to make all the said assets liable to the extent of Rs. 18,897 odd and therefore there is no question about the extent of the liability sought to be imposed on the said assets. Again, so far as the assets are concerned, it cannot be said that they are incapable of valuation. The assets have got a money value and are capable of valuation. In I L R (1937) Mad 980[2] following 13 C W N 815[3] it was pointed out that the word 'estimate' in Art. 17 (b) Court-fees Act, involves the idea of approximation and all that is necessary is that the subject-matter should be capable of being approximately and by no means accurately valued. The plaintiff has valued the assets approximately in the sum of Rs. 9500. This case in my opinion is governed by the principle of the Full Bench decision in 30 Mad 96.[4] It was a case which arose out of a suit upon a mortgage and the decree which was granted by the trial Court exonerated certain properties from the decree on the ground that the mortgage was not binding on the said properties. The appellant by his memorandum of appeal sought to make the said properties also liable. The decree that was granted by the Court in favour of the plaintiff was for a sum of Rs. 9420 but he valued the properties sought to be charged at Rs. 4000. The question that arose was, what is the court-fee payable? The learned Judges held that primarily court-fee should be paid upon the amount of the decree but inasmuch as the properties were worth only Rs. 4000 it would be enough if he paid court-fee on Rs. 4000. The reasons for their conclusion were given thus :

> The amount of the decree is not in dispute. The liability of the lands other than the lands claimed by defendants 6 to 9 is not in dispute. The question in dispute is the liability of the lands claimed by defendants 6 to 9 to be proceeded against for the debt. If the plaintiff succeeds in the appeal he will no doubt be entitled to proceed against the lands claimed by defendants 6 to 9 for the satisfaction of the whole debt but he can only recover the sale proceeds of these lands. The lands have been valued at Rs. 4000 and unless this valuation is successfully impeached by the respondents it must .... be taken as the value of the subject-matter in dispute in this appeal.

I would follow this decision and hold in this case that court-fee is payable on the sum of Rs. 9500 the value which the plaintiff-appellant has placed on the assets. My decision in 1937 M W N 672[1] on which reliance was placed is not applicable to the facts of this case. As pointed out by me in that case there were two mortgages on the property and the question was one of priority. The amount of the decree in that case was not disputed and the liability of the property in respect of both the mortgages was not disputed and there was an order for sale. The decree directed that the amount payable in respect of one mortgage should be paid first and that the amount due under the other mortgage should be paid later. The question of priority was the only question in dispute and I held that the relief for declaration was enough and can be valued as such. I also pointed out that even if I was not correct in the view I took, having regard to the form of the decree in that case it could be said that the relief was one which was incapable of valuation. This decision is therefore distinguishable. In the result I direct the appellant to pay the deficit court-fee as required by the office note, i. e., the court-fee payable on Rs. 9500 the value fixed by her less the sum of Rs. 100 already paid by her. Time for payment is four weeks. In the course of the argument I suggested that it would be better to have a specification of the assets both from the point of view of valuation and from the point of view of the Court being able to define the charge with reference to specific property at the time of the passing of the decree. No statement has been filed but I give leave to the appellant to do so at the time of payment of the additional court-fee ordered here. I fix the Government Pleader's costs at Rs. 35 which he is entitled to realise from Government.

C.R.K./R.K. *Order accordingly.*

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2. ('37) 24 AIR 1937 Mad 786: 173 I C 608 : I L R (1937) Mad 980 : (1937) 2 M L J 347, In re N. Duraiswami Iyer.
3. ('09) 13 C W N 815 : 1 I C 670, Bunwari Lal v. Daya Sunker Misser.
4. ('07) 30 Mad 96 : 1 M L T 311 : 16 M L J 458 (FB), Ramakrishna Reddi v. Kotta Kota Reddi.

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(29) A. I. R. 1942 Madras 154

VENKATARAMANA RAO J.

Muthukumaru Maniakarar and another — *Appellants*

v.

Pethia Maniakarar — *Respondent.*

Second Appeal No. 167 of 1939, Decided on 19th September 1941, against decree of Sub-Judge, Tuticorin, in A. S. No. 113 of 1937.

Civil P. C. (1908), S. 66—Applicability — Decree for arrears of rent — Sale in execution of by revenue Court under Madras Estates Land Act — S. 66 does not apply.

Section 66 only applies to purchases made and sale certificates issued under the rules contained in Sch. 1, Civil P. C., which makes provision for sales b in execution of decrees and issue of sale certificates for purchases made at those sales. A person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code would not be protected under S. 66 : ('37) 24 A I R 1937 All 176, *Rel. on*; 14 M I A 496 (P C), *Ref.* [P 155*a*]

The Madras Estates Land Act itself provides the procedure for the sale of immovable property in execution of decrees for rent and therefore that procedure has to be followed and not the procedure prescribed in the Civil Procedure Code. Therefore, the provisions of the Civil Procedure Code so far as they relate to the sale of immovable property and the issue of sale certificate to a purchaser at such a sale must be deemed to be inconsistent with the provisions of the Madras Estates Land Act within the meaning of S. 192 of that Act as amended by c Act 8 of 1934 : ('27) 14 A I R 1927 Mad 1035, *Rel. on.* [P 155*h*]

Consequently S. 66, Civil P. C., cannot apply to sale in execution of a decree for arrears of rent by a revenue Court under the provisions of the Madras Estates Land Act : ('28) 15 A I R 1928 P C 75, *Disting.* [P 156*b*]

A. Swaminatha Iyer and S. Thyagarajan — for Appellants.

C. S. Rajappa — for Respondent.

Judgment.—The question for decision in this appeal is whether the plaintiffs are precluded by S. 66, Civil P. C., from praying for a declaration that defendant 4 has no right to item 1 of the property in the schedule to the plaint in the suit out of which d this appeal arises. The relevant facts are few and may be briefly stated. Defendants 1 and 2 executed a deed of mortgage dated 18th July 1924 in favour of the plaintiffs' undivided father, one Ramasami Maniagarar. Five items of property were mortgaged thereunder and they are items 1 to 5 of the schedule to the plaint. Item 1 was brought to sale in execution of a decree for arrears of rent by the revenue Court and purchased by defendant 4 on 4th July 1934. The present suit has been filed by the plaintiffs, sons of the said Ramasami Maniagarar, to recover a sum of Rs. 150 as being the balance due under the said mortgage. In the plaint they allege that item 1 though purchased by de- e fendant 4, was really for their (plaintiffs') benefit, that at the time of the purchase defendant 4 was acting as kariasthan or manager of their property, that the property was purchased with their funds for a sum of Rs. 300, that ever since the date of the purchase they have been in possession of the property and enjoying the profits thereof and paying kist on the same, that they have given credit in the suit for the value of the said item and only prayed for a decree for the balance and that since defendant 4 is setting up title thereto they have impleaded him and prayed for a declaration in regard to that item and for a sale of the remaining f items of the hypotheca, namely, items 2 to 5 of the plaint schedule. Defendant 4 denied that the purchase was on their behalf but asserted it was only for his benefit and that in any event under S. 66, Civil P. C., the plaintiffs are not entitled to the declaration prayed for. So far as the mortgage was concerned, there is no defence by defendants 1 to 3 and there was a decree as prayed for. But the learned District Munsif dismissed the suit against defendant 4 on the ground that S. 66 precludes the plaintiffs from asking for a declaration of right in respect of item 1. On appeal, the learned Subordinate Judge g confirmed his judgment taking the same view. The question therefore is whether this view is tenable.

Two contentions were raised by Mr. Thyagarajan Ayyar on behalf of the plaintiffs. (1) The property having been purchased in a sale in execution of a rent decree, S. 66, Civil P. C., is not applicable and it would not prevent the plaintiffs from pleading that the purchase was for their benefit. (2) Assuming that S. 66 applied, defendant 4 having been the kariasthan for the plaintiffs who were on the date of the purchase, and are still, minors, with their funds, under cl. (2) h of that section, the purchase must be deemed to have been made fraudulently or without their consent and therefore they are entitled to the declaration prayed for. I shall now deal with the first contention, viz., the applicability of S. 66 to sales in execution of decrees for rent by a revenue Court. Section 66 (1) runs thus :

> No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

The section deals with a purchase certified by the Court in such manner as may be

prescribed. Prescribed has been defined in the Civil Procedure Code as "prescribed by the rules." Rules are defined as meaning "rules and forms contained in Sch. 1 or made under S. 122 or S. 125, Civil P. C." Prima facie, therefore, the section only applies to purchases made and sale certificates issued under the rules contained in Sch. 1, Civil P. C., which make provision for sales in execution of decrees and issue of sale certificates for purchases made at those sales. As pointed out by Sulaiman C. J. in I L R (1937) ALL 113[1] at page 121 :

> A person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code would not be protected under S. 66, Civil P. C.

The section has been construed strictly and their Lordships of the Judicial Committee very early indicated the policy underlying the said section in construing a corresponding provision (S. 260) in Act 8 of 1859 (14 M I A 496[2] at p. 522).

> It is well known that benami purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and, therefore they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course. The enactments relied on by the plaintiffs are found in a Code professing to deal, not with rights, but with remedies, and procedure to enforce rights. The only express enactment on the subject occurs in S. 260. . . . . This enactment is clear and definite; *there is nothing from which it can be inferred that more is meant than is expressed.* (The italics are mine).

The question, therefore, is whether the purchase by defendant 4 can be said to be one certified by the Court under any of the rules framed under the Civil Procedure Code. If it is not, the section will not apply. The provisions which are applicable to sale of property in execution of decrees passed by a revenue Court for rent are to be found in Chap. 6, Madras Estates Land Act, because it is admitted that the decree was passed by a revenue Court under the provisions of that Act. Section 132 of the Act provides that the provisions of the said chapter shall be applicable as far as may be, to the execution by a revenue Court of any decree for arrears of rent and Ss. 111 to 131 deal with the procedure for sale of holdings. Section 124 provides for the issue of a sale certificate. Section 124 (2) provides that on the expiration of 45 days from the date of sale as specified in the notification under sub-s. (3) of S. 123, the Collector shall grant a certificate of sale to the purchaser if no application has been made to set aside the sale under S. 131 of the Act. Therefore the sale certificate in the present case must be deemed to have been issued under the provisions of that section. Thus it is clear that the procedure followed in a sale in execution of a decree for arrears of rent is that provided by the said Act and the sale certificate is issued under that Act and prima facie, therefore, in this case neither the sale was made nor the certificate issued under the rules in Sch. 1, Civil P. C. There. fore S. 66 would have no application to the sale in question. But the view taken by both the lower Courts and which is pressed before me by the learned counsel for the respondent is that under S. 192, Madras Estates Land Act, S. 66 must be deemed to have been made applicable to such sales and therefore that section operates as a bar to the plaintiffs getting the relief they claim. The material portions in Sec. 192 are as follows:

> (1) The (Provincial Government) may from time to time make rules consistent with this Act declaring that any provisions of the Civil Procedure Code, 1908, shall not apply to suits, applications, appeals, or other proceedings under this Act in any civil or revenue Court or to any specified classes of such suits, applications, appeals or proceedings . . . or shall apply to them subject to modifications and additions specified in the rules. (2) Subject to any rules so made and subject also to the other provisions of this Act and the following modifications and additions, the provisions of the Civil Procedure Code, 1908, shall apply to all such suits.

The contention is that the local Government has not made any rules declaring that S. 66 does not apply and, therefore, under cl. (2) of that section, it must be taken that S. 66 is made applicable to a sale in execution of a decree of a revenue Court. But the contention omits to take notice of the fact that the provisions of the Civil Procedure Code are only made applicable subject to the provisions of the Act and so far as the provisions of the Code are not inconsistent therewith. Where the Act itself provides the procedure for the sale of immovable property in execution of decrees for rent that procedure has to be followed and not the procedure prescribed in the Civil Procedure Code. Therefore, the provisions of the Civil Procedure Code so far as they relate to the sale of immovable property and the issue of sale certificate to a purchaser at such a sale must be deemed to be inconsistent with the pro-

1. ('37) 24 A I R 1937 All 176 : 167 I C 683 : ILR (1937) All 113 : 1937 A L J 52, Bishan Dayal v. Kesho Prasad.
2. ('70) 14 M I A 496 : 10 Beng L R 159 : 18 W R 157 (P C), Mt. Buhuns Koonwur v. Lalla Buhuree Lall.

visions of the Act. This is the view taken by a Division Bench of this Court in 51 Mad 76[3]: *vide* the observations of Jackson J. at p. 82. Reliance is placed on the decision of the Privy Council reported in 54 M L J 462,[4] where S. 66 was held, by their Lordships of the Judicial Committee, to be applicable to a sale held in execution of a decree for arrears of revenue by a Collector. The sale was held under the provisions of the Central Provinces Land Revenue Act (18 of 1881). On a reference to the provisions of that Act, it will be seen that S. 109 distinctly provides that where immovable property is sold under that Act, the rules prescribed in Ss. 287, 288, 293 and 306 to 316, Civil P. C., 1882, corresponding to O. 21, Rr. 66, 71, 84 to 94 in Sch. 1, Civil P. C. of 1908 should be followed. Therefore as the sale was held and certificate issued in pursuance of the provisions of the Civil Procedure Code their Lordships applied S. 66 of that Code.

It seems to me therefore that S. 66 is not applicable to sales in execution of a decree for arrears of rent by a revenue Court under the provisions of the Madras Estates Land Act. In regard to the second contention both the Courts hold that as there was no allegation in the plaint that the name of defendant 4 was inserted in the certificate fraudulently or without the consent of the real purchaser the application of S. 66(2) does not arise. On a reference to the plaint I find the only allegation is that the property was purchased by defendant 4 for the benefit of the plaintiffs. In the view I have taken in regard to the first contention relating to the applicability of S. 66, Civil P. C., I think it unnecessary to deal with this point. In the result I set aside the decrees of both the lower Courts so far as item 1 is concerned and remand the suit for hearing to the District Munsif of Koilpatti on issue 4. In the circumstances of this case I direct each party to bear his own costs throughout. The appellants will be entitled to the refund of court-fee paid on the memorandum of appeal both here and in the lower appellate Court. Leave to appeal is refused.

C.R.K./G.N. *Appeal allowed.*

3. ('27) 14 A I R 1927 Mad 1035 : 105 I C 88 : 51 Mad 76 : 53 M L J 688, Jagannatha Pillai v. Kathaperumal Pillai.
4. ('28) 15 AIR 1928 P C 75 : 108 I C 11 : 24 NLR 59 : 54 M L J 462 (P C), Balaram v. Naktu.

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(29) A. I. R. 1942 Madras 166

LEACH C. J. AND HORWILL J.

M. Ethirajulu Naidu — Appellant

v.

A. Ranganatham Chetty and others — Respondents.

Appeal No. 57 of 1938, Decided on 18th September 1940, from judgment and decree of Venkataramana Rao J., in C. S. No. 41 of 1933, D/- 11th May 1938.

(a) Lessor and Lessee — Lessee to construct building on land leased —Lessor to pay market value of building at time of resuming possession — Method of valuation — Value of building must be taken to be constructional value — No special value can be placed by reason of building being cinema hall.

Where the contract between the parties stipulates that the price to be paid by the lessor for the building erected by the lessee on the leased land should be according to the market value of the building at the time the lessor resumed possession, the proper method in valuing the building is to find out the cost of reproducing the building and then to allow for depreciation and cost of repairs in the absence of a stipulation to the contrary. No special value can be placed upon the building by reason of its being a cinema hall : ('39) 26 A I R 1939 P C 235, *Rel. on.* [P 158 *c,d,e*]

(b) Mesne profits — Lease of land — Lessor to be entitled to building erected by lessee on payment of market value at time of resuming possession — Landlord not to resume possession until value paid —Amount offered reasonable — Lessee must be treated as trespasser — Landlord is entitled to mesne profits—Amount offered ridiculously inadequate —Lessee cannot be treated as trespasser and is not liable for mesne profits — Court allowing lessor rent for occupation and ordering him to pay value of building fixed by it to lessee within fixed time — Court cannot allow interest in default.

Where on the expiry of the lease the lessor is to be entitled to the building erected by the lessee on the leased land on payment of the market value of the building but is not to resume possession until the value is paid, the lessee must be treated as a trespasser if he had refused a reasonable offer for the building at the expiration of the lease and therefore is liable for mesne profits. [P 157*f*; P 158*h*]

But if the amount offered by the lessor was ridiculously inadequate the lessee cannot be treated as a trespasser liable for mesne profits and his occupation must be deemed to have continued on the basis of the rent fixed by the contract between the parties. In such a case where the Court allows the lessor rent for occupation on the basis fixed by the contract between the parties and orders him to pay a certain sum fixed by it as the value of the building to the lessee within a fixed time, the Court is not entitled to direct that the sum should carry interest in the event of default in payment as ordered. [P 159*a,b*]

A. Viswanatha Ayyar and T. S. Muthuswami — for Appellant.

K. Rajah Ayyar and A. Subramaniam — for Respondents.

Leach C. J.—The appellant is the owner of a plot of land in Thatha Muthiappan

Street, George Town, Madras. On 18th October 1912 the appellant leased this land to the respondents for a period of ten years. The respondents acquired the lease for the purpose of building thereon a hall which was intended to be used for dramatic performances. At the time the lease was entered into, there was a building on the land, but this the respondents demolished and erected in its stead a new building, which was used for dramatic performances and for cenematograph entertainments. On the expiration of this lease the appellant granted to the respondents a new lease for another period of ten years from 1st October 1922. Clause 4 of the second lease reads as follows :

> The lessee shall always and in any event be entitled to be paid the price of the superstructure built on the said plot of land before he surrenders possession of the land either on the expiry of the lease hereby granted or any other future lease or at any time. The price shall be fixed according to the market value of the buildings as at the time of ascertainment and payment.

Therefore, when the respondents' right to occupy the land expired, the appellant was to be entitled to the building on it, provided he paid to the respondents the market value. This had to be paid before the respondents surrendered possession. This factor has an important bearing on one of the questions raised in this appeal. The second lease was not renewed and the appellant became entitled to the possession of the property on payment to the respondents of the value of the building which now stands upon the land. He tendered to the respondents the sum of Rs. 3000 as representing its market value. This was not accepted and on 25th January 1933 the appellant filed on the original side of this Court the suit out of which this appeal arises. He prayed for a decree for possession, for payment to him of Rupees 2900 (the amount which he claimed to be due as mesne profits upto the date of the filing of the suit) ; and for payment of future mesne profits at the rate of Rs. 725 per mensem. The respondents contested the appellant's right to possession of the land. They contended that by virtue of the Madras City Tenants Protection Act of 1921, which came into force on 21st February 1922 they were entitled to a conveyance of the land on payment to the appellant of a sum representing the value of the building. The respondents also contended that the appellant could not in any event obtain a decree for possession until he had paid Rs. 100,000, which the respondents alleged was the true value of the building. The suit was tried by Wadsworth J. who held that the Madras City Tenants Protection Act did not apply and that the appellant was entitled to a decree for possession. Having decided this question, the learned Judge directed the Official Referee to hold an inquiry into the value of the superstructure. A preliminary decree was passed in accordance with this judgment and an appeal was then filed. The appellate Court concurred in the opinion expressed by Wadsworth J., that the Madras City Tenants Protection Act did not apply. The respondents then appealed to the Privy Council, but there also failed. The judgment of the Judicial Committee was delivered on the 10th October 1939.

With regard to the appellant's contention that he was entitled to recover mesne profits from the respondents, Wadsworth J. said that this question depended on whether the respondents were in wrongful possession of the property and he considered that they could not be held to be in wrongful possession if the amount of compensation offered by the appellant, namely, Rs. 3000, was "ridiculously inadequate." If, on the other hand, the amount offered approximated to the true value of the superstructure the respondents would be wrong in refusing to deliver possession to the appellant, and consequently they would render themselves liable for mesne profits. With these observations the learned Judge left the question of liability to mesne profits to be decided after the property had been valued. The inquiry conducted by the Official Referee proved to be a lengthy one and his order was not passed until 4th March 1938. The Official Referee found that the value of the superstructure was Rs. 18,000. This findings was challenged by both sides. The appellant said it was far too much and the respondents said it was far too little. The objections to the Official Referee's report were heard by Venkataramana Rao J. who, on 11th May 1938, held that the value was Rs. 20,400. The learned Judge directed the appellant within three months to deposit the amount into Court or to pay it to the respondents. In default of payment, the amount was to carry interest at six per cent. per annum from the date of default. The learned Judge also held that the appellant was entitled to set off against this sum, Rs. 100 per mensem from 1st October 1932 upto the date of payment as "the rent due and payable" for the occupation of the premises. On 10th October 1938 the appellant paid into Court Rs. 20,400, but pending the decision of the Privy Council the

respondents obtained a stay of that part of the decree requiring them to give possession the appellant. It was made a condition of the stay that the respondents should pay into Court a sum of Rs. 900 every month as security for the mesne profits which the appellant might be entitled to. The appellant obtained possession of the property on 1st August 1940.

The present appeal is from the decision of Venkataramana Rao J. In the first place the appellant says that the learned Judge should not have valued the building at more than Rs. 14,000. In the second place, he says that he is entitled to mesne profits from the date of the expiry of the lease, namely 1st October 1932 to 1st August 1940 when possession was obtained. He also advances the contention that the learned Judge should not have awarded any interest on the Rs. 20,400. The respondents have filed a memorandum of cross-objections. They contend that the learned Judge should have valued the building at the sum of Rs. 50,000. In holding that the value of the building was Rs. 20,400 that is Rs. 2400 more than the value placed upon it by the Official Referee, Venkataramana Rao J. said that if the landlord were to erect a pucca building on the site, some time would be taken to construct it and he would during the interval be deprived of the present user and the income derived therefrom. Therefore the learned Judge was not inclined to allow any sum for depreciation. We find ourselves unable to agree that this is a valid reason for refusing to allow for depreciation. The contract between the parties stipulated that the price to be paid should be according to the market value of the building at the time the landlord resumed possession. In valuing the building at rupees 18,000, the Official Referee had regard to the cost of reproducing the building and then allowed for depreciation and cost of repairs, a method of which the Privy Council approved in (1939) 2 M L J 722.[1] No authority has been cited which lends support to the decision of the learned Judge that there ought to be no deduction for depreciation.

While accepting the applicability of the principle referred to in (1939) 2 M L J 722[1] Mr. Rajah Ayyar on behalf of the respondents, has contended that regard should also be had to the fact that this building can be let out as a cinema hall at a monthly rent of Rs. 800. In our opinion that was never in the contemplation of the parties and is not a factor which should be taken into consideration in a case where a person is allowed to build on another's land on the understanding that when his right of occupation to that land has expired the building shall become the property of the landowner on payment of its value as a building. Unless there is some stipualtion to the contrary, it seems to us that value must be the constructional value of the building. Any figure in excess of that value must be attributable to the site, not to the building. A building which is favourably situated will fetch more in rent than a similar building which is not well situated. Mr. Rajah Ayyar has conceded that if a special value is not to be placed on the building by reason of its being a cinema hall he cannot object to the finding of the Official Referee that its value is Rs. 18,000. With regard to the value of the building, it only remains to consider whether the Official Referee was right in his conclusion that Rs. 18,000 was the fair price to be paid. After a a careful examination of the evidence the Official Referee considered that the cost of the erection would be Rs. 20,000, but it would be proper to allow a deduction of ten per cent. for depreciation. Mr. Viswanatha Ayyar does not object to the finding that the constructional value was Rs. 20,000, but he says that there should be a greater amount allowed for depreciation. He asks that a third of the amount should be deducted on this ground. We consider that this is far too much and that the Official Referee was right in allowing a deduction of ten per cent.

The next point to be considered is whether the learned Judge was right in allowing the appellant a sum of Rs. 100 per mensem by way of rent instead of an amount for mesne profits. If the appellant is entitled to mesne profits he would certainly be entitled to more than Rs. 100 per mensem, because for many years the building was let at a rent of Rs. 700 per mensem and later at Rs. 800 per mensem. The appellant can only claim mesne profits if the respondents are to be regarded as trespassers. As did Venkataramana Rao J., we agree with Wadsworth J. that the respondents could only be treated as being in wrongful possession if they had refused a reasonable offer for the building at the expiration of the lease. No reasonable offer was made. The offer of Rs. 3000 was "ridiculously inadequate." The appellant should have made an offer in the neighbourhood of Rs. 18,000. As I have already pointed out the contract contemplated that the res-

1. ('39) 26 A I R 1939 P C 235 : 183 I C 328 : 66 I A 258 : I L R (1939) Kar (P C) 363 : (1939) 2 M L J 722 (P C), Harichand v. Secretary of State.

pondents should remain in possession until the market value of the building had been paid. It was not paid until 10th October 1938 and as no reasonable offer was made in the meantime the respondents cannot be regarded as trespassers and in the circumstances that the respondents' occupation must be deemed to have continued on the basis fixed by the contract, namely on payment of Rs. 100 per mensem. This, of course, does not apply after the stay was granted. The position since then will be governed by the conditions of the stay. The only other question for consideration is whether Venkataramana Rao J. was right in holding that the sum of Rs. 20,400, which he regarded as the value of the building, should carry interest at 6 per cent. in the event of default in payment within three months of his order. Inasmuch as the learned Judge directed the respondents to pay Rs. 100 a month for their occupation of the land he was not entitled to direct that the Rs. 20,400 should carry interest. This objection must be upheld. The decree on the original side will be modified to the extent indicated. As the appellant has failed in the main and as the respondents have failed entirely, we make no order as to costs in this Court.

C.R.K./G.N. *Decree modified.*

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(29) A. I. R. 1942 Madras 159

GENTLE J.

Kikishru Nadershaw Chinoy —

Applicant

v.

Nargesh Kikishru Chinoy Nee Nargesh Dorabji Tarapore — *Respondent.*

Matrimonial Suit No. 3 of 1941 (Application No. 1360 of 1941), Decided on 25th July 1941; application for revocation of order in Appln. No. 65 of 1941, D/- 6th February 1941.

(a) Parsi Marriage and Divorce Act (1936), Ss. 29 (3) and 47—Leave granted under S. 29 (3) —Remedy of aggrieved party is to appeal under S. 47 and not to apply for revocation under O. 13, R. 14 (a), Madras High Court Original Side Rules.

The appellate provision in S. 47 (b) of the 1936 Act is a new provision which expressly gives a remedy by appeal in regard to the grant by the Court of leave to present proceedings under S. 29 (3). This provision is in conflict with the provisions in O. 13, R. 14 (a) of the Original Side Rules of the High Court which provides a remedy for revocation of leave to sue by means of an application to the Judge and in consequence the statutory provision in S. 47 (b) must prevail. Therefore the remedy open to a party aggrieved by an order granting leave under S. 29 (3) is to avail of the provisions of S. 47 (b) and not to apply under the rule of the original side which has no application to the Matrimonial Court. [P 160*e*,*f*]

(b) Practice — Written statement — No steps taken for long time after notice of suit—Extension of time for filing written statement not to be granted.

The respondent took no steps at all until more than two months had elapsed after he was informed of the filing of the suit when he initiated some other proceeding which went against him. Subsequently he applied for extension of time for filing his written statement :

Held that he could not be granted extension of time. [P 160*g*,*h*]

S. V. B. Row — for Applicant.

C. R. Pattabhiraman — for Respondent.

Order. — This is an application by the respondent in a petition presented pursuant to the Parsi Marriage and Divorce Act 3 of 1936. In the application the applicant seeks to obtain revocation of the order giving leave to the petitioner to present her proceedings in this Court, the grounds being that the balance of convenience will be met by the proceeding being presented in a Court nearer to the Punjab where the respondent says he is residing. This Court is not the High Court sitting in its original jurisdiction. It is the Parsi Chief Matrimonial Court which is constituted under the provisions of Ss. 18 and 19, Parsi Marriage and Divorce Act, 1936. The application on the face of it purports to have been issued under O. 13, R. 14 (f) of the Rules of the Original Side of the High Court. This rule provides that the Judge sitting on the original side of the High Court shall deal with applications for revocation of orders granting leave to sue.

The petitioner applied to the Parsi Chief Matrimonial Court under S. 29, sub-s. (3) of the Act for leave to present her proceedings in the Matrimonial Court in Madras and on 6th February 1941, this Court granted the leave which the petitioner sought. Learned counsel on behalf of the respondent, the applicant in the application before me, has with great frankness, conceded that his client was served with the proceedings in the suit brought against him by his wife by the end of February 1941. Early in the month of March, this Court fixed the date to hear the suit between the petitioner and the respondent to take place on 5th August 1941 and again learned counsel on behalf of the respondent has conceded that his client was aware of the date of trial by end of March 1941. No step was taken by him until 7th May 1941 when the present application was issued to revoke the leave granted to the petitioning wife to bring her proceedings in Madras. This application was not served until on or

about 20th July. Learned counsel on behalf of the wife takes the preliminary objection that the wrong procedure has been adopted and he relies upon the provisions of S. 47, Parsi Marriage and Divorce Act, which, so far as is material, provides as follows :

> An appeal shall lie to the High Court from . . . . (b) the granting of leave by any such Court under sub-s. (3) of S. 29 provided that such appeal shall be instituted within three calendar months after the decision appealed from shall have been pronounced.

The words above "such Court" clearly refer to the Chief Parsi Matrimonial Court within the jurisdiction of the High Court. It is contended that the husband should have presented an appeal to the High Court from the decision of the Matrimonial Court granting leave to sue and the machinery which has been adopted pursuant to the provisions of the original side rules of the High Court is wrong and consequently this application must fail. Prior to 1936 the statutory enactment in force was the Parsi Marriage and Divorce Act of 1865 which contains some similar provisions to the Act of 1936 but by S. 51 of the earlier Act the High Court of the area in which the Parsi Matrimonial Court is established was empowered to make such rules and regulations concerning the practice and procedure in the Matrimonial Court as it might consider expedient. Under the provision of the section, to which I just referred, the High Court provided in O. 35, R. 18 of its original side rules that the rules of the High Court should apply to all suits under the Matrimonial Parsi Marriage and Divorce Act of 1865. Counsel on behalf of the husband thereupon contends that the original side rules are still applicable to the Parsi Matrimonial Court and he is entitled to present this application. Section 53 of the Act of 1936 repealed the whole of the Act of 1865. It has therefore repealed S. 51 to which I have referred. By the Repealing and Amending Act of 1937, S. 53 of the 1936 Act was itself repealed. Section 24, General Clauses Act, provides that :

> Where any Act . . . . . is . . . . . repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided, any order, scheme, rule, form or by-law, made or issued under the repealed Act . . . . . shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been issued under the provisions so re-enacted.

The important words to emphasise are "so far as it is not inconsistent with the provisions re-enacted." Under the Act of 1865 there was no provision by which the potential petitioner in a matrimonial suit in a Parsi Court could obtain leave to present the proceedings and there was no comparable provision in the earlier Act to that contained in S. 29 (3) of the 1936 Act. The appellate provision in S. 47 (b) of the 1936 Act is also a new provision which expressly gives a remedy by appeal in regard to the grant by the Court of leave to present proceedings under S. 29 (3). This provision is in conflict with the provisions in O. 13, R. 14 (a) of the Original Side Rules of the High Court which provides a remedy for revocation of leave to sue by means of an application to the Judge and which is therefore inconsistent with the statutory provision in S. 47 (b) of the Act of 1936. It is not necessary for me to decide whether or not all the original side rules of the High Court still have application to the Matrimonial Court for this reason. Assuming that they do, then, the provision by which an application can be made to the Judge to revoke the leave to sue is inconsistent with the statutory provision and in consequence the statutory provision must prevail. It is quite clear that the remedy open to the respondent husband in the proceedings was to have availed himself of the appellate provisions S. 47 (b) of the Act of 1936. He has not done so but has taken proceedings under a rule of the original side of the High Court which, in my view, has no application to the Matrimonial Court. The consequence is that the present application cannot be entertained and must be dismissed with costs.

Learned counsel on behalf of the husband (respondent) applied for an extension of time to be given to his client for filing the written statement and he stated the reason why it had not already been filed or prepared was because of the pendency of the present application. The respondent took no steps at all until more than two months had elapsed after he was informed of the filing of the suit in this Court and not until about six weeks following his being apprised of the date of trial and although the application was issued on 7th May 1941 service was not effected on the wife's learned advocate until about 20th July. True it is that the vacation of this Court was then taking place, but I see nothing to have prevented initiation of the proceedings long before the present application was filed. I see no ground to extend the time. I refuse to do so.

C.R.K./K.S. *Application dismissed.*

a

A. I. R. (29) 1942 Madras 161

MOCKETT AND KUNHI RAMAN JJ.

Minor Ramanathan Chettiar by next friend Chidambaram Chettiar — *Appellant*

v.

Muthuraman Naidu and others — *Respondents.*

Appeals Nos. 227 of 1938 and 256 of 1939, Decided on 31st July 1941, against decrees of Sub-Judge, Kumbakonam, D/- 20th December 1937.

(a) Civil P. C. (1908), S. 47 — Hindu trading family — Decree against karta in his individual capacity and not as representing family business —Decree is inexecutable against other members or their properties.

b

A decree obtained against the karta of a joint Hindu trading family in his individual capacity and not against the trading firm represented by him as the manager cannot be executed against the other members or their properties : ('18) 5 A.I.R. 1918 P.C. 146, *Rel. on*; ('34) 21 A.I.R. 1 934 P.C. 4, *Ref.* [P 166*b*]

(b) Hindu law — Debts — Father — Decree against father—To make son liable decree must relate to debt for which he is liable.

A decree passed against a Hindu father creates a debt prima facie dischargeable by the sons. But to create a debt payable by the son the decree itself must relate to a debt for which he is liable: 27 Mad. 243 (F. B.), *Rel. on.* [P 164*f*,*g*]

c

(c) Hindu law — Joint family — Manager — Powers of, to contract debts for family business — Coparceners are liable to extent of their interest in family property.

The manager of a joint Hindu family business has an implied authority to contract debts for the ordinary purpose of the family business, and, where such debts have been incurred, the other coparceners are liable, but only to the extent of their interest in the joint family and a decree against the manager can be executed against the shares of the other members: 15 Cal. 70 (P C) and ('37) 24 A.I.R. 1937 Mad. 610 (F. B.), *Rel. on.* [P 164*g*,*h*; P 165*c*]

(d) Hindu law—Father — Father as manager can represent family in all transactions—Liability found to be family liability — Every item of

d

joint family property is liable—Decree need not be against father as manager.

A Hindu father, by virtue of his position as manager, can represent the entire family in all transactions, not only with regard to immovable property but with regard to other transactions as well ; the decree need not be specifically passed against him as such; and once a liability is declared to be a family liability, every item of the joint family property is bound to satisfy that liability : ('37) 24 A.I.R. 1937 Mad. 610 (F. B.), *Rel. on.* [P 165*b*,*c*]

(e) Negotiable Instruments Act (1881), Ss. 50 and 117 — Manager of joint family executing pronote for debt incurred for family benefit— Payee indorsing note to third party without assigning debt — Indorsee obtaining decree on note and not on debt — Decree cannot be executed against other members.

e

Where the manager of a joint Hindu family incurs debt for the benefit of the family and executes a pronote for the same which is indorsed by the payee to a third party without assigning the debt as well, the indorsee can sue on the pronote alone and not the debt and the decree obtained by him on the pronote against the maker being one for compensation and not for debt cannot be executed against the other members of the family by invoking the principles of Hindu law : ('38) 25 A.I.R. 1938 Mad. 377 (F.B.), *Rel. on*; ('40) 27 A.I.R. 1940 Mad. 544, *Approved.* [P 165*g*; P 166*c*,*d*]

T. V. Ramiah — for Appellant.

R. Sundaralingam — for Respondents.

Mockett J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Kumbakonam in O. S. No. 32 of 1935. In that suit the plaintiff (the present f appellant) prayed for a decree declaring in substance that his (plaintiff's) half share in a house was not liable to be attached in execution of a decree passed in O. S. No. 33 of 1932 in the East Tanjore District Court. He also prayed for an injunction restraining defendant 1 from executing the said decree against his half share. O. S. No. 33 of 1932 was a suit by one Muthuraman Naidu against R. M. M. S. T. Vairavan Chettiar for money due on a promissory note. Vairavan Chettiar is the natural father of the appellant (the plaintiff in O. S. No. 32 of 1935). The promissory note was executed on 6th October g 1929 by Vairavan Chettiar to Thambuswami Naidu and this note was endorsed by the payee to Muthuraman Naidu, the plaintiff in O. S. No. 33 of 1932. The promissory note is marked Ex. 6. The judgment in O. S. No. 33 of 1932 is marked as Ex. 8B and the decree based thereon as Ex. B. As the arguments in this case have been directed to one aspect only it is unnecessary to set out at any great length the details of this suit. It will be enough to state that the plaintiff alleged that he was adopted by the widow of Chidambaram Chettiar, the brother of Vairavan Chettiar in 1924 and that in 1926 there was a division in status and an actual h division of one house in that family. The lower Court found the allegation of adoption to be proved and no arguments have been addressed to us attacking that finding. The lower Court also found that the allegation regarding the division in status was not proved and that finding has not been attacked before us. The decree in O. S. No. 33 of 1932 was assigned to defendant 3, respondent 2 in this case. The essential facts in this case, and it is upon these facts that the arguments have been based, can therefore be summarised as follows :

The appellant's natural father executed

a a promissory note to Thambuswami Naidu who endorsed it to defendant 1 Muthuraman Naidu and on the basis of the decree passed in the suit on that promissory note, O. S. No. 33 of 1932, in which Muthuraman was plaintiff, execution was sought to be levied on the appellant's share in the joint family property at the instance of defendant 3 the assignee of the decree from Muthuraman. The effect of the finding of the learned trial Judge with regard to the adoption in 1924 is that in 1929, the date of the execution of the promissory note, the plaintiff (appellant) was no longer the son of Vairavan Chettiar, the maker of the promissory note, having
t been adopted by the widow of Vairavan Chettiar's brother Chidambaram Chettiar. This is said to have an important bearing on this case. The learned trial Judge has dismissed the appellant's suit. The appellant contends that his property is not liable in execution because no liability of any sort can attach to him in view of the fact that the original decree against his father Vairavan Chettiar was based on a promissory note to which he (the appellant) was not a party and that (Vairavan Chettiar) was sued not by the payee but an endorsee from the payee. There has been no contest on the facts as I
c have indicated. The learned Judge has investigated the status of the appellant's family. There is no doubt about who they are. They are an old-established Nattukottai Chetty firm whose hereditary business is money lending and rice trade and their style and vilasam is R. M. M. S. T. Such families and such businesses are well-known in South India and Burma. The appellant has contended in the first place that the learned Judge was wrong in his finding with regard to the form of the promissory note and the form of the suit. In para. 53 of his judgment there appears the following :

d It is clear on a reading of Ex. 6 that it was executed by Vairavan Chettiar not merely in his individual behalf but as representing his firm and trading business. The promissory note was in fact executed by the firm and the endorsee thereof has the same rights on the negotiable instrument as the endorser to sue the firm which is the executant of the promissory note. The suit was also against the firm represented by the manager who had executed the note on behalf of the firm.

On an examination of the promissory note and the pleadings and the decree I am unable to agree with this finding. The promissory note is signed by R. M. M. S. T. Vairavan Chettiar. It is in renewal of a former promissory note which is stated to have been executed by Subbayya Chettiar "who was the agent of our firm at Velipalayam." It is not signed on behalf of the firm. e It is true that the words "we shall pay" are used, but it is not possible in view of the practice of Nattukottai Chetty agents who frequently use the word 'we' as meaning 'I', to attach any great importance to this. I observe that the translations of Exs. 6 and A vary. Exhibit A says, "On demand I shall pay you" whereas Ex. 6 has the words "we shall pay." We have had therefore recourse to the Tamil Interpretor of this Court who informs us that actually the word 'we' is not present in the original, nor is the word 'I', but the subsequent 'shall' denotes the plural. But whether the suit could have been filed against the firm, *vide* 5 M.L.W. 721,[1] f is of no great importance in this case. It may well be, that the plaint could have been so framed. The plaint in fact is not in my view, framed against the firm. The defendant is R. M. M. S. T. Vairavan Chettiar and he is described as "R. M. M. S. T. Vairavan Chettiar, father's name not known." Paragraph 1 alleges that the defendant is carrying on money-lending, etc., business under the vilasam (name and style) of R. M. M. S. T. at Velipalayam. That is a personal allegation that he himself is a firm or the proprietor of a firm. Paragraph 2 states that the money was borrowed in connexion with g and for the benefit of the defendant's ancestral family business and the prayer is for a decree against "the defendant personally and out of the properties of the defendant's business vilasam."

It must be observed that the plaint is not filed as against the R. M. M. S. T. firm in which case particulars could have been demanded as to its members under O. 30, Civil P. C., but appears to allege that the defendant owns the business. The decree describes the defendant as "R. M. M. S. T. Vairavan Chettiar, father's name not given" and the decree is that the defendant do pay to the plaintiff the sum of Rs. 22,341-14-0. It may h be, as the learned counsel for the respondents has argued, that this firm was so well-known, that the draftsman of the plaint overlooked the necessity for a careful pleading. The allegation in para. 2 is very clear that the money was borrowed for the benefit of the defendant's ancestral family business and there is no shadow of doubt on the record, nor is it suggested before us that that is not so and that the present appellant was not a member of the trading family of

1. ('18) 5 A.I.R. 1918 Mad. 524: 40 I. C. 347: 5 M.L.W.721, Ghulamsa Ravuthar v. Viswanathan Chettiar.

R. M. M. S. T. The conclusion I therefore arrive at is that, although the plaint is directed against the defendant personally and there is no allegation that the appellant is in any way concerned with the R. M. M. S. T. firm there is no doubt that this money was borrowed for purposes of the joint family trade and that the appellant was a member of the joint family. In 46 Cal. 663,[2] the Privy Council have made it abundantly clear that the name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or on the back of the document so that the responsibility is made plain and can be easily recognized as the document passes from hand to hand. Their Lordships observe :

> In this case the preliminary words mention no more than that Mohan Lal has been directed to execute the hundis, and they do not necessarily imply that he has been clothed with authority to execute them in any other form than that in which they were actually prepared — a form which it has already been shown constituted nothing more than a personal liability on behalf of Mohan Lal.

In *Abdul Majid Khan* v. *Saraswati Bai*, cited to us from 66 M L J 65,[3] their Lordships have laid down that :

> Where the karta of a Hindu trading family borrows money on promissory notes executed in his own name and not in the name of the firm, there is no presumption that the borrowing was for the purposes of the joint family business, and the lender must prove that the money was required for the family business.

The first of these decisions supports, I think, my construction of the promissory note and with regard to the second decision, I concur with the learned Judge's finding, which has not been attacked, that the money was borrowed by Vairavan Chettiar for the benefit of the R. M. M. S. T. Firm. But Mr. A. V. Viswanatha Sastri has argued that notwithstanding this view of the pleadings, which we indicated to him appealed to us, the decree was still executable against the share of the appellant. Mr. T V. Muthukrishna Iyer has argued that the findings in this case that at the time of the making of the promissory note the appellant had been adopted by the widow of Chidambaram Chettiar, combined with the view we take that the suit and the decree were prima facie against Vairavan Chettiar personally are fatal to the decision of the lower Court that this decree could be executed against the appellant. Mr. Muthukrishma Iyer has argued that since the decision of the lower Court a decision of a Full Bench of this High Court has concluded the matter in his favour. That case is I.L.R. (1938) Mad. 568.[4] In that case, the facts were that a Hindu father executed a promissory note which was endorsed by the payee to the plaintiff. A suit was brought based on the promissory note and by the indorsee making the sons of the maker defendants. The decision of the Full Bench was that the sons were not liable on a negotiable instrument on which their names did not appear. Reference was made to the decision in 46 Cal 663[2] to which we have also referred, and the statement of the law by Lord Buckmaster cited. Leach C. J in the course of his judgment, with which the other members of the Bench concur, after reviewing the case law, stated :

> From these decisions, it will be observed that there are two principles to be borne in mind. The first is the principle which I have already stated, namely that no one whose name does not appear on a negotiable instrument can be sued on it. The second is that there is no privity of contract between an indorsee and the maker or acceptor.

The reference to the Full Bench was :

> Whether an indorsee of the promissory note executed by the managing member is entitled to recover the debt from the property of the non-executant coparceners on the ground of their liability under the Hindu law or whether he is limited to the remedy available on the note.

And the answer of the Full Bench was :

> The indorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note, unless the endorsement is so worded as to transfer the debt as well and the Stamp law is complied with, and therefore in the case of an ordinary endorsement the indorsee cannot sue the non-executant coparceners on the ground of their liability under the Hindu law.

At page 576, the learned Chief Justice observes :

> The maker alone can be sued on the note and the fact that under Hindu law sons are liable in respect of debts incurred on behalf of the family or by the father for his own purposes, provided they are not incurred for illegal or immoral purpose, does not affect the principle involved.

It seems to me that the decision of the Full Bench was concerned only with the question of an action on a promissory note. At no time was any question of rights of execution under Hindu law discussed. On the contrary the remarks and the observations in the judgment of the learned Chief Justice make it clear that this case was decided on the basis of a right of suit and

2. ('18) 5 A.I.R. 1918 P. C. 146 : 50 I. C. 216 : 46 Cal. 663 : 46 I. A. 33 (P.C.), Sadasuk Janki Das v. Sir Kishen Pershad.
3. ('34) 21 A.I.R. 1934 P. C. 4 : 147 I. C. 1 : 30 N. L. R. 60 : 61 I. A. 90 : 66 M.L.J. 65 (P. C.).
4. ('38) 25 A I R. 1938 Mad. 377 : 174 I C. 577 : I L R. (1938) Mad. 568: (1938) 1 M L J. 378 (F.B.), Maruthamuthu Naicker v. Kadir Badsha Rowther.

that the discussion of any other right under Hindu law was expressly excluded. But the latter question is raised in this appeal. This Full Bench decision related to a promissory note made by a father and the liability under discussion was the liability of the son to an indorsee in a suit. We have to consider here the liability of a member of a trading family not in a suit but in execution for debts incurred by the manager for the purpose of the trading family. It is clear from the decision of the Full Bench that in a suit it matters not what the relationship between the maker and the person sought to be made liable is, if the latter's name is not upon the promissory note. There is a further decision of this High Court which is instructive. In I.L.R.(1940) Mad. 815,[5] Leach C. J. and Krishnaswami Ayyangar J., had before them an appeal in which a question of execution came up for consideration. The appellants obtained a money decree against respondent 3 making respondent 3's sons parties to the suit. The suit was on a promissory note executed by the father alone and the decree was passed against the father alone, the plaintiff deciding not to ask for a decree against the sons, who were dismissed from the suit. Notwithstanding this dismissal, the Bench held that execution can be levied against the sons' share in the joint family property on the basis that under Hindu law the sons were liable to pay their father's debts. There was of course no question of endorsement of a promissory note in that case, but it is a clear case of execution being levied on a person in respect of the debt due under a promissory note by the maker of that promissory note, although the name of the person on whose property execution was sought to be levied was not upon the promissory note. The Bench was largely concerned with the consideration of principles of res judicata, but the facts are of interest for the reason I have indicated. I derive this from that decision, that although under the law relating to negotiable instruments and the framing of suits thereon the sons would not be liable in a suit by the payee against the father the sole maker, nevertheless the result will ultimately be in circumstances of that case, that, although not liable in the suit, they were nevertheless liable in execution under a totally different system of law, namely, the Hindu law.

But, to return to the arguments of the learned counsel for the appellant, does the fact that in the case now before us the promissory note was endorsed alter the position? In I.L.R. (1938) Mad. 568[4] a distinction is made between the indorsee's remedy on a mere endorsement of the note and his remedy on an endorsement transferring the debt as well and complying with the Stamp law. It has been naturally a matter for careful consideration as to whether that affects the question before us; it seems to me that it does. The absence of such a formal assignment of the debt is no doubt fatal to a suit by the indorsee purported to be based on the debt and with which the Hindu law is concerned. It seems to me that for the appellant to escape liability we must hold that there is no debt due by the manager (he happens to be their natural father) to the decree-holder which they are under an obligation to pay. In so far as a father and son are concerned, a decree passed against a father creates a debt prima facie dischargeable by the sons: 27 Mad. 243.[6] See also Mayne's Hindu law, Edn. 10, page 420. It seems to be established that the judgment against the father having created a debt which the son is liable to discharge, the consequent proceedings against the son will not be upon the judgment but upon the debt created by the decree. But to create a debt payable by the son, I think it reasonable to suppose that the decree itself must relate to a debt for which he is liable. Whether the decree now sought to be executed not against the son but against a member of a joint trading family did relate to a debt will be a matter for consideration. So far the relationship of a father and son has been discussed. So far as the powers of a manager to contract debts for family purposes are concerned, it seems clear that the manager of a joint family business has an implied authority to contract debts for the ordinary purpose of the family business, and, where such debts have been incurred, the other coparceners are liable, but only to the extent of their interest in the joint family: *vide* Mayne, Edn. 10, pp. 449 and 450 for a summary of the law. In I.L.R. (1937) Mad. 880,[7] Venkatasubba Rao J., points out that

> there is a legal duty cast upon the son, as upon any other junior coparcener, to discharge a liability incurred by the father in his capacity of manager for family purposes, and it is therefore unneces-

5. ('40) 27 A.I.R. 1940 Mad. 544 : 193 I. C. 825 : I.L.R. (1940) Mad. 815 : (1940) 1 M.L.J. 363, Krishnan v. Somi.

6. ('04) 27 Mad. 243 : 14 M.L.J. 84 (F.B.), Periaswami Mudaliar v. Seetharama Chettiar.

7. ('37) 24 A.I.R. 1937 Mad. 610 : 171 I. C. 101 : I.L.R. (1937) Mad. 880 : (1937) 2 M.L.J. 251 (F.B.), Venkatanarayana v. Somaraju.

sary on the facts here to invoke the doctrine of pious obligation.

It will be seen that the learned Judge emphasizes that, although the manager may also be the father, all the junior coparceners are under a duty to discharge liabilities properly incurred by him because of his position as manager. I have already indicated that the circumstances of this case show that, although the suit is not framed as against the firm, there is no doubt that it is against the manager for money advanced for the firm. The Full Bench decision in I.L.R.(1937) Mad. 880[7] also held that the principle of representation by the managing member was not confined to immovable property but to other transactions as well, for instance, loans. I have been unable to understand why there should ever have been such a distinction. This decision of the Full Bench is, I consider, important in this case because it is an authority binding on me for the proposition that a Hindu father, by virtue of his position as manager, can represent the entire family in all transactions, not only with regard to immovable property but with regard to other transactions as well; that the decree need not be specifically passed against him as such; and that, once a liability is declared to be a family liability, every item of the joint family property is bound to satisfy that liability.

Our attention has been drawn to the decision of this High Court in 68 M.L.J. 104,[8] which was not cited to the Full Bench in I.L.R. (1937) Mad. 880.[7] It appears from the facts of that case that the money borrowed was a personal debt and did not concern a trading family or an endorsed promissory note but it is evident that the learned Judges were reluctant to allow investigations in proceedings in execution to be made against persons who are not sons or descendants of the judgment-debtor. Where a suit is brought by an original payee against an original maker there appears to be no difficulty about the legal position of the members of the maker's family in execution proceedings; it is argued that the fact that the decree on which execution is sought to be levied against the appellant's property is based upon an endorsed promissory note materially affects his liability as a member of his family. Except for the decision in I.L.R.(1938) Mad. 568[4] and the cases therein cited, no case relating to an endorsed promissory note has been brought to our notice and no case relating to execution on a decree on an endorsed promissory note. As in I.L.R. (1938) Mad. 568,[4] so in this appeal, the following facts are in my view of vital importance: (1) The promissory note was endorsed to Muthuraman Chettiar, and (2) the debt was not assigned to Muthuraman Chettiar. There is the further fact that the element of pious obligation between a father and son is absent. There is a wealth of authority,

that a decree obtained against a managing member for a debt binding on the family can be executed against the shares of the other members.

Vide 15 Cal 70[9] and the numerous cases cited by Mayne, 10th Edn., at p. 450. The question in this appeal, therefore, seems to be whether there is a debt in the hands of defendant 3 which the plaintiff is bound to pay. In my view, there is not. I consider that the general principle laid down in I.L.R. (1938) Mad. 568[4] is applicable to this case. No debt was ever assigned to Muthuraman Naidu by Thambuswami Naidu, the promisor under Ex. 6. It could have been assigned, but it was not. By his endorsement and delivery, Thambuswami Naidu transferred the property in the note to Muthuraman Chettiar: S. 50, Negotiable Instruments Act. The subsequent decree therefore can only have been on the note, and not on the debt. There is not, therefore, in existence any decree based on a debt. Any decree against the maker of the note will be as Varadachariar J. points out in I.L.R.(1938)Mad. 568[4] at p. 569, for compensation and not for debt: S. 117, Negotiable Instruments Act. It seems to me therefore that the present decree-holder cannot on the principle that the members of this trading family are liable to pay debts properly incurred by the manager make their property liable in execution in respect of a decree against the manager not for a debt but for a remedy under the provisions of a statute. I see no reason to stretch the principles of Hindu law in so far as they relate to the liability of persons not parties to suits, nor to extend the meaning of the word "debt". I again emphasise that the element of pious obligation by a son which seems to have given a somewhat comprehensive meaning to the word "debt" is absent in this appeal. That the payee might, had the plaint been correctly framed or the debt correctly assigned, have been entitled to recover from the plaintiff is no reason for taking another view; nor is the possibility that, had there

8. ('35) 22 A.I.R. 1935 Mad. 145: 155 I.C. 574: 68 M.L.J.104, Lakshmanan Chettiar v. Muthu Chellia Goundan.

9. ('88) 15 Cal. 70:14 I.A. 187:1 P.R. 1888: 5 Sar. 84 (P. C.), Daulatram v. Mehr Chand.

been no endorsement, no difficulty would have arisen for Thambuswami Naidu to recover. Indeed I consider that the fact that the plaintiff in the suit on the note preferred other methods is a reason for a holder of the decree therein being confined rigidly to his rights as they work out logically.

For the above reasons this appeal must be allowed with costs here and below. It must follow also that Appeal No. 256 of 1939 will also be allowed with costs, which will be limited to the stamp duty paid, printing charges and other out of pocket expenses.

Kunhi Raman J. — I have had the advantage of perusing the judgment just delivered by my learned brother. In stating that I concur in the views expressed in it, I wish to add a few words. There is no doubt at all that the decree in O. S. No. 33 of 1932 was not against a firm represented by Vairavan Chettiar as manager, but that it was against the individual Vairavan Chettiar. The decree cannot, therefore, be executed against other members of the firm or their properties. It is clear from the decision of a Full Bench of this Court reported in I.L.R. (1938) Mad. 568[4] which is binding on us, that the payee of a promissory note executed by the manager of a joint Hindu family may, if he wishes to sue, base his suit on the note, in which case, only the maker of the note can be made liable, or on the debt, in which event, he may seek to make the sons or the other undivided members of the family of the maker also liable. When, however, the payee endorses the note to a third party, without assigning the debt also to the indorsee, the latter can sue only on the note and not on the debt. In the present case, the suit was by such an indorsee who did not therefore acquire any wider rights in respect of the debt under the Hindu law. The decree he obtained was only against the maker of the note, the cause of action being based purely on the negotiable instrument. Such a decree cannot obviously be executed against any other undivided member of the family of the maker of the note. Seeing that the appellant who is the natural son of the maker of the note was given away in adoption to his paternal uncle, no question of pious obligation to discharge the debt created by the decree in this case can also arise. In the circumstances, I agree that the appeals must be allowed as indicated in the judgment of my learned brother.

C.R.K./G.N. *Appeals allowed.*

A. I. R. (29) 1942 Madras 166

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Chelikanti Sitaramayya — Appellant

v.

Koppula Pedda Venkanna—Respondent.

Letters Patent Appeal No. 63 of 1939, Decided on 7th November 1940, against order and judgment of Wadsworth J., *Reported in ('40) 27 A.I.R. 1940 Mad 15.*

Civil P. C. (1908), S. 144 — Decree by *A* against *R* — *R* appealing — No execution by *A* pending — *R* applying for stay — Stay granted on condition of his furnishing security — *R* depositing decretal amount instead — *R* successful and withdrawing amount—Application by *R* against *A* for interest — S. 144 held not applicable and *A* held not liable to pay interest : (1939) 2 M.L.J. 509=('40) 27 A.I.R. 1940 Mad. 15 =187 I. C. 30, *REVERSED.*

A obtained a decree against *R*. *R* appealed. While the appeal was pending, *R* fearing that *A* might institute proceedings in execution applied for a stay of execution. A stay was ordered on the condition that *R* furnished security to the Court for the amount of the decree. It was not convenient for *R* to furnish security in the form of immovable property and instead he deposited the sum in cash. On paying the money in, he asked the Court to direct that the decree-holder should only withdraw it on furnishing security and this the Court directed. *R* succeeded in his appeal. *R* then withdrew his money from the Court and at the same time applied for an order against *A* directing him to pay interest thereon :

Held that S. 144 did not apply. Although there was no application for execution pending, *R* applied for stay and he got the stay on certain terms. The terms did not include the payment of the money into Court. If he had furnished security in the form of immovable property, there would have been no question of payment of interest. He could also have guarded himself against loss by converting the money into Government Promissory Notes, but he did not choose to do this and was content to leave the money lying in Court. If *R* suffered any loss, the blame must rest with him. *A* was not liable to pay interest in the circumstances : (1939) 2 M.L.J. 509=('40) 27 A.I.R. 1940 Mad. 15=187 I.C. 30, *Reversed.* [P 167c,d]

K. Bhimasankaran — for Appellant.

Ch. Raghava Rao — for Respondent.

Leach C. J. — In 1931 the appellant obtained a decree against the respondent in the Court of the District Munsif of Peddapur for the payment of Rs. 2948-15-8. The respondent appealed to the Subordinate Judge of Cocanada and was successful, the appellant's suit being dismissed with costs. While the appeal was pending the appellant applied for the execution of the decree which he had obtained, but as the result of an arrangement with the respondent the application was dismissed on payment of costs. Apparently fearing that the appellant might institute further proceedings in execution,

the respondent applied for a stay of execution. A stay was ordered on the condition that the respondent furnished security to the Court for the amount of the decree. It was not convenient for the respondent to furnish security in the form of immovable property and instead he deposited the sum of Rupees 2948-15-8 in cash. On paying the money in, he asked the Court to direct that the decree-holder should only withdraw it on furnishing security and this the Court directed. When the appeal was allowed, the respondent withdrew his money from the Court and at the same time applied for an order against the appellant directing him to pay interest thereon. The District Munsif refused to do so, but on appeal the Subordinate Judge reversed his decision and awarded the respondent interest at the rate of 12 per cent. per annum. The appellant then appealed to this Court. The appeal was heard by Wadsworth J. who with some hesitation agreed with the Subordinate Judge. Wadsworth J. considered that the general principle embodied in S. 144, Civil P. C., applied and on this footing the respondent was entitled to recover any loss he might have suffered as the result of the first Court's decree.

We are unable to concur in the opinion of the learned Judge that S. 144 applies here. Although there was no application for execution pending, the respondent applied for stay and he got the stay on certain terms. The terms did not include the payment of the money into Court. If he had furnished security in the form of immovable property, there would have been no question of payment of interest. He could also have guarded himself against loss by converting the money into Government promissory notes, but he did not choose to do this and was content to leave the money lying in Court. If the respondent has suffered any loss, the blame must rest with him. The appellant is clearly not liable to pay interest in the circumstances. The appeal is allowed with costs throughout.

C.R.K./R.K. *Appeal allowed.*

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* A. I. R. (29) 1942 Madras 167

CHANDRASEKHARA AYYAR J.

Sayed Abdul Huq Sahib — Appellant

v.

Usman Khan Sahib Kabuli and others — Respondents.

Second Appeal No. 236 of 1939, Decided on 18th August 1941, against decree of Dist. Court, Trichinopoly, in A. S. No. 346 of 1937.

*** Limitation Act (1908), S. 19, Arts. 111 and 132 — Person having two separate and distinct remedies arising out of one and same transaction—Acknowledgment to save one of remedies will not save other also — Vendor taking promissory note from vendee for unpaid sale price — Acknowledgment of liability under promissory note cannot be treated as acknowledgment in respect of vendor's lien.**

Where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction and the remedies are separate and distinct in their scope and in their essential features, anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also.

[P 169*a*,*b*]

Where the vendor has taken a promissory note for the unpaid sale price from the vendee, he has two remedies open to him for recovery of the unpaid sale price viz., one by way of enforcement of the personal liability under the note and the second by way of enforcement of the statutory charge by sale of immovable properties which is not extinguished by the execution of the note. The remedies in respect of the statutory charge and the promissory note are certainly not similar or co-extensive and the periods of limitation are different for the two causes of action. Hence an acknowledgment of liability evidenced by endorsements on the promissory note cannot be treated as acknowledgments of liability in respect of the vendor's lien : ('24) 11 A.I.R. 1924 Mad 854; 7 Mad. 392; ('17) 4 A.I.R. 1917 Mad. 460 and 25 Cal. 844 (P.C.), *Disting.* [P 168*g*,*h*]

K. V. Sesha Ayyangar — for Appellant.

K. S. Narayana Ayyangar — for Respondents.

Judgment. — A point of limitation arises in this second appeal preferred by the plaintiffs. The facts are these. The plaintiff sold certain immovable property to one Mohamed Ghouse on 15th January 1920 for a sum of Rs. 1750. A sum of Rs. 600 out of the sale price was not paid by Mohamed Ghouse who therefore executed a promissory note in favour of the plaintiff for the said amount on the same date. Payments were made towards the amount due under the promissory note and endorsements were made on the note evidencing those payments. On 15th August 1927, a sum of Rs. 187-7-0 remained due to the plaintiff under the note and he obtained a decree for the said amount in O. S. No. 302 of 1927. The present suit to enforce the vendor's lien was filed by the plaintiff against the defendant who purchased the properties in execution of a mortgage decree for sale obtained by a Fund against the owner, Ghouse Sahib, for the recovery of the balance due to him; and plaintiff's case is that he was not aware of the mortgage in favour of the fund and that the defendant purchased the properties with notice of his charge or lien.

As the suit was filed by the plaintiff on 4th July 1936, that is more than 12 years

after the date of the sale to Ghouse Sahib, both the lower Courts held that it was barred by limitation under Art. 132. The plaintiff tried to save himself from the bar of limitation by relying on the endorsements on the promissory note, contending that they amounted to an acknowledgment of liability not merely in respect of the promissory note, but as regards the statutory charge as well. The same argument is now advanced for the appellant in the second appeal by Mr. K. V. Sesha Ayyangar. He contended that the original debt was one and the same and that acknowledgments of liability on the promissory note enured to keep the debt alive and that the statutory charge was consequently not barred. He also pointed out that the decision relied on by the lower Courts reported in 1924 M.W.N. 755[1] was reversed in L. P. A. No. 150 of 1924. The decision of Devadoss J. in the Weekly Notes case has little to do with the point now under consideration. His Lordship took the extreme view that as the charge was a statutory one, the time limited for its enforcement by statute could never be extended by agreement of parties and that even though the sale deed gave a particular period for payment of the price, still the charge would be extinguished on the expiry of 12 years from the date of the sale deed. This view was overruled as incorrect by Wallace and Madhavan Nair JJ. in the Letters Patent Appeal.

We have to consider whether acknowledgments of liability evidenced by endorsements on the promissory note can be treated as acknowledgments of liability in respect of the vendor's lien. Three cases were cited in support of this position, namely, 7 Mad. 392,[2] 34 I.C. 417,[3] 25 Cal. 844.[4] But in all the three cases, not merely was the debt the same but the remedies were identical also. In 7 Mad. 392[2] the point was whether the acknowledgment of liability in respect of a hundi on Penang in favour of the plaintiff's agent for a debt due by defendant to the plaintiff, requesting the drawee of the hundi to pay the amount to the plaintiff still due on the hundi constituted a sufficient acknowledgment of the debt due in respect of which the hundi was drawn. In 34 I.C. 417,[3] Coutts-Trotter and Srinivasa Ayyangar JJ. had to consider a payment endorsed on a chit and purporting to be for the chit. The chit was inadmissible as a promissory note and their Lordships held that the acknowledgments on the chit were nevertheless available as an acknowledgment of the liability of the original debt. In 25 Cal. 844,[4] the Privy Council held that a petition by three co-owners giving direction to the manager to pay the surplus income towards the payment of certain debts due by them specified in the petition amounted not merely to an acknowledgment of joint liability in favour of the creditor who had obtained decrees for arrears of rent, but also amounted to an acknowledgment of liability inter se as between the co-owners themselves for any claim or contribution that might arise. Their Lordships say at p. 851 that it was not necessary that the defendants should admit liability to the defendant nor promise to pay him anything. They observe:

> It is not required that an acknowledgment within the statute shall specify every legal consequence of the thing acknowledged. The defendant acknowledged a joint debt. From that follow the legal incidents of her position as joint debtor with the plaintiff, one of which is that he may sue her for contribution.

The case before us is in my opinion different from the cases cited for the appellant. Though the debt is identical, two distinct remedies became available for its recovery, one by way of enforcement of the personal liability under the promissory note, and the second by way of enforcement of the statutory charge by sale of immovable properties. Where the note is executed by the vendee to the vendor, as in this case, there is no extinguishment of the lien or the charge; but there may be cases where such extinguishment takes place and some of them have been dealt with in 50 Mad. 548[5] by Ramesam and Reilly JJ. The remedies in respect of the statutory charge and the promissory note are certainly not similar or co-extensive. In the one, we are concerned with the immovable properties and in the other with the personal liability of the executor of the note. The periods of limitation are different for the two causes of action.

If the promissory note had been taken in the name of a third party instead of by the plaintiff it could not at all be said that payments made by the vendee towards the amount due under the note can be treated

1. ('24) 11 A.I.R. 1924 Mad. 854: 82 I.C. 481: 1924 M.W.N. 755, Authinarayana Ayyar v. Krishnasami Aiyar.
2. ('84) 7 Mad. 392, Raman v. Vairavan.
3. ('17) 4 A.I.R. 1917 Mad. 460:34 I.C. 417, Chockalingam Chetty v. Annamalai Chetti.
4. ('98) 25 Cal. 844: 25 I.A. 95: 2 CW.N. 402: 7 Sar. 294 (P.C.), Sukhamoni Chowdhrani v. Ishan Chunder Roy.
5. ('27) 14 A.I.R. 1927 Mad. 219: 100 I.C. 10: 50 Mad. 548: 51 M.L.J. 856, Swaminatha Odayar v. Subbarama Ayyar.

as acknowledgments of liability in respect of the statutory charge. A similar difficulty would arise in the case of negotiation of the promissory note by the payee under the Law Merchant. Could it be contended that an acknowledgment of liability on the promissory note would serve as a good acknowledgment to extend the period of limitation for the enforcement of the charge, when the charge-holder had assigned it to a third party? These considerations show that in the case where two remedies flow either by operation of law or by agreement between the parties out of one and the same transaction and the remedies are separate and distinct in their scope and in their essential features, anything said or done to save one of the remedies from the bar of limitation cannot operate by itself to save the other also. As has already been pointed out, the three cases cited for the appellant are all cases of a single debt and a single remedy for the debt. Holding for the reasons given above that the lower Courts have taken the correct view on the point as to limitation, I dismiss this second appeal with costs. As the question involved is of some importance I grant leave to prefer an appeal.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 169

WADSWORTH AND PATANJALI SASTRI JJ.

Karuppa Goundan — Appellant

v.

T. R. Narayanaswami & Co. by partner P. S. G. Rangaswami Naidu — Respondent.

Second Appeal No. 764 of 1940, Decided on 22nd September 1941, against decree of Dist. Court, Coimbatore, in A. S. No. 689 of 1939.

(a) Negotiable Instruments Act (1881), S. 120 —Defence independent of plea of invalidity of instrument is not barred by S. 120.

Section 120 only prevents the maker of the note from denying the validity of the instrument as originally made or drawn. It does not bar any defence which is independent of a plea that the instrument as originally made or drawn was invalid. [P 169*g*]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 3 — Assignee of pronote is creditor within Act.

The endorsee of a promissory note is the assign of the original promisee even though he has greater rights than an assign by deed in that he is a holder in due course. [P 169*h*]

(c) Madras Agriculturists Relief Act (4 of 1938)—Applicability—Negotiable instruments.

The provisions of Act 4 are not invalid even though they may affect the rights of parties under the Negotiable Instruments Act: ('39) 26 A.I.R. 1939 Mad. 361 (FB), *Foll.*; ('41) 28 A.I.R. 1941 F.C. 47, *Ref.* [P 169*h*, 170*a*]

S. Ramachandra Aiyar and M. Krishna Bharathi — for Appellant.

K. S. Sankara Aiyar and T. B. Balagopal — for Respondent.

Wadsworth J. — This appeal arises out of a suit on a promissory note. The note in question was executed by the appellant in favour of one Aiyasami Naicken on 30th July 1931 for a sum of Rs. 1000 of which Rs. 500 was advanced in cash at the time of the execution, the balance represented a payment towards interest on an earlier mortgage, Ex. 3 in favour of one Rangasami Naicken. In February 1936 the note was assigned to the plaintiff by an endorsement. The trial Court held that the defendant was entitled to plead Act 4 of 1938 and that, to the extent to which the note was in discharge of interest on the prior mortgage, the principal was liable to be reduced to the sum actually advanced in cash. He gave credit for a payment of Rs. 100 made towards principal, passed a decree for Rs. 400, scaling down the interest under the Act. The lower appellate Court, without going into the question whether to the extent of the payment towards the prior mortgage, the promissory note was a renewal, came to the conclusion that the endorsee of the promissory note was not a creditor under Act 4 of 1938 and that the debtor was barred by S. 120, Negotiable Instruments Act, from pleading the defects in the note or the transaction. It seems to us that on both these points the learned District Judge is clearly in error. Section 120, Negotiable Instruments Act, only prevents the maker of the note from denying the validity of the instrument as originally made or drawn. It does not bar any defence which is independent of a plea that the instrument as originally made or drawn was invalid. Section 3 of Act 4 of 1938 defines a creditor as including his assigns and there can be no doubt that the endorsee of a promissory note is the assign of the original promisee even though he has greater rights than an assign by deed in that he is a holder in due course. It has been suggested on behalf of the respondent, relying on observations in the judgment of the Federal Court, 1940 F.C.R. 188,[1] that Act 4 of 1938 must be deemed to be invalid in so far as it affects the rights of holders in due course of negotiable instruments; or, alter-

1. ('41) 28 A.I.R. 1941 F.C. 47: 192 I.C. 225: 1940 F.C.R. 188 : I.L.R. (1941) Kar.F.C. 25, Subramaniam Chettiar v. Muthuswami Goundan.

natively, that it must be deemed that this Act does not affect such rights. It seems to us that these are questions which, so far as we are concerned, are governed by the decision of the Full Bench in I. L. R. (1939) Mad. 151[2] which went fully into the effect of Act 4 upon negotiable instruments and decided that the provisions of Act 4 were not invalid even though they may affect the rights of parties under the Negotiable Instruments Act. In this Court, therefore, the contention of the respondent cannot succeed. But we certify with reference to S. 205, Government of India Act, 1935, that the case involves a substantial question of law as to the interpretation of the Government of India Act.

The Courts below have not considered the question whether the portion of the principal of the promissory note which consists of interest due on the earlier mortgage can be deemed to be interest under the explanation to S. 8, having regard to the fact that the mortgagee under Ex. 3 was one Rangaswami Naicken whereas the promisee under the promissory note was Aiyaswami Naidu. It may be that there are facts which would enable the defendant to plead that the interest under the mortgage was due to the same creditor as the creditor under the promissory note. That is a matter which will have to be gone into in the lower appellate Court. We therefore allow the appeal and remand the case to the lower appellate Court for fresh disposal in the light of this judgment. The costs of the second appeal will abide by the result. Court fee on the second appeal will be refunded.

C.R.K./R.K. *Case remanded.*

2. ('39) 26 A.I.R. 1939 Mad. 361 : 180 I. C. 994 : I.L.R. (1939) Mad. 151: (1939) 1 M.L.J. 272 (F.B.), Nagaratnam v. Seshayya.

A. I. R. (29) 1942 Madras 170

ABDUR RAHMAN J.

Kayambu Pillai and another — *Petitioners*

v.

Court of Wards by Collector, Trichinopoly District and others — *Respondents.*

Civil Misc. Petn. No. 4426 of 1940, Decided on 13th August 1941, praying to excuse delay in filing review petition against order of Venkatasubba Rao and Abdur Rahman JJ., in A. S. No. 343 of 1931, D/- 4th March 1938.

Limitation Act (1908), S. 5—Words "sufficient cause" must be liberally construed — Existence of circumstances mentioned in S. 14 constitutes "sufficient cause" within S. 5.

The words "sufficient cause" in S. 5 must be liberally construed so as to advance substantial justice particularly when "no negligence, nor inaction nor want of bona fides is imputable to the applicant" : 13 Mad. 269, *Rel. on.* [P 170*g*]

In considering the words "sufficient cause" under S. 5, the equities on which S. 14 is based may be taken into account though that section may not in terms be applicable. The existence of circumstances mentioned in S. 14 therefore constitutes a sufficient ground for excusing the delay under S. 5 caused by wrong proceedings : ('37) 24 A.I.R. 1937 P. C. 276, *Rel. on.* [P 171*a*,*b*]

The question of excusing the delay has to be approached from the point of view of the petitioner's conduct rather than of the advantage gained by other side. [P 171*h*]

T. S. Venkatesa Ayyar and S. Sundaresa Ayyar — for Petitioners.

K. Kuttikrishna Menon—for Respondents.

Order.—This is an application to excuse the delay in presenting a petition for review against the orders passed by Venkatasubba Rao J., and myself in A. S. No. 343 of 1931 on 4th March 1938. I have not, up till now, decided to issue any notice in regard to the petition for review and nothing in this order shall be taken to refer to the application for review which I shall consider separately. Since the existence of sufficient cause is a condition precedent without which the discretion given to a Court under this section (S. 5, Limitation Act) cannot be exercised, the question whether the delay should be excused depends for its answer on the fact whether the petitioner has succeeded in making out the same. According to the well-known decision in 13 Mad 269[1] cited by learned counsel for the appellant, the words 'sufficient cause' have to be liberally construed so as to advance substantial justice particularly when "no negligence, nor inaction, nor want of bona fides is imputable to the appellant." In defining the general rules of guidance for the exercise of discretion, Lord Dunedin observed in 45 Cal 94[2] :

We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal.

Learned counsel for the Court of Wards has, on the other hand, naturally laid great stress on the fact that once the time for making an application is past, a very valuable right has accrued to the successful party of which he should not be lightly deprived. Section 14, Lim. Act, provides that in computing the period of limitation for any suit or application, the time during which the

1. ('90) 13 Mad. 269, Krishna v. Chathappan.
2. ('17) 4 A.I.R. 1917 P. C. 156 : 42 I. C. 43 : 45 Cal. 94 : 44 I. A. 218 : 104 P. R. 1917 (P.C.), Brij Indar Singh v. Lala Kanshi Ram.

applicant has been prosecuting in good faith and with due diligence another civil proceeding in another Court, which from defect of jurisdiction or other causes of a like nature, is unable to entertain it, shall be excluded. It has been contended by learned counsel for the appellant that in considering the words "sufficient cause" under S. 5, Limitation Act, the equities on which S. 14, Limitation Act is based may be taken into account, it being a common case of the parties that S. 14 as such has no application to the present case. The contention has, in my opinion, considerable force. As observed by their Lordships of the Privy Council in A.I.R. 1937 P. C. 276[3] at p. 278 that in applying S. 5 to cases where delay has been caused by taking a wrong proceeding, "analogy of S. 14 is an argument of considerable weight." The existence of circumstances mentioned in the section has been, therefore, regarded in decided cases as a sufficient ground for excusing the delay caused by wrong proceedings. In order to decide therefore whether the plaintiff would be entitled to exemption, I must see whether he had been during the time that has elapsed in excess of what is allowed to him by law, prosecuting in good faith and with due diligence other proceeding or proceedings for substantially the same relief in another Court which was, for defect of jurisdiction or for other causes of a like nature unable to entertain the same and grant the relief to the petitioner.

There is no doubt, as a reference to the petitioner's affidavit would show, that he has been prosecuting certain Letters Patent appeals and other civil miscellaneous applications between 17th March 1938 and 18th April 1939. So far as the time spent for the disposal of these appeals and applications is concerned, there cannot be much of a doubt that these proceedings must be regarded as having been taken in good faith and prosecuted diligently. Had the time to pay court-fee and to give security been extended either by the Court on 18th February 1938 or had Letters Patent appeals, against those orders been allowed on 18th April 1939 the appeal would not have been dismissed on 4th March 1938 and even if dismissed, the order of dismissal would have had to be vacated. No reasons for the dismissal of these appeals have been given by the Division Bench disposing of them but it seems to be obvious that they were dismissed as the prayer to extend the time or to excuse the delay in the Letters Patent appeal filed against the order in Civil Miscellaneous Petition No. 5204 of 1934 which was five days beyond time had not been granted. The applicant cannot be regarded to have been guilty of negligence or inaction or want of bona fides so far as this delay is concerned. This time must, therefore, be taken into account in his favour and he should get a credit for the same in computing the period of limitation. This is, however, not enough for the petitioner. He says that the Courts were closed on 5th May 1939 and re-opened on 17th July 1939 on which date applications were made on his behalf, S. R. 18426 of 1939 (C.M.P.), for accepting the court fee and security and re-hearing the appeal and C. M. P. No. 3582 to excuse the delay in making this application. That these applications, if made on 5th May 1939 would have been taken into consideration in computing the period of limitation on the same basis as the proceedings under the Letters Patent appeals, does not seem to be open to question. Nor is there any doubt that if these applications had been granted, the petitioner would have achieved his object and the present petition for review would have been unnecessary. The only question then is whether the time during which the Court was closed, when these applications could not have been presented, should be taken into consideration in calculating the period of limitation. If the words 'sufficient cause' have to be construed liberally and if the test to be kept in view, as laid down in 13 Mad 269[1] is whether negligence, inaction or want of bona fides can be imputed to the plaintiff, my reply must be in his favour. It is true that this is to a certain extent detrimental to the respondent, although the application for review has not been taken up for consideration so far, and interferes with the valuable right that has accrued to the respondent; but this question has to be approached, in my opinion, from the point of view of the petitioner's conduct rather than of the advantage gained by the respondent. I would, for the above reasons, excuse the delay and ask the learned counsel for the petitioner to satisfy me whether any notice on the petition for review should be issued to the other side. No costs.

C.R.K./G.N. *Delay excused.*

3. ('37) 24 A I.R. 1937 P.C. 276 : 169 I.C. 769 : 31 S. L. R. 672 (P. C.), Rajendra Bahadur Singh v. Rajeshwar Bali.

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* A. I. R. (29) 1942 Madras 172

KING AND HAPPELL JJ.

Bysani Venkataratnam Chetti

v.

R. Venkatayya of Kadiri.

Appeal No. 340 of 1939, Decided on 18th September 1941, against order of District Court, Anantapur, D/- 3rd July 1939.

*** Provincial Insolvency Act (1920), Ss. 16, 9 —Object of S. 16 explained — Creditor who has filed petition subsequently found to be not qualified to do so — Subsequent creditor is not prevented from taking advantage of its date and continuing the petition — He cannot be compelled to prove qualification of original creditor.**

The object of S. 16 is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not b diligently prosecute the petition and gives the second creditor the benefit of the date of the original petition, no matter how much later may be the date of his own introduction into the case; and there is no reason on principle why a second creditor should not have the benefit of that date not only in regard to the question of whether his own debt is barred by limitation, but in regard to the question of the act of insolvency of the insolvent himself. And the mere accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so will not prevent a subsequent creditor, who but for that petition might well have filed one himself, from taking advantage of its date. And the creditor substituted under S. 16 cannot be compelled to prove the qualification of the original creditor to file a petition : ('28) 15 A.I.R. 1928 Mad. 608, *Rel. on*; ('38) 25 A.I.R. 1938 Mad. 884, *Disting.*; c (1895) 1 Q.B. 194, *Expl., and Disting.* [P 173c, d, e]

A. Bhujanga Rao and D. R. Krishna Rao — for Appellant.

G. V. Ramalingam, R. S. Swaminathan and S. Ranganatha Ayyar — for Respondents.

Judgment. — The question at issue in this appeal is whether a certain Sathrasala Appayya has or has not been rightly adjudicated an insolvent. The petition upon which the order of adjudication has been passed was originally filed by one of his creditors on 25th August 1934 and stated that the act of insolvency was the execution of a mortgage deed by the debtor on 17th August of that year. In 1937 petitioner 2 was allowed to d continue the insolvency under the provisions of S. 16, Provincial Insolvency Act, as the Court was satisfied that the original petitioner was not proceeding with due diligence. At the enquiry into the petition, it was held that petitioner 2's debt entitled him to ask for the adjudication of the insolvent as such and on the question of the nature of the mortgage executed by the insolvent there was no contest. His adjudication accordingly followed.

One of the arguments taken against the adjudication was by the present appellant who is another creditor of the insolvent and was proceeding in execution against him at the time of the insolvency petition. His point e was that petitioner 1 was not in fact a creditor of the insolvent at all, and therefore under S. 9 of the Act was not entitled to present this petition in August 1934, and that when petitioner 2 was allowed to continue the petition in 1937 it was incumbent upon him not to prove his own status as a creditor for more than Rs. 500 but to prove the status of petitioner 1 as such a creditor, and that as he has failed to do this, the order of adjudication must be set aside and the matter remanded for further enquiry. The appellant in the lower Court relied in support of this argument upon a case reported in (1938) 2 M L J 390.[1] This case has not been dis- f cussed by the learned District Judge and we cannot see in what way any such discussion would be material to the solution of the present issue. On the other hand, the respondents relied upon a case reported in 51 Mad 594.[2] That is also a case of the substitution of one creditor for another creditor under the provisions of S. 16. That substitution took place at the time when the second creditor's debt had become barred by limitation. It was held by this Court that in spite of that fact, substitution might be allowed and the second creditor might continue the petition, taking advantage of the date on which it was ori- g ginally presented. This ruling also does not deal directly with the point now in issue but as will be shown presently, it seems to us to proceed upon principles which may fairly be applied to the facts of the present case also. In the argument in appeal, learned counsel for the appellant has referred us to an English case in (1895) 1 Q.B. 194.[3] That was a case in which a petition in bankruptcy was filed by three creditors, who had occasion to fear that the Court would find that the amount of their debts did not entitle them to file the petition. They then sought to amend their petition by joining with themselves h two other creditors, so that the total indebtedness of the five might qualify them for taking action. At that time more than three months had elapsed from the date of the alleged act of bankruptcy. It was held by the Court that such amendment could not be allowed and it is stated in p. 197 :

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1. ('38) 25 A.I.R. 1938 Mad. 884 : 182 I.C. 660 : I.L.R. (1939) Mad. 144 : (1938) 2 M.L.J. 390, Chockalinga Chettiar v. Muthiah Chettiar.
2. ('28) 15 A.I.R. 1928 Mad. 608 : 110 I.C. 611: 51 Mad. 594: 55 M.L.J. 168, Venkata Hanumantharao v. Gangayya.
3. (1895) 1 Q.B. 194 : 64 L.J.Q.B. 183 : 15 R 159: 72 L.T. 58 : 43 W.R. 207, In re Maund; Ex parte Maund.

It is perfectly clear that the Court ought not to allow, after three months have elapsed from the date of the committal of the act of bankruptcy, the introduction of creditors, as petitioning creditors, who could not themselves present a petition, and the introduction of a debt which, after the same period has elapsed, would not be a debt upon which a petition could be founded.

This case is to some extent analogous with the case which is now before us, but we are not prepared to follow it, where the facts are so dissimilar. In the English case, as has been stated, the three creditors who originally presented the petition were continuing to prosecute it, and merely wanted to strengthen their position by joining two other creditors with themselves. In the present case an order under S. 16 presumes the fact that the original petitioner does not proceed with due diligence on his petition. The English decision was not therefore upon any provisions in the English Bankruptcy Act which correspond to S. 16. In those circumstances, we do not feel ourselves called upon to consider whether the principles upon which the English decision was given could be applied to the facts of this case. On the other hand, 51 Mad. 594[2] deals directly with the question of S. 16, and it points out that the object of the section is to prevent other creditors from being injured by the action of one creditor who by reason of collusion or otherwise may not diligently prosecute the petition. 51 Mad. 594[2] gives the second creditor in a case of this kind the benefit of the date of the original petition, no matter how much later may be the date of his own introduction into this case; and we see no reason on principle why a second creditor, as in the present case, should not have the benefit of that date not only in regard to the question of whether his own debt is barred by limitation, but in regard to the question of the act of insolvency of the insolvent himself. If it once be conceded that the purpose of S. 16 is that the general body of creditors should be benefited, and, if it also be remembered that other creditors will very probably hold their hand and decline to file unnecessary insolvency petitions themselves when they know that one creditor has already done so, we do not think that the mere accident of the fact that the creditor who has filed the petition should turn out not to have been qualified to do so should prevent a subsequent creditor, who but for that petition might well have filed one himself, from taking advantage of its date.

One further point of practical importance appears to us to support the view that the Legislature can hardly have expected a creditor substituted under S. 16 to be compelled to prove the qualification of the original creditor to file a petition, and that is, that in the circumstances of the case, it would inevitably be difficult for one creditor to prove the existence of another creditor's debt. The original creditor who ex hypothesi has no further interest in the case would naturally be in possession of the necessary documents and have knowledge of the necessary evidence. On these grounds we see no good reason to interfere with the decision of the learned District Judge and dismiss this appeal with costs.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 173

SOMAYYA J.

Chandanmal — Appellant

v.

Rupakula Ramakrishnayya and another — Respondents.

Second Appeal No. 789 of 1939, Decided on 19th August 1941, against decree of Sub-Judge, Bezwada, in A. S. No. 108 of 1938.

(a) Contract Act (1872), S. 23 — Undertaking not to prosecute part of consideration — Entire agreement is illegal.

Stifling prosecution is a recognized head of public policy and even if part of the consideration was the undertaking not to proceed with the prosecution, the entire agreement would be illegal : ('30) 17 A.I.R. 1930 P.C. 100, *Rel. on.* [P 174*h*; P175*d*]

(b) Criminal P. C. (1898), S. 345—Agreement compounding offence compoundable without Court's leave is lawful — Such agreement in case of non-compoundable offence is unlawful.

An agreement to compound an offence compoundable without the permission of the Court is lawful, there being no law or public policy violated in such a case. [P 176*a*]

But in the case of a non-compoundable offence the agreement is unlawful : ('30) 17 A.I.R. 1930 P.C. 100, *Rel. on.* [P 176*b*]

(c) Criminal P. C. (1898), S. 345 (2)—Offences specified in S. 345 (2), Criminal P. C., can be lawfully compounded before they go to Court — Prosecution launched—Agreement to compound it without Court's leave is void under S. 23, Contract Act—Agreement compounding offence of cheating before launching prosecution by execution of pronote held valid.

There is no rule of public policy preventing the parties from compounding offences specified in S. 345 (2), Criminal P. C., before the matter has reached the criminal Court. But once matter has reached the criminal Court, an agreement to compound it without the leave of the Court would, if permitted, defeat the provisions of S. 345 (2), Criminal P. C., and hence would be void under para. 2 of S. 23, Contract Act : ('36) 23 A.I.R. 1936 Mad. 656, *Approved;* ('39) 26 A.I.R. 1939 Lah. 98, *Not approved.* [P 176*g*, *h*]

A borrowed money from *B* by pledging a security which was found to be worthless and thus committed the offence of cheating. Subsequently through

the mediation of *C* and *D* the matter was settled and on *B* agreeing to accept a smaller sum than was advanced by him and also to give time for the payment of that sum *A*, *C* and *D* executed a pronote in favour of *B* for the sum agreed. *C* and *D* were not under any pre-existing liability but were asked to join the execution of the pronote for the purpose of saving *A* from criminal prosecution :

Held that the agreement was valid and *A*, *C* and *D* were liable on the pronote : (1890) 45 Ch D 351 and (1875) 10 Ch A 297, *Ref.* [P 174*g*; P 176*h*]

K. Rajah Ayyar and S. Srinivasachari — for Appellant.

K. Bhimasankaran and P. Somasundaram — for Respondents.

Judgment.—The plaintiff appeals against the decrees of the lower Courts dismissing his suit against defendants 2 and 3. The suit was filed to recover Rs. 2086-14-6 being the amount due under a promissory note (EX. A) executed by defendants 1 to 3 in favour of the plaintiff. The defence which found acceptance in the lower Courts is that the consideration so far as defendants 2 and 3 are concerned was the stifling of a criminal prosecution against defendant 1 and therefore illegal under S. 23, Contract Act. Both the Courts found against the plaintiff. Defendant 1 pledged certain packages of goods representing that they contained bottles of condensed milk and "jeevamrutham" bottles and borrowed money from the plaintiff. The money was not paid and the pledgee took steps to have the goods sold. When the packages were opened for the purpose of sale, it was found that they contained stones, husk, saw dust, waste paper, etc. This was clearly a case of cheating. The discovery was made on 19th September 1935. That evening defendant 3 who is a pleader practising at Masulipatam came to Bezwada and that night there were talks between the plaintiff and the defendants. Defendant 2 is the brother of defendant 1 and defendant 3 is his son-in-law. All three took part in the discussion. There was a mediation. P. W. 3 and D. W. 4 are admittedly two of the mediators, who took part in the mediation. The result was that at about 6 o'clock next morning, i. e., the 20th, EX. A the suit promissory note, came into existence, which was executed by all the three defendants for Rs. 2050. The promissory note recites that a sum of Rs. 2800 was settled by the mediators to be paid in full settlement of all the claims of the plaintiff and that a sum of Rs. 750 was paid that day. For the balance of Rs. 2050, the three defendants executed the promissory note. It appears that a larger sum than Rs. 2800 was in fact due. The mediators settled that the plaintiff should give up a portion and be content with Rs. 2800. It also appears that the defendants wanted time to pay; thus acceptance of a smaller sum than what was due and giving time for the payment of the sum settled were, at any rate, part of the consideration for defendants 2 and 3 joining in the execution of the promissory note. But the question is, was it also a part of the bargain that the consideration for defendants 2 and 3 joining in the promissory note was that the plaintiff should refrain from prosecuting defendant 1 and if so, whether it vitiates the promissory note altogether as one opposed to public policy. One of the plaintiffs went into the box and swore :

> We believed defendant 1 committed an offence and cheated us... We contemplated criminal action against defendant 1 but did not take any steps in that direction. . . . It was known in the town that the defendant played mischief. There was talk in the night that defendant 1 should be saved from prosecution by settling the matter that night. We did not take any action thereafter as the matter was settled. We said we would give up takingaction if defendants 2 and 3 joined in the execution of the promissory note. They had nothing to do with the business of defendant 1. We would have taken action if defendants 2 and 3 had not joined in the execution of the promissory note. We sought the advice of Mr. C. Venkatapayya at that time . . . . . We never saw defendant 3 before.

The evidence of P. W. 3 makes it further clear that defendants 2 and 3 were asked to join the execution of the promissory note partly, at any rate, for the purpose of saving defendant 1 from criminal prosecution. They were not under any pre-existing liability. On the evidence therefore the consideration for defendants 2 and 3 joining in EX. A is partly, at any rate, abstention on the part of the plaintiff from prosecuting defendant 1. The question is whether in such a case the consideration or object of the agreement is unlawful within the meaning of S. 23, Contract Act. The section runs thus :

> The consideration or object of an agreement is lawful, unless—it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Stifling prosecution is a recognized head of public policy. The law is clearly laid down by the Judicial Committee in 57 Cal. 1302.[1] There a prosecution for forgery was launched and during the pendency of the criminal proceedings, an agreement was entered into,

1. ('30) 17 A.I.R. 1930 P.C. 100 : 123 I.C. 187 : 57 Cal. 1302: 57 I.A. 117 (P.C.), Kaminikumar Basu v. Birendranath Basu.

the validity of which came up for consideration. The complaint in that case was in respect of offences under Ss. 465, 567, 193 and 194, Penal Code, which are all non-compoundable. The matters were referred to arbitration and the arbitrators delivered an award. Subsequent to the award, the parties entered into an ekrarnama or agreement embodying the result of the decision of the arbitrators. The criminal proceedings were subsequently dropped. The Subordinate Judge held that the object of the arbitration proceedings and of the agreement was the securing of the withdrawal of the criminal proceedings and that the consideration was unlawful and void. The High Court differed from the Subordinate Judge and held that the reference to arbitration was a bona fide one for the settlement of the disputes as to title. The High Court further held that as the Magistrate dismissed the complaint under S. 203, Criminal P. C., it could not be said that the prosecution was dropped, implying thereby that the stage at which the prosecution could be said to have commenced had not been reached within the meaning of the Code of Criminal Procedure. The High Court also held that there was no tampering with the administration of justice by the complainant and gave a decree on the basis of the agreement. On appeal to the Judicial Committee it was held that it was immaterial whether the stage of prosecution had been reached within the meaning of the Criminal Procedure Code or not :

If it was an implied term of the reference or the ekrarnama that the complaint would not be proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama, as the case may be, is unlawful (*see* (1892) 1 Ch 173[2]) and the award or ekrarnama was invalid, quite irrespective of the fact whether any prosecution in law had been started. . . . In a case of this description it is unlikely that it would be expressly stated in the ekrarnama that a part of its consideration was an agreement to settle the criminal proceedings. It is enough for the defendants to give evidence from which the inference necessarily arises that part of the consideration is unlawful . . . . . Their Lordships have no hesitation in holding that, prior to the execution of the ekrarnama, it was an implied though not an expressed term, that in consideration of the executant admitting the shares of the plaintiffs they would not proceed with the charges laid by them against the accused.

It is clear from this decision that even if part of the consideration was the undertaking not to proceed with the prosecution, the entire agreement would be illegal. It is urged by Mr. Rajah Ayyar the learned advocate for the appellant that the offence complained of in the case before the Judicial Committee was a non-compoundable one and that in this case the offence is not of that nature but is compoundable, though if a prosecution has been started, it cannot be compounded without the leave of the Court. He points out that it is well-established that the compounding of a purely private complaint in which the public is not interested at all, e. g., the case of assault is perfectly valid and that an agreement to pay a sum of money in consideration of the prosecution not being started or the dropping of the prosecution already started would not vitiate the contract. Public policy requires that in cases where public interests are involved, the parties should not compound the offence. In (1890) 45 Ch. D. 351,[3] Cotton L. J. says :

I do not intend to enter at all into the question whether an agreement to stifle any prosecution is illegal or not. That does not arise here, because this was merely a prosecution on a public matter—a matter which concerned the public. It was an interference with the public highway in a very serious manner.

Fry L. J. observed :

Now, I confess it appears to me that the law upon this point is determined by the case in (1814) 6 Q B 308.[4] That lays down this principle, which I take to be one of general application, that where the matters of indictment are matters of public concern, they are not the subject of compromise. To use the language of the learned Judge who delivered the judgment in the Court of Queen's Bench (6 Q B 322) 'These are matters of public concern, and therefore not legally the subject of a compromise'.

Lopes L. J. observed :

As a general principle, it may be stated that it is the duty of every prosecutor where the public are interested to prosecute either to conviction or to acquittal . . . . . If the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it. Now, there can be no doubt that in the present case the offence was of a public nature.

In a case where a trade mark was alleged to be infringed, the Court of Appeal held in (1875) 10 Ch. Ap. 297,[5] that it is not illegal to compound it. James L. J. observed :

This is one of those misdemeanours where the person injured has the choice between a civil and criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance

2. (1892) 1 Ch. 173 : 61 L.J.Ch 138 : 65 L.T. 685 : 40 W.R. 273 : 17 Cox C.C. 389, Jones v. Merionethshire Permanent Benefit Building Society.

3. (1890) 45 Ch.D. 351 : 59 L.J.Ch. 608 : 63 L.T. 366 : 38 W.R. 738, Windhill Local Board of Health v. Vint.

4. (1814) 6 Q.B. 308 : 13 L.J.Q.B. 259 : 8 Jur. 824, Keir v. Leeman.

5. (1875) 10 Ch.A. 297 : 44 L.J.Ch. 500 : 32 L.T. 628 : 23 W.R. 460, Fisher & Co. v. Appolinaris & Co.

or repair the highway. Offences of this kind are indictable, but it is not against the policy of our law to allow the injured person to enter into a compromise with regard to them.

The decisions of the English Courts do not further elucidate the matter. In each case the Court will have to decide on which side of the line the case falls. In India, the Criminal Procedure Code lays down what offences can be compounded; some are compoundable without the permission of the Court; some others are compoundable only with the leave of the Court before which a prosecution for the offence is pending. Others are not compoundable at all. In the first class of cases, there is no difficulty in saying that an agreement to compound such an offence is lawful, there being no law or public policy violated in such a case. In the case of a non-compoundable offence, as pointed out by the Judicial Committee in 57 Cal 1302,[1] the agreement is unlawful. The difficulty arises in cases where the offences are compoundable with the leave of the Court. Clause (2) of S. 345 obviously refers to a stage where a prosecution is already launched and provides that the offences specified therein are compoundable only with the leave of the Court before which the prosecution is pending. What is the principle to be applied to a case where the offence is one falling under S. 345 (2) but the matter has not yet reached the Court? That is the case which arises for decision here. In I.L.R. (1937) Mad. 471[6] a charge was laid for an offence under S. 420, Penal Code. After the prosecution was launched an agreement was entered into, part of the consideration being the dropping of the criminal proceedings and leave of the Court was not obtained for compounding the offence. Venkataramana Rao J. after discussing the question whether the object of the transaction was or was not the dropping of the prosecution says this on page 478:

> There can be no doubt that in this case the offence must be deemed to be non-compoundable as the permission of the Court to compound was not obtained.

It will be noticed that the prosecution had already been launched and the case was exactly covered by S. 345 (2) and so the offence could not be compounded except with the leave of the Court. In the present case, the matter did not reach the Court and therefore S. 345 (2) does not in terms apply. In A.I.R. 1939 Lah. 98[7] a Bench of the Lahore High Court held that where the offence is compoundable with the leave of the Court, a compromise during the pendency of a case is perfectly lawful. This of course is in direct conflict with the decision of Venkataramana Rao J. in the case just cited.

The question therefore reduces itself to this. Where the matter has not reached the criminal Court, is there any rule of public policy preventing the parties from compounding offences specified in S. 345 (2), Criminal P. C.? The fact that after the matter has reached the Court, leave of the Court is necessary does not, in my opinion, solve the difficulty. Is the offence of cheating of such a nature that an agreement to compound it before the matter reaches the Court is illegal and void? Suppose the parties desire to compound an offence of cheating involving a few rupees. Is it necessary for them to file a complaint, place the agreement before the Court and then alone compound it? That means that a complainant who is no longer desirous of prosecuting must file a complaint; else the agreement which he enters into by which he secures reparation for the pecuniary loss sustained by him will be invalid. Both parties agree that there should be no prosecution; yet the complainant must launch the prosecution and then seek the permission of the Court; thus breaking the agreement. The whole thing is reduced to a farce. In a case where a man is cheated of a few rupees, how are the public interests so much involved as to prevent the parties from adjusting the matter. Extreme cases on both sides of the line may be put. But after giving the matter my best consideration, I hold that in the case of offences specified in S. 345 (2), Criminal P. C., the matter may be lawfully compounded before it goes to Court. After a prosecution is launched, S. 345 (2) expressly provides that these offences are compoundable only with the leave of the Court. In such a case, an agreement to compound it without the leave of the Court would if permitted defeat the provisions of S. 345 (2), Criminal P. C., and hence void under para. 2 of S. 23, Contract Act. I therefore reverse the decision of both the lower Courts and decree the suit as prayed for with costs throughout. Leave to appeal is granted.

C.R.K./G.N. *Appeal allowed.*

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6. ('36) 23 A.I.R. 1936 Mad. 656 : 167 I.C. 148 : I.L.R. (1937) Mad. 471 : (1937) 1 M.L.J. 489, Veerayya v. Sobhanadri.

7. ('39) 26 A.I.R. 1939 Lah. 98 : 182 I.C. 490, Rajaram v. Charanjilal.

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A. I. R. (29) 1942 Madras 177
SPECIAL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras — *Petitioner*

v.

Firm N. V. Abdulla Sahib — *Respondents.*

O. P. No. 101 of 1941; Decided on 25th September 1941; reference by Commissioner of Income-tax, Madras.

Income-tax Act (1922), S. 26A — Individual shares of partners not clearly stated — S. 26A does not apply — Share of widow 2 annas and of children collectively 4 annas recovered as 6 annas in the name of widow in application for registration under S. 26A — Application held rightly rejected as children as a body could not be taxable unit.

Section 26A only contemplates the registration of a firm which is constituted under an instrument of partnership which with clearness states what the individual shares of the partners are to be.

[P 178c]

The assessees constituted a firm trading in timber. Before the year 1939-40 the firm had been registered under S. 26A, Income-tax Act. In the first week of November 1939, the senior partner died and his death resulted in the reconstitution of the firm. His widow was taken in as a partner and his three sons and three daughters who were minors, were admitted to the benefits of the partnership. In the application for the registration of the new firm under S. 26A the shares of the partners were stated, the share of the widow of the deceased senior partner being shown as 6 annas. Her share really was 2 annas, the remaining 4 annas being intended for the benefit of the minors, who were admitted to the benefits of the partnership as a body and not as individuals. The intention was that the minors were not to take a vested share in the fund, but that their rights should be governed by the law of survivorship when the fund was distributed :

Held that the individual shares of the minors who were admitted to the benefits of partnership could not be said to have been specified in the deed presented for registration under S. 26A of the Act. The minors as a body could not be regarded as a taxable unit.

[P 178c,d,e]

K. V. Sesha Ayyangar — for Petitioner.

B. Pocker — for Respondents.

Leach C. J. — The assessees constitute a firm trading in timber under the style of N. V. Mammaly & Sons. Before the year 1939-40 the firm had been registered under S. 26A, Income-tax Act, and on 10th October 1939, an application for a renewal of the registration was made. Three weeks later N. V. Abdulla Sahib, the senior partner, died and his death resulted in the reconstitution of the firm. His widow was taken in as a partner and his three sons and three daughters, all of whom are minors, were admitted to the benefits of the partnership. In the application for the registration of the new firm under S. 26A the shares of the partners were stated to be : N. V. Ummarkutty, 6 annas; N. V. Kayumma, 2 annas; N. V. Mariyumma, 2 annas; and K. Bibi (the widow of N. V. Abdulla Sahib) 6 annas. K. Bibi had not in fact a 6 annas share in the partnership. Her share was 2 annas, the remaining 4 annas being intended for the benefit of the minors, who were admitted to the benefits of the partnership as a body and not as individuals. Clause 5 of the partnership deed states :

That the said six minor children, viz., three sons and three daughters of said late N. V. Abdulla are hereby agreed and declared to be admitted to the benefits of the said partnership. They shall as a body be jointly entitled to two-eighth share of the net profits of the business, if any, and the said body shall for the purposes of the partnership be regarded as a unit or a single individual so that the benefits of the partnership hereinbefore agreed and declared shall enure and accrue to them and the survivors of them at the time when the accounts of the partnership are taken from time to time.

Clause 16 of the deed reads as follows :

That in the event of any of the children of said late N. V. Abdulla attaining the age of majority, as and when each child of his should attain such majority, he or she shall be called upon by the firm or its managing partner to elect to become a partner in the business or not to do so, and if he or she should elect to become a partner, then his or her share of profits shall be as may be agreed to between the parties hereto and him or her as the case may be. But if he or she should elect not to become a partner then he or she shall be entitled, in the manner hereinafter provided, to the payment of what may stand to his or her credit in the separate account and also to his or her proper share in the share of profits standing on such date to the credit of the body of minor children of said late N. V. Abdulla. The total amount of profits standing at any time to the credit of the minor children of said late N. V. Abdulla as a body as hereinbefore provided shall at the time of division or whenever required be divisible equally among all the children alive at the time without reference to the sex of the children or shares under Mahomedan law. And it is also hereby expressly declared and provided that if at any time the amount due to any of the children of late N. V. Abdulla under his or her separate account, or as his or her proper share in the profit account, the same shall be payable by the firm only on the expiry of one year from the date of demand or intimation.

This clause is reproduced from the statement of the case, but it would appear that the words "be demanded" or similar words have been omitted after the words "in the profit account." Throughout, the drafting of this clause is faulty, but reading the deed as a whole it is clear that the intention is that the minors are not to take a vested share in the fund, but that their rights shall be governed by the law of survivorship when the fund is distributed. Mr. Sesha Ayyangar on behalf of the Commissioner of Income-tax

has, however, expressed the opinion that a duly constituted guardian of a minor would at any time be entitled to withdraw his ward's share. Section 26A, Income-tax Act, reads as follows:

(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners, for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.

Section 2 (6-B) states that the expression "partners" includes any person who being a minor has been admitted to the benefits of partnership. The application which was made for the registration of the new partnership clearly did not comply with the requirements of S. 26A. The individual shares of the partners were not correctly specified. The widow was credited with a 6 annas share, whereas she was only entitled to a 2 annas share and nothing was said about the admission of the minors to the benefits of the partnership. The Income-tax Officer rejected the application on these grounds and there can be no doubt that in doing so he was acting in accordance with the law. The appellate Assistant Commissioner of Coimbatore having upheld the Income-tax Officer's refusal to register the firm the assessees applied to Commissioner of Income-tax to state a case to this Court and in accordance with their request the Commissioner, acting under S. 66 (2), has referred the following question:

Whether the individual shares of the minors who were admitted to the benefits of partnership can be said to have been specified in the deed presented for registration under S. 26A of the Act.

It will be observed that in framing the question in this way the Commissioner raises the wider issue whether the deed itself, not the application, specifies the individual shares of the minors in the benefits of the partnership. We have no hesitation in answering the question in the negative. No doubt the deed contemplates the admission of the minors to the benefits of the partnership, but it does not specify with certainty what their shares are to be. As the deed stands, should one of the minors die before the fund is distributed, his or her estate will not participate in the fund. The dead minor's share will go to the survivors. The Act requires the tax in a particular year to be levied on the income of the previous year. Now, supposing a minor died in the year of assessment he or she would have no right whatever in the profits made during the year of account, and unless the partnership deed specifically indicates what each partner shall receive out of the profits in the year of account it is not possible for the firm to comply with requirements of S. 26A. The section only contemplates the registration of a firm which is constituted under an instrument of partnership which with clearness states what the individual shares of the partners are to be, and that is certainly not the case here. The minors as a body cannot be regarded as a taxable unit. As the question referred is answered in the negative, the Commissioner of Income-tax is entitled to his costs, which we fix at Rs. 250.

C.R.K./R.K. *Answer in negative.*

A. I. R. (29) 1942 Madras 178

HORWILL J.

In re T. V. Venkatarama Chetti
Accused — Petitioner.

Criminal Revn. Case No. 685 and Petn. No. 643 of 1941, Decided on 23rd October 1941, to revise order of Sub-Divisional Magistrate, Kollegal, D/- 17th February 1941.

Criminal P. C. (1898), Ss. 526 (8) and 344 — Intimation by party of his intention to move for transfer — Case adjourned — Party cannot be ordered to pay costs of the day.

When the Court grants an adjournment on intimation by a party under S. 526 (8) about his intention to move High Court for transfer, he does not grant an adjournment under S. 344, which permits the imposing of terms, but under S. 526 (8), which leaves no option to the Court to adjourn when once it has been intimated to the Court that the applicant intends to move the High Court for a transfer. The Magistrate has therefore no power to order the accused to pay the costs of the day to the prosecution. [P 179*b*,*c*]

S. Rajaraman and K. K. Gangadhara Ayyar — for Accused.

Public Prosecutor — for the Crown.

Order. — The petitioner was desirous of moving this Court to transfer a case from the file of the Sub-Divisional Magistrate of Kollegal; and in compliance with the provisions of S. 526 (8), Criminal P. C., he intimated the fact to the Court. The Sub-Divisional Magistrate thereupon passed an order under S. 526 (8) adjourning the case to 3rd March 1941, requiring the accused to execute a bond for Rs. 200, and fixing 3rd March 1941 as the date within which the High Court should be moved for transfer. He further directed that the petitioner should pay Rs. 39-8-0 as the costs of the day to the

prosecution; because the petitioner had from time to time procured unnecessary adjournments and had delayed the application for transfer. The question that arises for consideration in this petition is whether the Magistrate was competent to pass an order directing the petitioner to pay the costs of the day to the prosecution.

Under S. 344, Criminal P. C., the Court has power to grant an adjournment at the request of a party upon such terms as it thinks fit and "such terms" would, of course, include payment of costs to the other side. Where however a party to a proceeding is desirous of moving the High Court for transfer, it is not necessary for him to ask for an adjournment. All he has to do is to intimate to the Court that he intends moving the High Court for a transfer. The Court then has to fix a day within which the applicant has to move the High Court and the security which the applicant has to furnish. If he executes the bond, then the Court is bound to grant an adjournment. In doing so, he does not grant an adjournment under S. 344, which permits the imposing of terms, but under S. 526 (8), which leaves no option to the Court to adjourn when once it has been intimated to the Court that the applicant intends to move the High Court for a transfer. The Sub-Divisional Magistrate had therefore no power to order the petitioner to pay the costs of the day to the prosecution. That being so, the order passed by the Sub-Divisional Magistrate on 17th February 1941 has to be set aside. The money paid by the petitioner will be refunded to him.

C.R.K./R.K. *Order set aside.*

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* A. I. R. (29) 1942 Madras 179

VENKATARAMANA RAO J.

Dhanalakshmi Weaving Works, Kakkat — *Appellant*

v.

Hajee Mohammad Abdul Azeez Sahib — *Respondent.*

City Civil Court Appeal No. 74 of 1939, Decided on 30th April 1941, against decree of Addl. Judge, City Civil Court, Madras, D/- 2nd October 1939.

* Trade Mark — Infringement of — Particular name becoming associated with goods manufactured or sold by plaintiff — Another person using that name on goods so similar to plaintiff's that purchaser might infer common origin—Plaintiff is entitled to protection of his name—Fact that plaintiff did not deal in article which defendant put upon market in plaintiff's name is no defence.

Where a particular name has become associated with goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which are so similar to that of the plaintiff that the purchaser might infer a common origin. The fact that the plaintiff does not deal in the articles which the defendant was putting upon the market in the plaintiff's name and therefore he did not infringe the trade name of the plaintiff is not a valid defence at law. [P 179*h* ; P 180*a*]

The plaintiff mill had been using the word "diamond" for 15 years on cotton twill shirting manufactured and sold by it and it was not until 1937 the defendant mill conceived the idea of putting the word "diamond" on their goods with the deliberate object of inducing the public to believe that the goods they were selling were connected with the goods of the plaintiff's company :

Held that the plaintiff was entitled to an injunction restraining the defendant from using the "diamond" trade name and the fact that the plaintiff mill had used the name "diamond" only in relation to white twill shirtings whereas the goods on which the defendant mill imprinted the word "diamond" were coloured striped shirtings was not a valid defence at law: (1898) 16 Reports of Patent & Trade Mark Cases 12 ; (1898) 15 Reports of Patent & Trade Mark Cases 105 and (1910) 1 Ch 248, *Rel. on.* [P 179*h*]

G. Ramakrishna Ayyar and K. Govindan — for Appellant.

C. Srinivasachari — for Respondent.

Judgment.—This appeal arises out of a suit filed by the plaintiff for restraining the defendants from using the trade name "diamond" or any other colourable imitation of that word in relation to cotton shirtings manufactured and sold by defendant 2. The learned City Civil Judge decreed the suit in favour of the plaintiff and it is against this decision defendant 2 has preferred this appeal. The finding of the lower Court is that the word "diamond" has become associated in the public mind with the cotton twill shirtings which the plaintiff was dealing in since the last 13 years. This finding has been canvassed by Mr. Ramakrishna Iyer on behalf of the appellant but the evidence justifies the finding. The evidence of the plaintiff's witnesses was believed by the learned Judge and I see no reason to differ from his estimate of it. The main defence is that the plaintiff has no doubt been using the word "diamond" with reference to twill shirtings but is only with reference to plain white mul; whereas the goods on which defendant 2 imprinted the word "diamond" are coloured striped shirtings and therefore he does not infringe the trade name of the plaintiff. It seems to me that this defence is not a valid defence at law. Where a particular name has become associated with goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which

are so similar to that of the plaintiff that the purchaser might infer a common origin. There can be no doubt in this case that the goods sold by the defendant are so similar to that of the plaintiff that the purchaser might infer a common origin. The goods sold by defendant 2 are certainly twill shirtings; only he says that his goods are coloured and striped. I would refer in this connexion to the case in (1898) 16 Rep. of Patent & Trade Mark Cases 12.[1] In that case the Dunlop Pneumatic Tyre Co. used the word "Dunlop" in connexion with the goods manufactured by them which goods consisted of pneumatic tyres for cycles and other accessories such as pumps, inflators, etc., but they never sold burning oil or lubricants. The defendants started a company as the Dunlop Lubricant Company and used the word "Dunlop" in connexion with the oils and lubricants sold by them. Romer J. remarked that though the plaintiff did not sell the same class of goods as the defendant, it would be wrong to allow the defendant company to use the word "Dunlop" because that would induce the public to believe that the goods are that of the plaintiff company. In meeting the argument that the goods were of a different description the learned Judge remarked as follows:

> They (the plaintiff company) themselves are sellers of cycle accessories, though as a matter of fact upto the present time they have not sold burning oil or lubricants. But they may do so, and in the meantime it appears to me that they are entitled to come into Court and say that a name substantially identical with theirs ought not to be allowed to be used by the defendant in the way in which he is using it.

The same learned Judge gave an injunction in a similar case reported in (1898) 15 Rep. of Patent & Trade Mark Cases 105,[2] where the plaintiff company invented the word "Kodak" and applied it to certain of its cameras sold by them and the Kodak cameras were especially available for use on cycles and they were much used by cyclists. The defendant company began to use the word Kodak in connexion with the sale of their cycles. It was found by the learned Judge that the word "Kodak" had become associated in the public mind as the goods manufactured by the plaintiff company in connexion with the cycle trade though the plaintiff company were not selling cycles. In the course of the judgment the learned Judge observed thus:

> Many shops sell and deal in both bicycles and photographic cameras and materials. To a certain extent the plaintiff company is identified with the name "Kodak" as connected with cycles, and so great is the connexion between the two classes of business, that in all probability, I may say, the plaintiff company may wish hereafter to manufacture and sell cycles specially adapted to carry their kodaks. That was the position of affairs when the defendant began to do what I am going to call attention to. In my opinion, it (the defendant company) wanted to use the word "kodak" and acquire a monopoly of it, as applied to cycles, in the hope and intention of, in some shape or other, identifying their company with the plaintiff company whose 'kodaks' were so well known in the market —to cause the public to suppose either that the defendant company, under its own name or under the name of the "Kodak Cycle Company Ltd., was plaintiff company, or was, at any rate, connected with the plaintiff company, or to lead the public to suppose that the goods which the defendant company was going to sell were the goods of the plaintiff company, and so to obtain the benefit of the large reputation, and the benefit also of the expenditure of the plaintiff company.

He also remarked that "no intelligible reason has been or can be suggested why the defendants took the term 'Kodak' to be applied to their cycles." The facts in this case are similar. The plaintiff has been using the word "diamond" for the last 15 years and it was not until 1937, defendant 2 mill conceived the idea of putting the word 'diamond' on their goods and from the evidence given by defendant 2's witness it is clear that they chose the word 'diamond' with the deliberate object of inducing the public to believe that the goods they were selling were connected with the goods of the plaintiff's company. I am giving here an extract of his deposition which clearly shows what the object of the defendant company was in using the word "diamond."

> Q. Did you make any enquiry in the markets what trade names or trade marks have a good reputation in?
>
> A. I made no enquiry.
>
> Q. Is there any reason for your using the word "diamond"?
>
> A. No. I say I never saw the diamond trade name or trade mark of the plaintiff. I say also I never heard about it.
>
> Q. If you remove "diamond" from the words "diamond standard" imprinted on your goods, your goods would not find a good market?
>
> A. I cannot tell—how do I know.

He is unable to give any intelligible reason why he used the word "diamond" and the inference is irresistible that he has done it for the purpose of connecting himself with the plaintiff and his business. In (1910) 1

1. (1898) 16 Rep. of Patent & Trade Mark Cases 12, Dunlop Pneumatic Tyre Co. Ltd. v. The Dunlop Lubricant Co.
2. (1898) 15 Rep. of Patent & Trade Mark Cases 105, Eastman Photographic Materials Co. Ltd. v. John Griffiths Cycle Corporation Ltd. and Kodak Cycle Co. Ltd.

Ch. 248,[3] the same principle was applied by Neville J. In that case the plaintiffs manufactured and sold tyres for cycles and motor-cycles under the name of "Warwick". They never used that name in connexion with motor tyres. The defendant company began to advertise the sale of motor tyres under the name of "Warwick." The plaintiffs sought to restrain the defendant company from doing so. *Held* that they were entitled to the injunction. The learned Judge found that

> having regard to the name 'Warwick' upon the market, a motor tyre introduced as a Warwick motor tyre would lead to the supposition that the persons who were dealing with it were the same persons as those who had for many years past been dealing with the Warwick cycle tyre.

In dealing with the argument that the plaintiff company never sold motor tyres, the learned Judge remarked as follows:

> It is also said that since the plaintiffs are not dealing in the article which the defendants are putting upon the market in their name there can be no damage for the loss of the sale of the goods, and therefore this action will not lie. Now I do not think that that argument is tenable. It seems to me the question is, are the defendants putting their goods upon the market in such a way as to lead to the supposition that they are the goods of the plaintiffs? If so I think the plaintiffs are entitled to an injunction restraining the defendants from so acting .... As I understand it, practically the sole asset possessed by the plaintiffs is the goodwill which attaches to the name "Warwick" in the tyre market.

In my view the learned City Civil Judge has approached the decision of the case from a correct standpoint and it has not been shown that his application of the principles of law to the facts of the case is in any way wrong. I therefore confirm the decree of the learned City Civil Judge and dismiss the appeal with costs.

C.R.K./G.N. *Appeal dismissed.*

3. (1910) 1 Ch. 248 : 79 L.J.Ch. 177 : 101 L.T. 889 : 27 Rep.Pat.Cas. 161, Warwick Tyre Co. Ltd. v. New Motor and General Rubber Co. Ltd.

A. I. R. (29) 1942 Madras 181

HORWILL J.

In re D. K. Reddy — Accused Petitioner.

Criminal Revn. Case No. 741 and Petn. No. 696 of 1941, Decided on 15th October 1941, to revise judgment of Sub divisional Magistrate, Bellary, D/- 7th May 1941.

Criminal P. C. (1898), Ss. 480, 486 (1) and 407 (2)—Sentence under S. 480 by second class Magistrate — Appeal lies under S. 486 (1) only and to District Magistrate — S. 407 (2) does not apply—District Magistrate cannot transfer appeal to other Magistrate of first class.

An appeal lies against a sentence imposed under S. 480 only under S. 486 (1). Such appeal lies to the Court to which decrees or orders made in such Court are ordinarily appealable, i. e., to the District Magistrate in the case of the sentence passed by the second or third class Magistrate. The District Magistrate cannot direct such an appeal to be heard by any Magistrate of the first class subordinate to him. Sub-section (2) of S. 407 cannot be properly applied to an appeal under S. 486 (1).

[P 181*g,h*; P 182*b*]

K. S. Jayarama Ayyar and C. K. Venkatanarasimham — for Accused.

Public Prosecutor — for the Crown.

Order. — The petitioner was alleged to have committed contempt of Court; and the Sub-Magistrate who was presiding over that Court took summary action under S. 480, Criminal P. C., and sentenced the petitioner to a fine of Rs. 15. He preferred an appeal under S. 486, Criminal P. C. In the first instance, he preferred it to the Sub-divisional Magistrate. On an objection taken by the Prosecuting Sub-Inspector, the Sub-divisional Magistrate held that he had no jurisdiction to hear the appeal. The petitioner then approached the District Magistrate, who held that the Sub-divisional Magistrate had power. When the matter came back to the Sub-divisional Magistrate, the Prosecuting Sub-Inspector again raised the objection, but the Sub-divisional Magistrate felt that his hands had been tied by the District Magistrate and so overruled the objection. The Prosecuting Sub-Inspector then went again to the District Magistrate, who passed an order which is not on the record, but which presumably was to the effect that the Sub-divisional Magistrate had power to hear the appeal. The short point that arises here is whether the Sub-divisional Magistrate had jurisdiction or no.

An appeal lies against a sentence imposed under S. 480 only under S. 486 (1); for S. 407, which is the general section granting a right of appeal from second class Magistrates, applies only to persons convicted on a trial held by a Magistrate. As the petitioner was not convicted on a trial, he would have had no right of appeal at all were it not for S. 486 (1). The appeal against the sentence under S. 480 lies—in the words of S. 486(1)—"to the Court to which decrees or orders made in such Court are ordinarily appealable." Section 407 (1) makes an appeal ordinarily lie to the District Magistrate; for he has to hear all appeals from second or third class Magistrates if they are not transferred under S. 407 (2): *vide* 26 Mad. 656[1] which

1. ('03) 26 Mad. 656 : 2 Weir 202 (F. B.), Eroma Variar v. Emperor.

was followed by Jackson J. in 1931 M.W.N.Cr. 262.[2]

The remaining question that has to be considered is whether the District Magistrate has a right to direct such an appeal to be heard by any Magistrate of the first class subordinate to him. It is argued by the learned Public Prosecutor that S. 486(2) gives such a power; for that sub-section says, "The provisions of Chap. 31 shall, so far as they are applicable, apply to appeals under this section. . . . ." Most of the provisions of Chap. 31 could properly be applied to appeals under S. 486; but this particular sub-s. (2) of S. 407 says that, "The District Magistrate may direct that any appeal under this section . . . . shall be heard by any Magistrate of the first class subordinate to him . . . ;" so that the District Magistrate has power to direct the transfer from his file to that of the first class Magistrate only appeals under S. 407 (2), i. e., appeals from convictions on a trial. That sub-section could not therefore be properly applied to an appeal under S. 486(1). The Sub-divisional Magistrate having acted without jurisdiction, this petition is allowed and the District Magistrate ordered to take the appeal on his file and to dispose of it according to law.

C.R.K./R.K. *Petition allowed.*

2. ('31) 1931 M.W.N.Cr. 262, Sivaswami Palaikondan v. Perumal Palayandan.

* A. I. R. (29) 1942 Madras 182

HORWILL J.

In re Baron Von Dincklage—Appellant.

Criminal Appeal No. 307 of 1941, Decided on 23rd September 1941, against conviction and sentence passed by the Second Presidency Magistrate, George Town, Madras, in C. C. No. 4157 of 1940.

*** Penal Code (1860), Ss. 407 and 409—Appropriation of money with dishonest intention attracts S. 407 — Doing of act, in anticipation of statute which would make it offence, is no offence—*V*, German Director of German Company on eve of declaration of war between Britain and Germany intending to realise as much money as he could selling his stock of enamels to *D* for Rs. 7643 — *D* coming with cheque on morning of 2nd September 1939 the day before war was declared but *V* insisting on cash—Cash paid in afternoon of 2nd September 1939—*V* handing over money to his wife—Act of accused in screening money from Government of India or custodian of enemy property in anticipation of war without any intention of causing wrongful loss or gain to any person held did not amount to any offence.**

Appropriation of money with a dishonest intention attracts S. 407. [P]

V a German Director of a German Company, on the eve of the declaration of war between Britain and Germany, attempted to realise as much money as he could and therefore sold the enamels that he had in stock to *D* for Rs. 7643. *D* came with a cheque for that amount on the morning of 2nd September 1939, the day before the war was declared but the accused refused to take a cheque and insisted on being paid in cash. The cash was paid in the afternoon of 2nd September and the accused handed over the money to his wife:

Held that the doing of an act in anticipation of a statute or enactment which would make that act an offence was no offence. At the time when the accused took the money and handed it over to his wife intending to withhold it from the Government of India there was nothing in law prohibiting the accused from screening the money from the Government of India or the custodian of enemy property. Consequently, the acts of the accused done merely to screen the money from the Government of India or the custodian of enemy property without any intention to cause wrongful loss or wrongful gain to any other person or persons, did not constitute an offence. In the absence of evidence that he intended to profit himself at the expense of his firm, of which he was a partner and had appropriated money belonging to a number of persons even though he was entitled to a share of the money, or that he intended to defraud the creditors of the firm, i. e., he acted with the intention of causing wrongful loss to the creditors of the firm, the accused could not be held guilty under S. 407.

[P 183*b*,*c*,*d*]

V. V. Srinivasa Ayyangar and B. T. Sundararajan—for Appellant.

Crown Prosecutor—for the Crown.

Judgment.—The appellant has been convicted by the Second Presidency Magistrate, Madras, under S. 409, Penal Code, of committing criminal breach of trust with respect to a sum of Rs. 7643, the sale proceeds of certain enamels sold to one Dwarakadoss Narayanadoss; and he has been sentenced to nine months' rigorous imprisonment. The facts of the case are fairly simple. The appellant, a German Director of a German Company, on the eve of the declaration of war between Britain and Germany, attempted to realise as much money as he could; and so asked his clerk to try to find a purchaser for the enamels that he had in stock. He was brought into touch with Dwarakadoss Narayanadoss, who agreed to pay Rs. 7643 for the enamels. He came with a cheque for that amount on the morning of 2nd September 1939, the day before the war was declared; but the accused refused to take a cheque and said that he must be paid in cash. The cash was paid in the afternoon of 2nd September and the accused handed over the money to his wife. The question is whether in doing so he committed a breach of trust.

Mr. V. V. Srinivasa Ayyangar was inclined to argue at first that no breach of trust was committed, even if there had been a dishonest intention; but I think that the

wording of S. 407 is wide enough to be attracted by a series of acts of this kind. The argument was not pressed because, as Mr. V. V. Srinivasa Ayyangar points out, it matters very little to the accused whether he is sentenced to nine months' rigorous imprisonment for criminal breach of trust or to some slightly lesser period for an offence under some other section of the Code. The real question is whether the accused acted dishonestly, that is to say, whether he intended to cause wrongful loss or wrongful gain to any person. The accused's explanation was that he received the money after the banks had closed on the second, which was a Saturday, that as he had no safe, he kept the money with him intending to remit it to the bank on the Monday, and that in the meantime he was arrested and interned. This statement is not consistent with the remainder of the accused's statement, from which it seems pretty clear that he was desirous of preventing this money from falling into the hands of the Government of India or whomsoever they might appoint to take charge of the assets of enemy firms. Moreover, the fact that he refused a cheque shows that he was anxious to avoid having the money in the bank. It is not, however, an offence to do an act in anticipation of a statute or enactment which would make that act an offence. At the time when the accused took this money and handed it over to his wife, intending to withhold it from the Government of India, there was nothing in law prohibiting the accused from screening the money from the Government of India or the custodian of enemy property. If, therefore, the acts of the accused were done merely to screen the money from the Government of India or the custodian of enemy property and he had no intention to cause wrongful loss or wrongful gain to any other person or persons, he did not commit an offence.

There are two interpretations of the acts of the accused which would make him guilty of an offence punishable under S. 407, Penal Code. One is that he intended to profit himself at the expense of his firm of which he was a partner. Others have shares in the assets of the company and if he had appropriated money belonging to a number of persons, he would have been guilty of a criminal breach of trust, even though he was entitled to a share of the money. The prosecution has not examined any other partner of the firm: nor is there any evidence, except the fact that he withdrew money from the partnership and kept it in his own custody, to show that he had any intention of defrauding the company. The explanation of the accused that he merely intended to protect the money so that in due course it might reach the hands of the share-holders is not unreasonable. That being so, we must give him the benefit of the doubt in this matter.

The other interpretation of the appellant's act which would make him guilty of the offence with which he was convicted is that even assuming that he acted from patriotic motives and with the intention of helping his firm, he nevertheless intended to defraud the creditors of the firm, i. e., he did these acts with the intention of causing wrongful loss to the creditors of the firm. If he had attempted to save money for his firm at the expense of his creditors, I think, he would have been criminally liable under S. 407, Penal Code. There is, however, no evidence to show that the assets available in India were not sufficient to meet the demands of Indian creditors. The evidence with regard to the amounts due to Indian creditors and the realizable outstandings of the firm is very vague, and it cannot, therefore, be presumed that the accused acted with an intention to cause wrongful loss to Indian creditors. Whatever way one may view the case, therefore, one is forced to the conclusion that the prosecution has not proved that the accused acted with any dishonest intention. The appeal is, therefore, allowed and the conviction and sentence set aside.

C.R.K./G.N. *Appeal allowed.*

**** A. I. R. (29) 1942 Madras 183**

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND HAPPELL JJ.

Polavarapu Lingayya and others
Appellants

v.

Vupputuri Punnayya and others
Respondents.

Second Appeal No. 218 of 1939, Decided on 10th November 1941, against decree of Sub-Judge, Bapatla, in A. S. No. 6 of 1937.

**** (a) Hindu law — Debt — Father — Son's liability—Pious obligation—Sale by father not for necessity—Sale set aside at instance of sons —Vendee can compel father to refund — This liability of father, which was contingent, becomes present one on happening of contigency —Liability comes within the doctrine of pious obligation — If sale is set aside during father's life time, liability can be enforced against him and if transaction is set aside after father's death, vendee has claim against estate in hands**

of sons—Whether son pays willingly or not is immaterial: (Remarks in conflict), 44 Mad 801=('21) 8 A I.R. 1921 Mad 447=64 I.C. 698 *OVERRULED.*

Notwithstanding that in charging the family properties for his own necessity the father has exceeded his powers, the debt incurred by him is one which falls within the purview of the pious obligation rule and can be enforced against the sons to the extent of their interests in the family property. The Hindu law makes no difference between a mortgage and a sale in this connexion and therefore the fact that the father has abused his powers does not taint his obligation to the alienee to an extent which would justify the Court in holding that it is not vyavaharika. [P 186*e*]

When a father sells family property without the needs of the family requiring the transaction to be entered into he becomes liable to return to the vendee a proportionate part of the purchase consideration should the other coparceners insist, as they have the right to do, on the sale being set aside so far as they are concerned. On this event happening the vendee can compel the father to make the refund. The position then is that until the transaction is set aside at the instance of one or more of the other coparceners the father's liability is contingent, but when the event has happened the liability becomes a present one. The basis of the pious obligation rule is the benefit which will accrue to the soul of the father by the discharge of his earthly obligations. This being the case it is difficult to see what difference the nature of the father's liability in the law can make, provided that it is a liability which the law recognizes and is prepared to enforce in terms of money. When an unlawful sale of family property is set aside during the father's life time the vendee has an enforceable claim against the father for the return of a proportionate part of the purchase consideration and a liability of this nature must come within the rule, if it is to be applied in accordance with the wording of the texts and the underlying idea. If the transaction is set aside after his death the vendee has a claim against his estate and the situation is the same. The redemption of the father cannot depend upon the state of mind of the son who pays the debt but on the fact of its discharge whatever the reason behind : ('17) 4 A.I.R. 1917 Mad. 418, *Approved*; (Remarks in conflict), 44 Mad 801 = ('21) 8 A.I.R. 1921 Mad. 447=64 I. C. 698 *OVERRULED*; *Case law discussed.* [P 187*a*,*b*,*c*; P 190*c*]

(b) Hindu law—Debt — Father — Duties and functions of father or manager are similar to those of a trustee — Expressions "trust" and "breach of trust" do not properly describe their position *(Per Krishnaswami Ayyangar J.).*

Legal expressions and legal concepts peculiar to one system of law do not always accurately fit into another system with a different origin and history and founded upon different theories. Hence expressions such as "trust" and "breach of trust" are strictly speaking out of place in describing the position of a father or manager in a joint Hindu family. Neither of them fills the position of an agent with respect to the family property in his charge, though it may be that some of his duties and functions may appear to be similar in character to those of trustees strictly so called : *Case law discussed.* [P 188*f*,*g*]

(c) Hindu law—Debt—Father— Son's liability — Pious obligation *(Per Krishnaswami Ayyangar J.).*

As long as the joint family system lasts with its doctrine of survivorship and the recognition of equal and co-ordinate rights in the sons, so long the theory of pious obligation should be maintained in the interests of the fair name of Hindu law. [P 189*g*]

B. V. Ramanarsu — for Appellants.

K. Umamaheswaran — for Respondents.

Leach C. J. — The rule of Hindu law which makes a son liable for his father's debts, provided they have not been incurred for illegal or immoral purposes has been discussed in innumerable cases in the Courts of India and many of the cases have been carried to the Privy Council. This appeal calls for a further discussion of the rule in order to settle a conflict of opinion in this Court with regard to its application. In 1917 respondents 1 and 2 with their father Lingayya constituted an undivided Hindu family. On 22nd June 1917, Lingayya purporting to act for his sons as well as himself, sold to the appellant for Rs. 1350 land belonging to the family. The area covered by the deed was 6·34 acres. On 19th July 1917 the father died. On 1st December 1924 respondents 1 and 2 filed in the District Munsif's Court a suit for a decree setting aside the sale to the appellant. They pleaded that their father was insane at the time of the transaction, that no consideration had passed and that there was no necessity for the sale. The District Munsif held that the father was sane and that consideration had passed, but that there was no necessity for the sale so far as the family was concerned. Consequently, he declared the transfer to be invalid to the extent of two-thirds. On appeal the Subordinate Judge of Bapatla concurred in the decision of the District Munsif and the land was then partitioned between respondents 1 and 2 and the appellant under the decree of the subordinate Court. On 5th December 1934 the appellant filed the present suit to recover a proportionate part of the purchase price. He claimed that he was entitled to a decree for Rs. 1478, being two-thirds of the Rs. 1350 with interest, on the ground that the pious obligation rule applied and that the vendor's sons were liable to the extent of the family property which had come into their hands. He also claimed that respondents 1 and 2 were in possession of properties belonging to their father personally and were liable as the representatives of his estate. The District Munsif considered that the pious obligation rule did not apply in such circumstances and dismissed the suit. The Subordinate Judge was of the same opinion and the present appeal is from the decree of the Subordinate

Judge dismissing the appeal from the decision of the District Munsif.

The appeal has been placed before a Full Bench because of the conflict of opinion to be found in the judgments of this Court in 31 M.L.J. 502[1] and 44 Mad. 801.[2] In the first of these two cases the facts were very similar to the facts in the case now before the Court. In 1894 the father of the defendants sold certain family properties to the plaintiff. The father died in 1904 and in the following year his sons sued the plaintiff for possession of their shares on the ground that the sale was not binding on them. It was held that the sale was unlawful so far as they were concerned and as their shares amounted to five-sixths of the whole it was set aside to this extent. The vendee then sued the sons to recover five-sixths of the purchase consideration, basing his claim on the pious obligation rule, and Seshagiri Iyer and Napier JJ. held that the claim was well founded. In the second of the two cases a son during the lifetime of his father sued for partition of the family estate and also asked that certain alienations of family property which his father had made should be set aside. The Court was called upon to decide merely whether the son was entitled to a decree for his share in the family properties without being required to refund the consideration paid to his father by the alienees.

It was held by Wallis C. J. and Seshagiri Iyer J. that the son was entitled to recover his share without any obligation to refund being imposed upon him. If the judgments had stopped there the present controversy would probably have not arisen, but both Wallis C. J. and Seshagiri Iyer J. went beyond the immediate question and the Court has now to consider whether their further observations can be accepted. There exists an important distinction between that case and the present one. There the question was whether the sons were entitled in a suit for partition filed by them against their father to have unlawful alienations made by him set aside unconditionally. Here the question is whether the sons can in a suit by the vendee be compelled by reason of their personal law to discharge a liability incurred by their father, namely a liability to refund a proportionate share of the purchase consideration. The liability to the vendee is the father's liability and until the transaction has been set aside the vendee is not in a position to invoke the pious obligation rule and if the father meets the vendee's claim the question of the application of the rule can never arise. Wallis C. J. laid great stress on the judgment of the Privy Council in 39 ALL. 437[3] and after observing that it was there pointed out that the alienation of joint family property by a father where there is neither necessity nor antecedent debt, amounts to a plain breach of trust and that the Mitakshara law does not warrant or legalise any such transaction, he added :

> It follows in my opinion that the Courts are bound to afford the sons adequate relief in the nature of a *restitutio in integrum* unfettered by any conditions based on the alleged pious obligation of the sons to pay their father's debts. I am moreover not satisfied that any such obligation exists in this case. Any liability which the father may incur to the alienees on such unconditional setting aside of the alienation arises from his own immoral act in making the alienation in the first instance in breach of the duty which he owed to his sons as manager of the joint family property, and I do not think the sons can properly be held to be under any pious obligation to relieve him from the consequences of his unsuccessful attempt to defraud them.

It is true that in delivering the judgment of the Board in 39 ALL. 437,[3] Lord Shaw expressed the opinion that the father, as the manager of the joint family of which he is the head, is in the position of a trustee and to permit him to use the family property for his own purposes would be equivalent to sanctioning a plain, and it might be, a deliberate breach of trust. The judgment delivered by Lord Shaw was the subject of much comment, as at first it was read as laying down the proposition that a loan raised by a father for his own necessity on the security of joint family property could not be regarded as constituting an antecedent debt which would render a subsequent mortgage of family property binding on his sons. The pious obligation rule makes the sons of a Hindu father liable for his debts when they have not been incurred for an illegal or immoral purpose. The important factor is the purpose for which the debt is incurred. Though the father may in abuse of his powers have executed a deed purporting to charge family property this will not make the debt illegal or immoral. Two years after the judgment in 39 ALL. 437[3] was delivered a Full Bench of five Judges of this Court,

1. ('17) 4 A. I. R. 1917 Mad. 418 : 36 I.C. 387 : 31 M. L. J. 502, Raman Pandithan v. Satha Kudumban.

2. ('21) 8 A. I. R. 1921 Mad. 447 : 64 I.C. 698 : 44 Mad. 801, Srinivasa Ayyangar v. Kuppuswami Ayyangar.

3. ('17) 4 A.I.R. 1917 P.C. 61: 39 I.C. 280: 39 All. 437 : 44 I.A. 126 (P.C.), Sahu Ram Chandra v. Bhup Singh.

Wallis C. J. presiding, considered its effect in 42 Mad. 711[4] and the conclusion arrived at was that the Privy Council did not intend to depart from what had upto then been accepted as the law and consequently held that a debt contracted by a Hindu father on the security of the joint family estate, provided that it was not contracted for an illegal or immoral purpose, is an antecedent debt and will support a subsequent mortgage which will involve the sons' shares in the property charged.

Shortly after this decision had been given a Bench of this Court in 43 Mad. 421[5] held that in a suit instituted against a Hindu father and his sons on a mortgage bond executed by the father alone the mortgagee was, notwithstanding that the mortgage was not binding on the sons, entitled to a conditional decree against the father personally and against the joint family property of himself and his undivided sons for the recovery of the balance should the proceeds of sale of the father's share of the mortgaged properties prove insufficient. In 46 ALL 95,[6] a Full Board of the Privy Council accepted this Court's interpretation of 39 ALL. 437[3] and there laid down the following propositions of law: (1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but (2) if he is the father and the reversioners are the sons he may, by incurring a debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt. (3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind the estate. (4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached. (5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.

In view of the judgment of the Judicial Committee in 46 ALL. 95,[6] the dicta of Wallis C. J. in 44 Mad. 801[2] cannot be accepted as correctly stating the law. Notwithstanding that in charging the family properties for his own necessity the father has exceeded his powers the debt incurred by him is one which falls within the purview of the pious obligation rule and can be enforced against the sons to the extent of their interests in the family property. The Hindu law makes no difference between a mortgage and a sale in this connexion and therefore the fact that the father has abused his powers does not taint his obligation to the alienee to an extent which would justify the Court in holding that it is not vyavaharika. The observations of Seshagiri Iyer J. in 44 Mad. 801[2] remain to be considered. Seshagiri Iyer J. said in effect that the pious obligation rule only applies to debts of the father which were enforceable when the family was joint. He considered that the liability of the father to refund to the alienee the purchase price when an alienation of family property is set aside is a liability for unliquidated damages and not a debt, but even if it becomes a debt, it is not a debt on the date of the suit for partition. Seshagiri Iyer J. referred to his previous decision and distinguished it on the ground that in that case there had been no severance of the joint family status. In my judgment this distinction is not sufficient and I find myself also unable to accept the opinion which Seshagiri Iyer J. expressed with regard to the nature of the obligations to which the rule applies. I consider that the rule has a much wider application.

In (1939) 1 M.L.J. 352,[7] my learned brother Krishnaswami Ayyangar examined with great care in the light thrown by the ancient texts, with which he is so well acquainted, the nature of the obligation of a Hindu son to discharge his father's debts and his conclusion was that the rule is not confined to a debt known to the English common law, but applies to other financial obligations incurred by the father, unless of course incurred for illegal or immoral purposes. I respectfully agree with all that my learned brother said there. He was not however called upon to express an opinion on the question whether the rule applies in the case where the father's liability is contingent and the contingency arises only after his death. That is the position in the present case and therefore it is necessary to carry the discussion somewhat further.

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4. ('19) 6 A.I.R. 1919 Mad. 75 : 52 I.C. 525 : 42 Mad. 711 : 37 M.L.J. 166 (F.B.), Arumugham Chetti v. Muthu Koundan.

5. ('20) 7 A.I.R. 1920 Mad 479 : 55 I. C. 320 : 43 Mad. 421 : 38 M.L.J. 203, Kandaswami Goundan v. Kuppu Moopan.

6. ('24) 11 A.I.R. 1924 P. C. 50 : 77 I. C. 689 : 46 All. 95 : 51 I. A. 129 (P. C.), Brij Narain v. Mangal Prasad.

7. ('39) 26 A. I. R. 1939 Mad. 450 : 187 I.C. 735 : I.L.R. (1939) Mad. 422:(1939) 1 M.L.J. 352, Nachimuthu Goundan v. Balasubramania Goundan.

When a father sells family property without the needs of the family requiring the transaction to be entered into he becomes liable to return to the vendee a proportionate part of the purchase consideration should the other coparceners insist, as they have the right to do, on the sale being set aside so far as they are concerned. On this event happening the vendee can compel the father to make the refund. The position then is that until the transaction is set aside at the instance of one or more of the other coparceners the father's liability is contingent, but when the event has happened the liability becomes a present one. The basis of the pious obligation rule is the benefit which will accrue to the soul of the father by the discharge of his earthly obligations. This being the case it is difficult to see what difference the nature of the father's liability in the law can make, provided that it is a liability which the law recognises and is prepared to enforce in terms of money. When an unlawful sale of family property is set aside during the father's lifetime the vendee has an enforceable claim against the father for the return of a proportionate part of the purchase consideration and, it seems to me that a liability of this nature must come within the rule, if it is to be applied in accordance with the wording of the texts and the underlying idea. If the transaction is set aside after his death the vendee has a claim against his estate and the situation is the same.

In 44 Mad. 801,[2] Seshagiri Iyer J., said that the father can hardly be expected to be rescued from the hell when the son is compelled, very much against his will and with imprecations in his mouth, by a decree of Court to make the payment. In 51 Mad. 361,[3] Coutts-Trotter C. J., described the rule as being an illogical relic of antiquity unsuited to any but a primitive society. Even if the description given by Seshagiri Iyer J., of the attitude of the Hindu son is a true one—it is not for me to express an opinion—I cannot imagine what difference it will make to the father if the son discharges a parental obligation with imprecations on his lips or with a smile on his face. What matters is payment to the father's creditor. The criticism of Coutts-Trotter C. J., is equally irrelevant in view of the fact that the rule still remains a rule of Hindu law and, as I had occasion to point out in (1941) 2 M.L.J. 311,[9] the Court is bound to apply it unless the Legislature steps in and alters the law. For the reasons indicated I consider that 31 M.L.J. 502[1] was rightly decided and that the observations in 44 Mad. 801[2] which are in conflict should be disregarded. It follows that in my opinion the Courts below erred in dismissing the suit and I would remand the case to the trial Court for decision on the other issues. Learned counsel for the respondents has intimated that his clients claim to be entitled to a scaling down of the debt in accordance with the provisions of the Madras Agriculturists Relief Act. In the circumstances this claim should be made in the District Munsif's Court. The appellant is entitled to his costs here and in the Subordinate Judge's Court. The decree for costs passed against him by the trial Court should be set aside and a direction given that the costs of that Court should abide the result of the trial. The appellant is also entitled to the refund of court-fees paid on this appeal to the Subordinate Court and on his appeal to this Court.

Happell J.—I agree and have nothing to add.

Krishnaswami Ayyangar J.—While I concur with the judgment just now pronounced by my Lord, I have considered it necessary, in view of the importance of the question at issue, to add a few words of my own by way of criticism of some of the opinions expressed in 44 Mad. 801.[2] The actual decision reached in that case, on the facts such as they were, is not open to question, if I may say so with respect. In arriving at the conclusion, that the alienee is not entitled to relief in the very suit in which the alienation is set aside, Wallis C. J., was only following, as he himself stated, the practice of the Court according to which a condition for the refund of the consideration is not ordinarily attached to the decree. Such a condition can properly be imposed where the alienation is justifiable in part, but not in whole, as in such a case the alienee is obviously entitled to an equity in respect of that part of the consideration which is found good. But where on account of a total absence either of necessity or antecedent debt, the father's sale is declared not binding on the sons to any extent whatever, the alienee can claim no equity as the liability of the sons to refund the consideration arises

8. ('28) 15 A.I.R. 1928 Mad. 657 : 110 I.C. 141 : 51 Mad. 361 : 54 M.L.J. 726 (F.B.), Subramania Iyer v. Sabapathi Iyer.

9. ('41) 28 A.I.R. 1941 Mad. 772 : 197 I.C. 199 : (1941) 2 M.L.J. 311 (F.B.), Murali Mohana Reddi v. Gangaraju.

independently of the sale successfully impeached by them in the suit. It is in fact an extraneous obligation cast upon them by their personal law. On this ground it was that the learned Chief Justice came to the conclusion that the sons were entitled to relief in the nature of *restitutio in integrum* unfettered by any condition for the refund of the purchase money. This was sufficient to dispose of the case and the further question whether the disappointed alienee has a remedy against the sons by recourse to a separate suit did not arise for determination. But the Chief Justice went on to express the opinion that the father's liability to refund the consideration in the circumstances mentioned, does not constitute such a debt as the sons will be bound to discharge by reason of their pious obligation. Support for this opinion was derived from the observations of the Privy Council in 39 ALL. 437,[3] in which Lord Shaw authoritatively defined an antecedent debt as meaning a debt antecedent in time and dissociated in fact from the alienation in question. The noble Lord proceeded, however, to explain the principle in language which literally taken would tend to displace a long current of Indian authority and upset numberless titles to property. He observed that the joint family estate cannot be effectively sold or charged so as to bind the sons except when it is made,

> in order to discharge an obligation not only antecedently incurred but incurred *wholly apart from the ownership of the joint estate or the security afforded or supposed to be available for such joint estate.*

The words italicised suggest a qualification not therefore known to Hindu law (21 Mad. 28[10]) and for sometime was understood as laying down the proposition that no mortgage for ready money could ever be an antecedent debt the payment of which was capable of supporting a new and later mortgage.

This qualification has since been declared untenable first by a Full Bench of this Court in 42 Mad. 711[4] and later by a Full Board of of the Privy Council in 46 ALL. 95[6] on the ground that the observations of Lord Shaw were in the nature of obiter dicta, and not a decision on the point. It is in the passage thus commented on, there occur the other observations referred to by Wallis C. J., which were obviously made for the purpose of elucidating the theory underlying the doctrine since exploded as mentioned. Lord Shaw said that to permit a father to mortgage the family property for his own purposes would be to enable him to sacrifice those very rights which he was bound to conserve and that this would be "equivalent to sanctioning a plain, and it may be, a deliberate breach of trust." Breaches of trust are of course offences against morality and may even sound in crime; and it may well be that a liability arising out of a breach of trust bears the taint of illegality or immorality. But even apart from authority, it is difficult to accept the proposition, that an alienation by the father, when there was no necessity or antecedent debt, is a breach of trust in this sense. Legal expressions and legal concepts peculiar to one system of law do not always accurately fit into another system with a different origin and history and founded upon different theories. For instance the notion that the property of maths and similar religious institutions is trust property and those charged with its administration are trustees caught the fancy of lawyers and held the field for sometime in this country until the Privy Council set aside this view in 44 Mad. 831[11] explaining away a previous decision of the Board in 43 Cal. 707.[12]

If I may say so with respect, expressions such as "trust" and "breach of trust" are strictly speaking out of place in describing the position of a father or manager in a joint Hindu family. Neither of them fills the position of an agent with respect to the family property in his charge, though it may be that some of his duties and functions may appear to be similar in character to those of trustees strictly so called: *see* 26 Mad. 544[13] at p. 553. But it is necessary to bear in mind the warning uttered more than once before — the decision of the Privy Council in 44 Mad. 656[14] at p. 663 is an instance in point— that it is a mistake to apply to such persons the strict rules of law applicable to trustees without necessary qualification. Neither a father nor a manager is in law accountable as a trustee. Neither of them is legally bound to keep or render accounts. Neither of them is under a duty to save, economise or invest

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10. ('98) 21 Mad. 28, Sami Ayyangar v. Ponnammal.

11. ('22) 9 A.I.R. 1922 P.C. 123 : 65 I.C. 161 : 44 Mad. 831 : 48 I. A. 302 (P. C.), Vidya Varuthi v. Baluswami Ayyar.

12. ('16) 3 A.I.R. 1916 P.C. 256 : 33 I.C. 583 : 43 Cal. 707 : 43 I. A. 73 (P. C.), Ram Prakash v. Anand Das.

13. ('03) 26 Mad. 544 : 30 I. A. 220 : 13 M. L. J. 287, Annamalai Chetti v. Murugesam Chetti.

14. ('22) 9 A.I.R. 1922 P. C. 71 : 61 I. C. 690 : 44 Mad. 656 : 48 I.A. 280 (P. C.), A. Perraju v. Subbarayadu.

the funds of the family. They cannot be called upon to account for acts of negligence. In the distribution of the family income they are guided not by the quantum of the share of the individual members but by their actual needs as conceived by them. Such being their position, it will not be incorrect to describe it as one far removed from those duties and restrictions which are associated with trustees strictly so called. It is not perhaps necessary to labour the point in view of the decision of the Board in 46 ALL. 95[6] already referred to, where their Lordships accepted after a critical examination of Lord Shaw's observations in the earlier case, the proposition that an independent debt contracted by a Hindu father on the security of the family property is still an antecedent debt sufficient to support a later mortgage of the sons' share notwithstanding that the debt was incurred simultaneously with the execution of the prior mortgage. The theory of breach of trust must therefore be held to have been laid to rest for good as otherwise the invalid charge created by the father on the family property, invalid for the reason that there was a simultaneous borrowing of ready money, could not have been held to have been a good antecedent debt which was neither illegal nor immoral. There can be no doubt that the Privy Council held a debt to be a good antecedent debt. It is impossible to mistake the meaning of the illustration given by their Lordships at page 102 of the report:

> For after all, if looked at straight in the face, what position can be more anomalous than this. A father who is manager, borrows a like sum from *A* and *B*. To *A* he gives a mortgage on the family estate containing a personal covenant. To *B* he gives a simple acknowledgment of loan. *B* sues and gets a decree; on this decree execution can follow and the estate can be taken. *A* suing upon his mortgage cannot recover. It seems to have been felt that if the debt for which a mortgage is given was in any proper sense, antecedent, then it, so to speak, escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity.

In fact and apart from the dicta to be found in 39 ALL. 437[3] no authority for the proposition can be found either in the texts or the decided cases. Even in that case it is to be observed that the Judicial Committee were not dealing with the nature or incidents of a father's alienation for the purpose of fixing the character of his liability consequent on the alienation being set aside at the instance of the sons; much less for the purpose of determining the scope of the pious obligation of the latter. It would therefore be wrong, in my opinion, to rely on this decision in justification of the view that the liability to refund is an immoral debt which the sons are not bound to discharge; and in my opinion receives support by the decision of this Court in 43 Mad. 421.[5] What has always to be remembered in this connexion is that a father's debt even though incurred for his own personal purposes has still to be discharged by the sons, notwithstanding that it met no necessity or procured no benefit for the joint family. It is therefore difficult to see how the fact that money was obtained for such purposes under a purported sale, so long as the object was neither illegal nor immoral can alter the character of the liability or convert the resulting obligation into an avyavaharika debt. It is the purpose for which the money is obtained which determines the character of the debt and not the means adopted which may vary. It follows from what has been said that the observations of the learned Chief Justice cannot be taken to represent the correct rule of law on the point in question.

Seshagiri Iyer J. delivered a separate judgment though he concurred with the Chief Justice. He took the occasion for expressing the view that the pious obligation of the son to discharge the debts of the father which were neither illegal nor immoral was in the nature of a moral precept which should never have been recognised by Courts of law and indeed he went the length of wishing that the texts on the point had been consigned to the limbo of oblivion as, in his opinion, they involved a theory incongruous with modern conditions. This, however, is an opinion which few, I consider, will share. As long as the joint family system lasts with its doctrine of survivorship and the recognition of equal and co-ordinate rights in the sons, so long it seems to me that the theory of pious obligation should be maintained in the interests of the fair name of Hindu law, and its title to take rank with civilized systems of jurisprudence. Mayne in his well known treatise on Hindu Law (Mayne's Hindu Law, Edn. 9, p. 348) explains the rule underlying the principle thus:

> The notion of a religious as well as a civil obligation to pay debts evidences the introduction of Brahmanical theories into a law *which was previously founded merely upon natural justice*. The kindred theory that the soul of a deceased debtor could not find repose till his debts were discharged probably grew up still later. The religious theory of obligation could well co-exist with the civil theory, as affording an additional sanction for a liability *which was already recognised*. The antiquity of the texts which state this religious theory shows that

it had sprung up before the family bonds were
a relaxed, by allowing the sons to possess a co-ordinate interest in the property and a right to restrain their father in his dealings with it. But even after this later development, natural equity and convenience would continue to attach a specially binding character to debts which were contracted by the official head and representative of the family, while the religious obligation would assume greater prominence in proportion as the secular obligation was weakened.

The italics are mine. The basis of the rule also fell to be explained by the Allahabad High Court in 55 ALL. 283,[15] where Iqbal Ahmed J., as he then was, made the following pertinent observations :

So far as I can see, this rule was introduced as a sort of corrective to the rule that every male mem-
b ber of a joint Hindu family acquires an interest in the joint family property from the moment of his birth, and therefore no member of such family can predicate the extent of his share or can alienate the same. If by the mere fact of his birth the newly born son acquires an interest in the joint family property, and thus automatically reduces the extent of his father's interest in the same, it is but fair and just that he should shoulder along with the father the liabilities of the father. To make provision for the payment of debts due to a creditor far from being "unsuited to any but a primitive and patriarchal society" is in consonance with common honesty and is, I should think, the recognised practice of the civilized world. The liability imposed on a son, to pay the just debts of his father is not a gratuitous obligation thrust on him by Hindu law but is a necessary corollary—if not a
c salutary counter-balancing proviso—to the principle that the son from the moment of his birth acquires, along with the father, an interest in joint family property.

It appears to me that the statement of the law contained in the passages extracted above exhibit a truer perception of the fundamentals of the doctrine and there would seem to be little reason either for those who are governed by the Hindu law to feel ashamed of it or for the Courts which are called upon to administer it to feel any compunction in enforcing it. I also regret to say that I find it difficult to follow the
d dictum that a father can hardly be expected to be rescued from hell when the son is compelled very much against his will and with imprecations in his mouth by a decree of Court to make the payment. With religious beliefs held or denied, the Court has nothing to do. But even under the ancient texts, it is to be remembered that the liability of the son whether it had its origin in secular or religious considerations, was a rule of law and not a rule of morality binding merely on the conscience. However that may be, it is hard to appreciate the argument ; for,

15. ('33) 20 A.I.R. 1933 All. 235 : 149 I.C. 181 : 55 All. 283 : 1933 A.L.J. 550, Lalta Prasad v. Gajadar Shukul.

surely the redemption of the father cannot
e depend upon the state of mind of the son who pays the debt but on the fact of its discharge whatever the reason behind.

The learned Judge has also expressed the veiw that the statement of the Judicial Committee in 39 ALL. 437[3] about the sale by the father amounting to a breach of trust deserved to be strictly enforced in which event, he was of opinion that the decisions in 37 Mad. 458,[16] 4 Pat. L. J. 653,[17] 40 Bom. 126[18] and 43 Bom. 612[19] would stand in need of review as they tried to put a strained construction on the rule of pious obligation. Here again, there is need for caution and a
f wholesale denunciation is, if I may say so with respect, scarcely warranted. If the theory that a sale by the father even when made for no justifiable purpose is a breach of trust is negatived, as I think it should be, the learned Judge's criticism of these cases, even if sound, would be found to be of little weight in advancing the argument. But it may be pointed out that the cases decided by this Court bearing on the question whether a son is liable for the debt of the father connected with a breach of trust have been recently considered by this Court in (1940) 2 M. L. J. 179[20] in the light of the decision of the Privy Council in 56 ALL. 548[21] and my
g Lord the Chief Justice has, if I may say so with respect, clearly stated the principle in the following words :

This Court has always held that where a father has fully received money the fact that he misappropriates it later will not change the character of the debt and the son is liable under the pious obligation rule. Where a person receives money on behalf of another a civil liability immediately arises and the fact that the person who has received it fails in his duty to pay it over to the person entitled to it does not alter the civil character of the debt.

The question which arises in this class of cases is whether a liability of the father

16. ('14) 1 A.I.R. 1914 Mad. 654 : 14 I. C. 705: 37
h Mad. 458 : 23 M. L. J. 61, Venugopal Naidu v. Ramanathan Chetty.

17. ('20) 7 A.I.R. 1920 Pat. 708 : 52 I. C. 734 : 4 Pat. L. J. 653 : 1 P. L. T. 133, Hanumat Mahton v. Sonadhari Singh.

18. ('15) 2 A. I. R. 1915 Bom. 280 : 31 I. C. 301 : 40 Bom. 126 : 17 Bom. L. R. 955, Ramakrishna Trimbak v. Narayan.

19. ('18) 5 A.I.R. 1918 Bom. 13 : 51 I. C. 612 : 43 Bom. 612: 21 Bom. L.R. 435, Hanmant Kashinath v. Ganesh Annaji.

20. ('40) 27 A.I.R. 1940 Mad 828 : 191 I. C. 755 : I. L. R. (1941) Mad. 27 : (1940) 2 M. L. J. 179, Ananda Rao v. President, Co-operative Credit Society, Pedatadepalli.

21. ('34) 21 A.I.R. 1934 P. C. 238 : 151 I. C. 33 : 56 All. 548 : 61 I. A. 350 (P.C.), Toshanpal Singh v. District Judge of Agra.

having its origin in a criminal act of his gives rise to a debt falling within the pious obligation rule, and the answer clearly is that it does not. It is certainly not a crime or anything akin to it for a father to raise money for his personal needs by selling family property. The restraint on his powers in this behalf is merely designed to provide some measure of check, albeit temporary in character.

A close examination of the judgment of Seshagiri Iyer J. reveals that it is based upon two grounds, namely, (1) that the claim of the disappointed purchaser for a refund of the consideration on the sale in his favour being set aside at the instance of the sons is really in the nature of a claim for damages against the father which does not materialise into a debt until the sale is set aside; (2) that if on that date the father was already dead or a division in status had been established between him and his sons, the latter would not in either event be liable.

With respect to the first ground, I have little to add to what has fallen from my Lord the Chief Justice. As regard the second ground I may perhaps add that the law on the point which was involved in a certain amount of doubt has since been elucidated by the Full Bench decision in 51 Mad. 361[8] which has firmly established the liability of the sons after partition for a debt of the father incurred before it. After this decision the only point which may require consideration is whether the obligation is one which has been incurred by the father before partition, and whether it is tainted by illegality or immorality. His subsequent death would make no difference; neither would a subsequent severance of status. I respectfully agree with my Lord in holding that the liability of the father, contingent though it be, is still inherent in the sale itself, and not a new liability coming into existence for the first time when the sale is set aside.

Of the decisions referred to by Seshagiri Iyer J. at p. 809, (of 44 Mad.) the case in 9 Mad. 188[22] will be found on examination to have no reference to the question of the liability of the sons for a debt of the father after partition. 22 Mad. 519[23] has been interpreted in the Full Bench decision in 51 Mad. 361[8] and held not to affect the principle laid down in it. The actual decision in 35 M.L.J. 451[24] goes no further than that in the suit by the sons for the recovery of their share in the joint family property sold by their father for purposes not binding on the family, the purchaser is not entitled to any charge on the sons' share for any portion of the consideration paid by him. It expressly left open the question whether or not he was entitled to sue the father and the sons by a separate suit for the refund of the consideration which had failed. The learned Judge's judgment in 31 M.L.J. 502[1] is clearly in point, and there the Court held that the debt of the father arose when he made the invalid sale and that it made no difference to the liability of the sons that the purchaser's claim was in the nature of unliquidated damages against the father. The position here taken is, if I may say so with respect, quite correct, only we must understand the word 'debt' used in this decision as well as in the case in 35 M.L.J. 451[24] in the wider sense in which the word "rina" is used in Hindu law. For the reasons explained I am of opinion that the view of Seshagiri Iyer J., that the death of the father or the disruption of the joint family before the sale is set aside, would deprive the purchaser of his remedies as against the sons cannot be supported either on principle or authority. I may add that for an obligation of the father to be enforceable against the sons, it does not require to be converted into a decree in the first instance.

C.R.K./R.K. *Case remanded.*

22. ('86) 9 Mad. 188, Sivaganga Zamindar v. Lakshmana.

23. ('99) 22 Mad. 519: 9 M.L.J. 127, Krishnaswami Konan v. Ramaswami Iyer.

24. ('19) 6 A.I.R. 1919 Mad. 776: 47 I.C. 192: 35 M. L. J. 451, Kottayya v. Durgayya.

A. I. R. (29) 1942 Madras 191

SPECIAL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras — *Petitioner*

v.

Maharajah of Pithapuram — *Respondent.*

O. P. No. 31 of 1941, Decided on 15th September 1941; reference by Commissioner of Income-tax, Madras.

Income-tax Act (1922, as amended by Act 7 of 1939), S. 16 (1) (c) — Settlement in favour of daughter prior to amendment revocable — Income of 1938-39 can be deemed as income from revocable transfers within S. 16 (1) (c).

It is the law in force at the time of assessment which governs the assessment and not the law as it was during the year in which the income was earned: ('41) 28 A.I.R. 1941 Pat. 59 (S.B.), *Rel. on.* [P 192 *g*, *h*]

Hence the income of the year 1938-39 derived from the assets comprised in the revocable instru-

ments of trust and settlements executed by the assessee in favour of his daughters before the commencement of the Income-tax Act, 7 of 1939 can be deemed to be income of the assessee under revocable transfers of the assets as contemplated by cl. (c) of sub-s. (1) of S. 16 as amended by the Income-tax Amendment Act, 7 of 1939. [P 192*c*, *h*]

K. V. Sesha Ayyangar — for Petitioner.

Ch. Raghava Rao — for Respondent.

Leach C. J.—By four deeds, all dated 5th April 1933 and referred to in these proceedings as "deeds of trust and settlement" the assessee settled immovable properties on each of his four daughters. The properties were to be held by the assessee as trustee during his lifetime. The deeds also provided that after his death his eldest son was to be the trustee. The assessee reserved to himself powers to revoke the settlements or to make fresh dispositions just as he deemed fit. In view of the provisions of S. 16 (1) (c), Income-tax Act, a clause which was inserted by the Amendment Act of 1939, the Income-tax Officer held that the assessee was liable to be taxed in respect of the income received by his daughters from the settled properties during the year of account (1938-39). The assessee objected. He contended that the Income-tax Officer was wrong in giving what he called retrospective effect to the latter part of S. 16 (1) (c). Accordingly he appealed to the Assistant Commissioner who concurred in the order of the Income-tax Officer. On the application of the assessee the Commissioner of Income-tax has referred to this Court under the provisions of S. 66 (2) the following question:

Whether the income of the year 1938-39 derived from the assets comprised in the revocable instruments of trust and settlement executed by the petitioner in favour of his four daughters on 5th April 1933, i.e., before the commencement of the Income-tax Act 7 of 1939 can be deemed to be income of the petitioner under revocable transfers of assets as contemplated by cl. (c) of sub-s. (1) of S. 16, Income-tax Act, 11 of 1922, as amended by the Income-tax Amendment Act, 7 of 1939.

In referring this question the Commissioner has given reasons for supporting the order of the Income-tax Officer and we agree with him. Section 16 (1) (c) says:

All income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disponer, shall be deemed to be income of the settlor or disponer and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor.

It is admitted, as it must be, that the deeds executed by the assessee operate to transfer the assets, and being revocable, the income arising from the lands transferred must from 1st April 1939 be deemed to be the income of the assessee. But it is said that the income which the Income-tax Officer proposed to tax in respect of the year 1939-40 was income which had accrued before the passing of the Amendment Act and that this makes all the difference. The learned advocate for the assessee has laid stress on the fact that with regard to the deeds falling within the first part of the clause quoted the Legislature has been careful to state that the provision shall have effect whether the deed was executed before or after the commencement of the Amendment Act. The fact that there are no words to this effect in the latter part of the clause indicates, he says, that the Legislature did not intend income arising from properties which are comprised in revocable transfers to be taxed until the amending Act had been in force sufficiently long to cover the year of account.

This argument ignores the plain wording of the clause and the scheme of the Income-tax Act. When there is income accruing to a person by virtue of a revocable transfer of assets that income is to be deemed the income of the transferor. When the Income-tax Officer made the assessment in this case the amending Act had come into force. The Income-tax Act says that an assessee shall pay the tax in respect of the assessment year based on the income received by him in the previous year. The assessee's income which the Income-tax Officer had to assess for the year 1939-40 included the income received from the properties which were covered by these revocable deeds of transfer. The income had actually been received by the daughters, but as the result of the amending Act that income must be deemed to be the income of their father. Therefore we agree with the Commissioner of Income-tax in his opinion that it is the law in force at the time of assessment which governs the assessment in this case and not the law as it was during the year in which the income was earned. The same opinion has been expressed by the Patna High Court: *see* 9 I. T. R. 137.[1] For the reasons given we answer the reference in the affirmative. The Commissioner of Income-tax is entitled to his costs, which we fix at Rs. 250.

C.R.K./R.K. *Answer in affirmative.*

1. ('41) 28 A.I.R. 1941 Pat. 59 : 192 I. C. 204 : 20 Pat. 202 : 21 P. L. T. 1096 : (1941) 9 I. T. R. 137 (SB), H. P. Banerjee v. Commissioner of Income-tax, B. & O.

A. I. R. (29) 1942 Madras 193

PATANJALI SASTRI J.

Yella Venkatramayya — Appellant

v.

Yella Seshayya and others — Respondents.

Second Appeal No. 906 of 1938, Decided on 3rd October 1941, against decree of Sub-Judge, Guntur, in A. S. No. 94 of 1937.

(a) Hindu law — Reconversion — Sudras — Hindu convert to Christianity coming back to Hinduism—Expiatory ceremonies.

Among Sudras, no formal expiatory ceremonies are necessary when a Hindu convert to Christianity comes back to Hinduism unless such ceremonies are enjoined by the practice of the community in question : ('40) 27 A.I.R. 1940 Mad. 513, *Rel. on.* [P 194*g,h*]

(b) Hindu law — Conversion — Hindu father and minor son becoming Christians — Reconversion to Hinduism does not ipso facto bring about coparcenary relationship.

The conversion of a Hindu father and his minor son to Christianity effects a dissolution of the family tie and their reconversion to Hinduism does not ipso facto bring about coparcenary relationship in the absence of subsequent act or transaction pointing to a reunion : ('28) 15 A. I. R. 1928 Mad. 1064, *Disting.*; ('19) 6 A.I.R. 1919 Mad. 988, *Ref.* [P 195*h*]

(c) Transfer of Property Act (1882), S. 41 — Applicability.

Section 41 does not apply to court sales : ('27) 14 A.I.R. 1927 Bom. 368, *Rel. on.* [P 196*d*]

(d) Estoppel—When arises.

No estoppel can arise when no representation is shown to have been made and acted upon. [P 196*e*]

(e) Hindu law—Alienation — Father — Son's liability — Sale in execution against father — Whether son's interest also passes.

The question whether a son's interest in family property also passes at a sale held in execution proceeding taken against the father alone depends not on whether such proceedings arise out of a decree of a civil Court or an award by the Registrar under the Co-operative Societies Act but on consideration of Hindu law. [P 196*f,g*]

V. Rangachari — for Appellant.

K. Kotayya — for Respondents.

Judgment.—This appeal raises questions of some importance as to the status of the members of a Hindu family, who having been converted to Christianity are subsequently reconverted to their old faith. The appellant is the son of respondent 1 and he sued for partition of his half share in the family properties, claiming that a mortgage executed by respondent 1 in favour of respondent 3 and a court sale in favour of respondent 5 in execution proceedings instituted against respondent 1 are not binding on his share in the properties. The Court below has upheld both the transactions in their entirety and this appeal has been preferred challenging the correctness of that decision.

The facts material for the decision of this appeal may be briefly stated. The appellant was born on 1st July 1914. In 1917, respondent 1 and his wife became converts to Christianity and the appellant was also baptised in the same year. In 1930 while the appellant was still a minor, respondent 1 executed the mortgage Ex. X which is one of the transactions now impeached in favour of respondent 3 for Rs. 7000 for discharging antecedent debts due to third parties. The mortgage was assigned to respondent 4 in March 1932 and it is admitted that only a sum of about Rs. 340 remains payable under it. Respondent 1 also borrowed Rs. 800 in November 1930 from the local Co-operative Society, respondent 2 herein, for discharging a debt due to another creditor. As this sum was not duly repaid the society brought claim No. 1793 of 1932 before the Registrar of Co-operative Societies and obtained an award which under the rules framed under the Co-operative Societies Act, 1912, was executable in the civil Courts as if it were a decree of the Court. In such execution proceedings items 1 to 7 and 9 of the plaint A schedule were brought to sale and purchased by respondent 5 on 21st January 1935 for Rs. 2000 subject to the mortgage already referred to which covered all the A schedule properties.

Now, the appellant's contention is that the conversion of his family resulted in a severance of the coparcenary status, that debts incurred by his father after such conversion could not bind the appellant or his share in the properties which were all admittedly ancestral and that neither the mortgage nor the court sale referred to above could affect the appellant's interests in the properties. On the other hand, the alienees contended that the appellant's family had all along been behaving as if they were Hindus of the Kamma caste and were treated as such by other Hindus of the same community in the village, that in such circumstances even if the appellant and his father had at one time become Christians, they must be deemed to have been reconverted to Hinduism and that, in any case, the appellant having held himself out to be an undivided son of respondent 1 and a member of a joint Hindu family, was estopped from pleading the contrary.

The trial Court held that notwithstanding their conversion to Christianity in 1917, the conduct of the parties showed that they must have soon forsaken their new religion

and gone back to their old faith, and that even if they continued to be Christians throughout, they must be taken to have elected to abide by the Hindu law notwithstanding their conversion to Christianity. In view of these findings, it upheld the validity of both the transactions applying the rules of Hindu law. In the lower appellate Court, it was urged for the appellant that it was not open to the trial Court to find that the appellant and his father had been reconverted to Hindu ism as no specific issue was raised on the point, that on the footing that the parties remained Christians, no coparcenary as known to the Hindu law could exist between the appellant and his father as they were governed in matters of testamentary and intestate succession by the Succession Act, and that therefore respondent 1 had no power to bind the interests of the appellant in the common properties by his borrowing or alienation. The learned Subordinate Judge was of opinion that the question of reconversion to Hinduism was immaterial as the trial Court had held that even if the parties continued to be Christians, they must be taken to have elected to be governed by the Hindu law and he agreed with that finding. He thought that there was nothing in the Succession Act to preclude persons who have been converted to Christianity being still governed by the Hindu law. He accordingly dismissed the appeal subject to a small modification as to which no question now arises.

Mr. Rangachari, the learned counsel for the appellant, did not attack the finding of the lower Courts that having regard to the long course of unequivocal conduct, the parties must be taken to have adopted the Hindu law even after their conversion to Christianity ; but he urged that it was not legally possible for them, after the passing of the Succession Act, to hold property in coparcenary with the incident of survivorship, that the appellant and his father held the properties only as tenants-in-common and that the principle that a sale of family properties in execution of a decree obtained against a Hindu father for a debt which is neither illegal nor immoral passes the interests of his undivided son also could not be invoked by the auction purchaser as that principle is founded on the existence of coparcenary relationship. Nor was it possible, he submitted, for the same reason for respondent 1 to mortgage the properties so as to affect the appellant's interest. On the other hand, the respondent while maintaining that the view taken by the lower appellate Court was correct, submitted that it was unnecessary to consider the bearing of the provisions of the Succession Act, on the status of the parties subsequent to their conversion to Christianity as the evidence in the case unmistakably showed that the family had re-entered their old faith long before respondent 1 executed the mortgage and incurred the debt which resulted in the court sale. He urged that the case should be dealt with on the footing that the family had been reconverted to Hinduism before the impeached transactions took place and invited this Court in exercise of its powers under S. 103, Civil P. C., to determine this question as it has not been determined by the lower appellate Court. It is true that as already observed, no specific issue was raised on this point in the trial Court although reconversion was expressly relied on in para. 6 of the written statements as one of the grounds on which the validity of the transactions in so far as they affected the appellant's share in the properties was sought to be sustained. But issue 4 which expressly refers to the reasons stated in para. 6 of the written statements raises the question with sufficient clearness and it is also clear that the parties went to trial fully aware that this was one of the questions for determination as evidence has been adduced on the point on both sides without any objection on the ground that no specific issue was framed. In these circumstances, I see no force in the complaint that the question of reconversion was not properly made the subject of enquiry in the trial Court and as the evidence on record is sufficient, this Court can determine the question.

It has been held by this Court that among Sudras, no formal expiatory ceremonies are necessary when a Hindu convert to Christianity comes back to Hinduism unless such ceremonies are enjoined by the practice of the community in question : *see* I.L.R. (1940) Mad. 653[1] where earlier cases to the same effect are also referred to. There is no suggestion here that any particular expiatory ceremonies are observed on such occasions in the Kamma community to which the parties belong. In the present case, whatever might have been the position prior to 1928, the appellant admitted in his evidence that he was married in that year when he was only 14 years old to a girl belonging to a Hindu

1. ('40) 27 A.I.R. 1940 Mad 513 : 190 I.C. 868 : I.L.R. (1940) Mad 653 : (1940) 1 M.L.J. 800, Durgaprasada Rao v. Sudarasanaswami.

family and that the marriage was conducted according to Hindu rites, a Brahmin priest officiating at the ceremony. He further admitted that three of his sisters who had been married so far were all married to Hindus according to Hindu rites and were living with their husbands as Hindus. All these marriages took place before 1933. He also said :

> The other Kammas in the village would be inviting us for feasts and we would be dining with them. For some days in the beginning the other caste people were not inviting us. All Hindu Kammas have been coming to our house for dinner parties.

Exhibit 6 is a sale deed executed by the appellant and his father in September 1932 in which the appellant is described as the undivided son of his father and both are said to be Kammas. Exhibits 3 and 1 are similar documents executed in July 1933 with similar recitals. It is unnecessary to refer in detail to the oral evidence of the plaintiff's witnesses which has been considered by the learned District Munsif in para. 5 of his judgment. I entirely agree with his appreciation of the evidence, and I have no hesitation in holding, with him, that the appellant and his father reverted to their old faith some time before 1928 and were Hindus at all times material for the purposes of this case. In this view, it becomes unnecessary to consider what the position would be on the footing that the appellant and his father remained Christians but continued to be governed by the rules and customs of the Hindu law.

The question next arises as to the legal effect of the reconversion as regards the status of the parties in relation to the properties held by them which were all admittedly ancestral. It was argued by Mr. Rangachari for the appellant that when defendant 1 became a convert to Christianity, there was a dissolution of the family tie and a severance of the coparcenary according to the decision of the Privy Council in 9 M.I.A. 195[2] and that this position was in no way altered by his reconversion to Hinduism. The coparcenary having once been severed could not, it was said, be revived except by a reunion, and as reunion could result only from an agreement amongst the parties and as the appellant was still a minor when respondent 1 executed the mortgage and incurred the debt which ultimately led to the court sale, respondent 1 notwithstanding the reconversion, had no power to bind by his borrowing the appellant's share in the properties. Mr. Rangachari further pointed out that no case of reunion between the appellant and his father was put forward by the respondents in their written statements and no issue was framed raising the question. In these circumstances, it was urged that it was not open to the respondents now to rely upon any reunion as the basis of coparcenary relationship between the appellant and his father.

Mr. Kottaya for the respondents, however, contended that no agreement to reunite was necessary to bring about a coparcenary between defendant 1 and his son after the reconversion and that just as a Hindu father could by his unilateral act bring about a severance of the coparcenary between himself and his minor son, so could he by an act of his own volition such as reconversion restore the coparcenary relationship. This argument, however, overlooks the position of defendant 1 at the time of the reconversion. It is no doubt true as between a Hindu father and his minor son, the former could by his unilateral act effect a division in status. But could a Hindu father by his own volition bring about a reunion between himself and his minor son ? No case actually deciding this point has been brought to my notice. Mr. Kotayya referred to the decision of Venkatasubba Rao J. in 55 M.L.J. 132[3] where that learned Judge has expressed the view that there is nothing inherently illogical in the father possessing the power of converting his son's status of a separated member into that of a reunited member. The case was one where there was no question of reunion between a father and his son, but the question was whether a father in reuniting with his brother could by his act carry his own undivided minor sons into the reunited family. In 1918 M.W.N. 680[4] this Court held that there could be no question of reunion with minors. Assuming however, that a Hindu father has such a power, it can have no application here as defendant 1 was not a Hindu when he reverted to his old religion. I am therefore unable to agree that the reconversion of respondent 1 ipso facto brought about coparcenary relationship between himself and the appellant. No subsequent act or transaction pointing to a reunion with the appellant during the latter's minority was relied on.

Mr. Kotayya next contended that the ap-

2. (1861-63) 9 M.I.A. 195 : 1 W.R. 1 : 2 Sar. 10 : 1 Suther 501 (P.C.), Abraham v. Abraham.

3. ('28) 15 A.I.R. 1928 Mad. 1064 : 112 I.C. 184 : 55 M.L.J. 132, Babu v. Gokuldoss Goverdan Doss.

4. ('19) 6 A.I.R. 1919 Mad. 988 : 47 I.C. 716 : 1918 M.W.N. 680, Venkata Reddi v. Kuppu Reddi.

pellant, should, at any rate, be deemed to have become reunited with his father after he attained majority in July 1932 as shown by Exs. 6, 3 and 1 and that as respondent 5 purchased the properties in January 1935 after such reunion, the appellant's share in the properties must also be deemed to have passed under the sale. These documents already referred to in another connection no doubt refer to the appellant as the undivided son of respondent 1 but they were executed so soon — Ex. 6 about three months and Exs. 3 and 1 about a year—after the appellant became a major, that it would, in my opinion, be unsafe to conclude from these documents alone that the appellant knowing that he was separate in status from his father, intended to agree to reunite with him so as to form a joint family. On the other hand Ex. 5 executed on the next day after Ex. 6, and Ex. 2 executed five days after Exs. 3 and 1 refer to the appellant merely as the son of defendant 1 which rather shows that the parties did not attach much significance to these descriptions. It must also be remembered in this connection that no reunion between the appellant and his father was specifically pleaded and no issue was framed on the point ; nor have the Courts below considered the question and expressed any opinion thereon. In these circumstances, I am not prepared to agree with Mr. Kotayya's contention that the appellant has been shown to have become reunited with defendant 1 after he attained majority and before the properties were brought to sale in court auction in January 1935. It follows that the appellant's share of the properties sold cannot be held to be bound by the court sale to respondent 5.

Mr. Kotayya next argued on the strength of the three documents referred to above that the appellant having held himself out to be an undivided son of defendant 1 must be held to be estopped from now contending that he was not joint in status with his father and that his share was not bound by the court sale. The principle of S. 41, T. P. Act, was invoked in support of this argument and the decision of this Court in 34 I.C. 494[5] was cited to show that it applies to court sales also. I find it difficult to appreciate this argument. Assuming that S. 41 or the principle underlying it applies to court sales (as to which however *see* 29 Bom.L.R. 471[6]) there is no question here of the appellant having placed any property belonging to him in the ostensible ownership of respondent 1. Nor is there any evidence to show that respondent 5 when he purchased the properties in court sale was aware that the appellant was represented to be an undivided son in Exs. 6, 3 and 1 and acted on the faith of such representation. No estoppel can arise when no representation is shown to have been made and acted upon. The appellant also raised an alternative contention. The court sale to respondent 5 having taken place in pursuance of an award made by the Registrar of Co-operative Societies, the appellant's share in the properties could not be deemed to have been affected by such sale, as the appellant was not a member of the society which advanced the loan to respondent 1. It is not, however, disputed that an award made by the Registrar can be executed as if it was a decree passed by a civil Court and that in fact the properties in question were sold by a civil Court in execution of the award obtained by respondent 2. Whether a son's interest in family property also passes at a sale held in execution proceeding taken against the father alone depends not on whether such proceedings arise out of a decree of a civil Court but on consideration of Hindu law. I see no substance in this contention and I have no hesitation in rejecting it.

The appeal however succeeds on the other grounds indicated above and the preliminary decree passed by the Courts below will be modified by deleting the words "subject to the mortgage Ex. X" and including items 1 to 7 and 9 also of the A schedule among the properties of which partition has been decreed. The appellant will be entitled to mesne profits in respect of these properties from the date of suit and the amount due to the appellant will be ascertained and provided for by the trial Court. The appellant will get his costs in all the Courts from respondents 2 to 5 who contested the appeal. Leave granted.

C.R.K./G.N. *Appeal allowed.*

5. ('17) 4 A.I.R. 1917 Mad. 885 : 34 I.C. 494, N. Kummali v. Paramboli Kandi.
6. ('27) 14 A.I.R. 1927 Bom. 368 : 102 I.C. 64 : 29 Bom.L.R. 471, Vaman Pandu v. Tikaram Dagdu.

A. I. R. (29) 1942 Madras 196

HORWILL J.

Public Prosecutor — Appellant

v.

Krishnaswami for Sundaram Aiyengar — Accused — Respondent.

Criminal Appeal No. 415 of 1941, Decided on 15th October 1941, against acquittal by City First Class Magistrate, Madura, in C. A. No. 15 of 1941.

Motor Vehicles Act (1939), Ss. 3 (1), 11 (3) and 112 — Term of licence expired — Person driving car without renewing licence is guilty under S. 112 — Subsequent renewal does not date back to date of expiry of old licence — Construction of S. 11 (3).

A person driving a motor vehicle after the expiry of the term of his licence without renewing the same contravenes the provisions of S. 3 (1) and is guilty under S. 112. The subsequent renewal of the licence does not date back to the date of the expiry of the old licence so as to have the effect of cancelling the offence committed under S. 3 (1). [P 197*g*, *h*]

Section 11 (3) deals only with the amount to be paid for a renewal of a licence and merely states that the fee for the renewal of a licence, if the application is made previous to or within 15 days subsequent to the date of the expiration of the licence shall be three rupees; if after that date, five rupees. Therefore it is incorrect to say that S. 11 (3) gives 15 days of grace within which period it is unnecessary to apply for a licence. [P 197*e*]

Appellant in person.

K. V. Sesha Ayyangar and N. S. Mani — for Respondent.

Judgment. — The accused's licence for driving a car expired on 10th December 1940. On 12th December 1940 an unfortunate accident occurred in which the accused ran over and killed a child. He at once applied for a renewal of his licence, which was granted. He was subsequently prosecuted for driving without a licence and was convicted by the Sub-Magistrate, Madura Town, because on the date on which the accident occurred he had no effective licence. The matter was taken in appeal to the first class Magistrate of Madura, who set aside the conviction and acquitted the accused on the ground that the subsequent renewal dated back to 10th December 1940 and that the accused must therefore be deemed to have had an effective licence on 12th December 1940.

As the licence of the accused expired on 10th December 1940 and he had no licence on 12th December 1940, he contravened the provisions of S. 3 (1) of Act 4 of 1939, which says that no person shall drive a motor vehicle without an effective licence. It is difficult to see how anything that the accused did after that date can cancel the offence committed before he obtained a renewal. Section 11 is however said to have that remarkable effect. Section 11 (1) gives a licencing authority power to renew a licence. Sub-section (2) sets out the method to be adopted for obtaining a renewal. Sub-section (3) deals with the fiscal aspect of the application for renewal and states that the fee for the renewal of a licence, if the application is made previous to or within 15 days subsequent to the date of the expiration of the licence shall be three rupees; if after that date, five rupees. It is argued that sub-s. (3) of S. 11 gives 15 days of grace within which period it is unnecessary to apply for a licence. It is difficult however to accept that argument, because, firstly, this sub-section deals only with the amount to be paid for a renewal of a licence and secondly, the 15 days is merely the period within which the renewal fee is limited to three rupees. A person is at liberty to apply for a renewal of his licence not merely within 15 days but at any time subsequent to the expiry of the licence, with the proviso that if he makes his application beyond 15 days after the expiration of the period of the licence he has to pay five rupees instead of three rupees.

There is no limit at all set to the period within which he need apply for a renewal of the licence; so that if the argument of Mr. Sesha Ayyangar is sound there is an unlimited period of grace within which a person can apply for a renewal of a licence; and no person could ever be convicted for offending against S. 3 (1) of the Act, unless the licensing authority became aware that the applicant had been driving without a licence and refused to renew the licence on that ground. The argument of the learned advocate for the respondent is based on the fact that when a licence is renewed, it dates back to the date of the expiry of the old licence. The reason for that is presumably that if a person wishes to have the benefit of a renewal, with its lower fee and absence of formalities, he must be prepared to pay from the date of expiry of the old licence. A renewal cannot be regarded as a licence to infringe at pleasure another provision of the Act or as a grant of pardon by the licensing authority to one who has broken the law. This sub-section nevertheless serves a real need; because it does not force a person who desires a renewal to do so at once if he has no intention of driving for some time.

I am therefore satisfied that the accused contravened the provisions of S. 3 of Act 4 of 1939, and thereby committed an offence punishable under S. 112 of the Act. The order of acquittal is consequently set aside and the accused convicted. The accused has been holding a driver's licence for a large number of years. He says that in the past he has always taken great care to apply for a renewal of his licence before the term has expired and that by inadvertence he had not noticed that the term for which the licence was effective had expired. I see no reason to doubt the truth of these statements; and so I think it will be sufficient under the circum-

stances if the accused is given a nominal sentence and ordered to pay a fine of one rupee.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 198

KING J.

Chettikulam Sri Ekambareswaraswami and Dhandayudapani Swami Temples represented by sole Trustee Devaroya Reddiar — Petitioner

v.

Veerappa Gounder and another — Respondents.

Civil Revn. Petn. No. 810 of 1937, Decided on 17th September 1940, to revise decree of Dist. Munsif, Turiyur, in S. C. S. No. 95 of 1936.

Religious endowment—Promissory note executed by trustee — Liability restricted to personal promise — Suit on promissory note — Decree against temple properties cannot be passed.

Where a trustee borrows money for purposes of the trust by executing a promissory note and the liability is restricted to the personal promise of the executant trustee to pay, the creditor is not entitled to a decree charging the amount due under the promissory note against the trust property : ('18) 5 A.I.R. 1918 Mad. 533, *Foll.*; *Case law referred.*

[P 198*c*; P 199*b*,*c*]

A. V. Narayanaswamy Iyer — for Petitioner.

M. S. Vaidyanatha Iyer — for Respondents.

Order. — The subject-matter of this petition is a promissory note executed by one T. D. Palaniappa Mudaliar in favour of the respondent for Rs. 200 on 22nd March 1933. Palaniappa Mudaliar describes himself in the body of the note as manager of a certain temple in Chettikulam, and states further that he has borrowed the money "for the preliminary expenses of the Panguni Uttiram festival in the said temple," but he has executed the note in his own name, and there is a personal covenant to repay without any reference to the temple funds, such as is found in the note with which I have dealt in C. R. P. No. 809 of 1937.[1] The respondent sued in due course upon this note and has obtained a decree against both Palaniappa Mudaliar personally and the properties of the temple. This is a petition on behalf of the temple in which its liability under the note is contested. The contention of the petitioner is supported by direct authority which if it has not been overruled and cannot be distinguished, is binding upon me. That authority is the decision of a Bench of this Court, 32 M.L.J. 259.[2] The headnote runs as follows :

> Where a trustee borrows money for purposes of the trust by executing a promissory note, the creditor is not entitled to a decree charging the amount due under the promissory note against the trust property,

and in the body of the judgment it is categorically stated that all that the creditor obtained was a promise on the part of the executant of the note to pay the debt. That statement, in my opinion, certainly applies to the facts of the present case, and unless respondent can show that 32 M.L.J. 259[2] is no longer good law, the petitioner here is entitled to succeed. Respondent's learned advocate has cited a number of rulings, but has not been able to convince me that I can refuse to follow 32 M.L.J. 259.[2] The first rulings cited were 39 Mad. 915[3] and 58 Mad. 735.[4] These cases deal with promissory notes executed by mothers as guardians of their infant sons, and lay it down that the provisions of the Negotiable Instruments Act do not stand in the way of decrees being granted upon such notes against the estates of the sons. I do not think there is any reasoning in these judgments, which can be applied to the case of a trustee and a temple. The next case, 45 Mad. 703,[5] is directly concerned with a trustee who executed a bond. In that bond, however, it was expressly stipulated that the creditor should be repaid from the temple properties. The learned Judges who decided it not unnaturally refused to follow 32 M.L.J. 259[2] because of this vital point of distinction, but they do not in the slightest degree indicate any opinion that it had been wrongly decided. 49 M.L.J. 717[6] is a case of a promissory note in which a definite recital is found that the executants promised to pay "in their capacity as uralars of the Devasvom" and that the amount was "due from the devasvom." This is precisely the same ground of distinction as in 45 Mad. 703,[5] and neither of these two cases can be of any assistance to the respondent in the present argument.

1. *Reported in* ('42) 29 A.I.R. 1942 Mad. 92: (1941) 2 M.L.J. 587, Ekambara Dhanda Yudhapani Swami v. Arunachala Goundar.

2. ('18) 5 A.I.R. 1918 Mad. 533 : 38 I.C. 172 : 32 M. L. J. 259, Swaminatha Aiyar v. Srinivasa Aiyar.

3. ('16) 3 A.I.R. 1916 Mad. 677 : 30 I.C. 574 : 39 Mad. 915, Padma Krishna v. Nagamani Ammal.

4. ('35) 22 A.I.R. 1935 Mad. 447: 155 I.C. 581: 58 Mad. 735: 68 M.L.J. 540 (F.B.), Satyanarayana v. Mallayya.

5. ('22) 9 A.I.R. 1922 Mad. 402 : 72 I.C. 103 : 45 Mad. 703 : 43 M.L.J. 147, Sundaresan Chettiar v. Viswanadha Pandara Sannadhi.

6. ('26) 13 A.I.R. 1926 Mad. 249 : 92 I.C. 481 : 49 M.L.J. 717, Subramanian Pattar v. Velu Nayar.

No other case has been cited which is concerned with a promissory note or bond, and the only other reference to 32 M.L.J. 259,[2] which has been pointed out to me occurs in 60 M.L.J. 90.[7] In that case trustees had purchased goods for temple purposes and it was held that the creditor could recover their value from the temple funds. There is only a passing reference to 32 M.L.J. 259[2] as a case which had been distinguished by 45 Mad. 703.[5] On p. 94, however, it is found very explicitly that the trustees had contracted with the creditor that the goods should be paid for out of temple funds. All these three cases therefore are cases of contract in which the creditor stipulated that he should look to the temple properties for his money. In 45 Mad. 703[5] and 49 M.L.J. 717[6] the contracts were contained in the documents themselves; in 60 M.L.J. 90,[7] there was no document to prevent the reception of evidence of such a contract. Here, whatever the respondent may say as to previous statements made to him by the temple trustees, the suit must in essence be deemed to be based upon the promissory note, and upon the promissory note alone, since it is clear that there was no antecedent debt in existence. By the promissory note the liability is restricted to the personal promise of Palaniappa Mudaliar to pay, and, having taken a promissory note in these terms, respondent must now abide by them. Following 32 M.L.J. 259,[2] therefore I am of opinion that the decree granted against the temple properties cannot stand, and that respondent's suit as against the temple must be dismissed. In the view which I have thus taken it is unnecessary to discuss other objections taken by the petitioner to the validity of the promissory note as against the temple. I find no trace of the particular point of law upon which this petition has succeeded having been raised before the District Munsif and direct therefore that the petitioner do pay his own costs.

C.R.K./K.S. *Petition allowed.*

7. ('30) 17 A.I.R. 1930 Mad. 1009: 128 I.C. 716: 60 M.L.J. 90, Venkatabalagurumurthi Chettiar v. Balakrishna Odayar.

A. I. R. (29) 1942 Madras 199

BURN J.

In re K. R. Kalyanarama Ayyar
Petitioner — Appellant.

Criminal Revn. Case No. 484 and Petn. No. 457 of 41, Decided on 29th August 1941, to revise judgnt of Court of Session, North Arcot Division, in A. No. 16 of 1941.

Defence of India Act (1939), Sec. 2, Rules under, R. 34 (6) (d), (e), (j) and (k) — Particular portion of speech can constitute "prejudicial act" — Portions of speech held prejudicial acts.

A particular portion of a speech can constitute a "prejudicial act" and therefore for the purpose of conviction under R. 34 (6) it is not necessary to prove that the speech as a whole amounts to a "prejudicial act." Statements in a speech that the war was directly causing starvation in the country or that there would be no peace or happiness unless the British Government in India was overthrown or that people should refuse to enlist in any of His Majesty's Forces constitute prejudicial acts as defined in R. 34 (6) (d), (e), (j) and (k). [P 199*g,h*; P 200*a*]

B. Jagannatha Das — for Appellant.

Public Prosecutor — for the Crown.

FACTS. — The accused, the Secretary of the North Arcot District Congress Committee, was charged with an offence under R. 38 (1) (a) read with R. 38 (5) of the Defence of India Rules for having delivered a speech which constituted a "prejudicial act" under R. 34 (6) (d), (e), (j) and (k) of the Defence of India Rules. The subject on which the accused gave the speech was the "present situation and our duty." The meeting was attended by a head constable who took down notes of only portions of the speeches that he considered objectionable. He did not record the entire speech. The objectionable statements in the speech were (1) that coercion was being employed in collecting funds for the war or that such complaints were being made and that they must be enquired into and (2) that war news published in the papers and broadcast through radio was not reliable since part of the truth was suppressed, (3) that the war was directly causing starvation in this country, (4) that there would be no peace or happiness unless the British Government in India was overthrown, and (5) that people should refuse to enlist in any of His Majesty's Forces. The Sessions Judge on appeal held that items 1 and 2 did not fall within the scope of the definition of "prejudicial acts" that the other statements clearly constituted "prejudicial acts" as defined in R. 34 (6) (d), (e), (j) and (k) and confirmed the conviction but reduced the sentence of imprisonment to three months rigorous imprisonment retaining the fine. Against this sentence the revision petition was filed.

Order. — The findings of fact are sufficient to sustain the conviction. It is not possible to accept the contention of learned counsel for the petitioner that the petitioner's speech must be considered as a whole and that he could not be convicted unless the whole speech were found to be a "prejudicial act." I see no good reason for supposing

that a particular portion of a speech cannot constitute a "prejudicial act." There is therefore no ground for interference with the conviction. Learned counsel for the petitioner has urged that the sentence of fine should be remitted or largely reduced since the petitioner is not a wealthy man. As the learned Sessions Judge has already reduced the sentence of imprisonment from eight months to three, maintaining the fine, I am not prepared to reduce the sentence further by reducing the fine. The petition is accordingly dismissed.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 200

WADSWORTH AND PATANJALI SASTRI JJ.

Thayyanayaki Ammal by agent Viswalingam Chettiar — Appellant

v.

Minor Sundarappa alias Apath Sahaya Kandiar by his mother and guardian Alamelu Ammal and others — Respondents.

Appeal No. 436 of 1938, Decided on 5th September 1941, against decree of Sub-Judge, Kumbakonam, in O. S. No. 65 of 1937.

(a) Limitation Act (1908), Ss. 20 and 19—Distinction — Mortgage — Payment by mortgagee after he has parted with mortgaged property saves right of suit against purchaser of equity of redemption.

A payment stands on a different footing from an acknowledgment as regards its effect in saving rights of action. Section 20 does not require, unlike S. 19, that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability, but enacts simply that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor, and saves the right of suit by the creditor in its integrity against all the persons who might have been sued within the prescribed period. Consequently a part payment by a mortgagor after he has parted with the mortgaged property but is personally liable to pay on his covenant saves the right of suit against the purchaser of the equity of redemption : ('40) 27 A. I. R. 1940 Mad. 470 (F. B.), *Expl., and Disting.*; (1886) 11 A. C. 639; 33 Cal 1278; ('18) 5 A.I.R. 1918 All. 61 and ('33) 20 A.I.R. 1933 Pat. 1, *Rel. on.* [P 201*d*,*e*,*g*; P 202*b*]

(b) Mortgage — Sale — *A* in 1917 purchased item 10 of property subject to mortgage after paying full consideration to mortgagee—*B* purchasing all properties comprised in mortgage in court auction in execution of money decree against mortgagor in 1925 and subsequently selling back properties purchased including items 6 to 9 except items 1 to 5 to mortgagor reserving bulk of consideration with mortgagor for discharging mortgage — Mortgagor defaulting — Subsequent sale of items 6 to 9 by mortgagor to *C*—*A* claiming that item 10 should be sold last while *B* claiming that items 1 to 5 should be sold after items 6 to 9—Equity claimed by *A* and *B* held should prevail.

In 1917 *A* purchased item 10 of the property which was subject to a mortgage after paying full consideration to the mortgagee, while *B* purchased all the properties comprised in the mortgage as well as some other properties in court auction in execution of a money decree against the mortgagor in December 1925 and subsequently sold the properties so purchased other than items 1 to 5 back to the mortgagor by a sale deed dated 16th June 1928 reserving the bulk of the consideration with the mortgagor for discharging this mortgage, which, however, the mortgagor failed to do. It was, therefore urged that in execution of the mortgage decree items 6 to 9 which were among the items thus sold to the mortgagor and which were subsequently passed by transfer to *C* should be sold before items 1 to 5 while *A* contended that item 10 should be sold last :

Held that the equity claimed by *A* and *B* should prevail and items 6 to 9 should be sold before items 1 to 5 in the hands of *B* and item 10 in the hands of *A* were brought to sale. [P 202*e*,*f*]

(c) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii)—Person claiming benefits of Act must show himself to be agriculturist within S. 3 (ii)—Original debt incurred by agriculturist —Transferee is not necessarily entitled to benefits of Act.

A person who claims to be entitled to the benefits of the Act must prove that he is an agriculturist within the meaning of the definition in S. 3 (ii). Therefore it is incorrect to say that because the debt was incurred originally by an agriculturist his transferees are entitled to the benefits of the Act whether they are themselves agriculturists or not. [P 202*f*,*g*]

K. V. Krishnaswami Ayyar and R. Ramasubba Iyer — for Appellant.

M. S. Venkatarama Iyer and C. A. Seshagiri Sastri — for Respondents.

Patanjali Sastri J. — This appeal has been preferred by the plaintiff from a decree of the Subordinate Judge, Kumbakonam, dismissing a suit brought to enforce a mortgage executed by one Rajagopala Kandiyar on 4th June 1913. Plaintiff claims title to the mortgage under the will of her father Sabapathi Chetti who was the son of the mortgagee and died in December 1934. Defendant 1 is the son of the mortgagor and defendant 6 is the Official Receiver of Tanjore, in whom the estate of the mortgagor has become vested on his adjudication as insolvent. The other defendants claim interest as purchasers in different items of properties comprised in the mortgage. The suit was filed in 1937 and certain part payments alleged to have been made from time to time and endorsed on the bond by the mortgagor were relied on as extending the period of limitation. The Court below held that some of these alleged payments and endorsements were not genuine and dismissed the suit as barred by limitation and the main question

argued in the appeal is whether this finding is correct. (After discussing the findings, his Lordship proceeded.) We are therefore unable to agree with the Subordinate Judge's conclusion that the endorsements EXS. A-4 and A-5 were fabricated in order to save the suit from the bar of limitation. It was next argued on behalf of defendant 2, the alienee of item 10, that even if the disputed payments and endorsements were genuine, they could not operate to save the right of suit against this defendant, as he had purchased the property in 1917 long before these payments and endorsements were made by the mortgagor. Reliance was placed in support of this contention on the recent Full Bench decision of this Court in I.L.R. (1940) Mad. 872[1] of which the headnote runs thus :

> A mortgagor who has lost all interest in the mortgaged property cannot bind by an acknowledgment under S. 19 or by a payment of principal or interest under S. 20, Limitation Act, 1908, the person on whom his interest has devolved, whether the devolution is of the whole of the mortgaged properties or only of a part thereof. In order to be binding on the assignee, the acknowledgment or payment must be made before the person making it has parted with his interest in the property to the assignee.

This would seem, no doubt, to support the contention, but it appears from the facts stated by the Full Bench who were dealing with a case placed before them and not answering a question of law referred to them that when the mortgagor made the payment there was no subsisting liability to pay as the enforcement of the personal covenant had become barred and the mortgaged property had been alienated before the date of such payment. In view of this fact, it could hardly have been maintained that there was a payment by the debtor or the person liable to pay within the meaning of S. 20 of the Act, and no question could therefore arise with reference to that provision. This was pointed out at p. 886 where it was observed :

> A payment of interest to start a fresh period of limitation must be made by the person liable to pay the debt or by his agent duly authorised in that behalf. If the personal remedy against the mortgagor is barred he is no longer liable to pay the debt.

It is thus clear that the Full Bench were not concerned on the facts before them with the question whether a part payment by a mortgagor who has parted with the mortgaged property but is personally liable to pay on his covenant saves the right of suit against the purchaser of the equity of redemption. It will be seen that the payment there in question was towards interest and was endorsed on the bond, the endorsement being signed by the mortgagor. It was therefore argued that the payment so endorsed could be considered to be a valid acknowledgment under S. 19 as it fulfilled the requirements of that provision and the question arose, this was the point which the Full Bench had really to determine, whether for purposes of S. 19 which requires that an acknowledgment of liability in respect of any property or right must, in order to be effective, be given by "the party against whom such property or right is claimed or by some person through whom he derives title or liability," the derivation of title or liability should take place after the acknowledgment has been given. It was held that it should, following certain English and Indian decisions. But no such question can arise on the language of S. 20, which so far as it is material here runs thus :

> Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

It will be observed that this section does not require, unlike S. 19, that interest or part of the principal should be paid by the party against whom the debt or legacy is claimed or by some person through whom he derives title or liability but enacts simply that a fresh period of limitation shall be computed where interest or part of the principal has been paid by the person liable to pay or by the debtor. A fresh period of limitation for what suit? Evidently for such suit as the creditor might have brought before the expiration of the prescribed period. That is to say, the right of suit is saved in its integrity against all the persons who might have been sued within the prescribed period. This difference in language is the more remarkable as S. 20 follows immediately on S. 19 which has made an acknowledgment binding only on the party making it or some person in privity with him. The following observations of the Privy Council in (1886) 11 A.C. 639[2] are here pertinent :

> It must be remembered that payment and acknowledgment are two very different things. As regards the person makig them, acknowledgment may, as pointed out in (1862-63) 1 De. G. J. & S.

1. ('40) 27 A. I. R. 1940 Mad 470 : 188 I. C. 603 : I.L.R. (1940) Mad. 872 : (1940) 1 M.L.J. 766 (F.B.), Pavayi v. Palanivelu.

2. (1886) 11 A.C. 639 : 55 L. J. P. C. 75 : 55 L.T. 410, Lewin v. Wilson.

122,[3] be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment; whereas, payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain, and is not put upon any further assertion of his rights, but not so if he only receives acknowledgment. If therefore we find that the Legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it.

The view we have expressed is in accord with the decision of the Calcutta High Court in 33 Cal. 1278[4] the principle of which has also been followed in 41 ALL. 111[5] and 12 Pat. 93.[6] We may here observe that even under the English Statutes of Limitation it has been recognised that payment stands on a different footing from an acknowledgment as regards its effect in saving rights of action. After reviewing the various statutory provisions and the decisions bearing upon them, Lightwood observes :

> The statutory provisions although varying slightly in their language are all subject to the same rule; the payment if so made as to be effectual at all is effectual to keep alive the creditor's remedies generally. Thus a payment by a person entitled to make it will keep alive the remedy on a mortgage or charge against the land although the person making it is not in possession of the land or in possession of a limited interest only; it will keep alive the personal remedy on a covenant although the remedy is to be enforced against another than the person paying; and after the death of a mortgagor or specialty debtor a payment by any one person interested in the estate will keep alive the liability of all other persons interested. (The Time Limit on Actions, page 365.)

It was further contended or defendant 2 that the property purchased by him, i. e., item 10 of the plaint schedule, should be directed to be sold last as he purchased it in 1917 paying full consideration to the mortgagee. Similarly, the learned advocate for defendant 5 urged that the properties in which he is interested namely items 1 to 5 should be sold after items 6 to 8 purchased by defendant 7 from the Official Receiver and transferred to defendant 8. It was pointed out that defendant 5 purchased all the properties comprised in the mortgage as well as some other properties in court auction in execution of a money decree against the mortgagor in December 1925 and that he subsequently sold the properties so purchased other than items 1 to 5 back to the mortgagor by a sale deed dated 16th June 1928 reserving the bulk of the consideration with the mortgagor for discharging this mortgage, which, however, the mortgagor failed to do. It was therefore urged that items 6 to 9 which were among the items thus sold to the mortgagor and which have subsequently passed by transfer to defendants 8 and 9 should be sold before items 1 to 5. We consider that the equity claimed by defendants 2 and 5 should prevail and we accordingly direct that items 6 to 8 held by defendant 8 and item 9 purchased by defendant 3 should be sold before items 1 to 5 in the hands of defendant 5 and item 10 in the hands of defendant 2 are brought to sale.

It only remains to deal with the claim of defendants 2, 4, 5 and 8 to relief under the Madras Agriculturists Relief Act. The Court below has held that inasmuch as the debt was incurred originally by an agriculturist, these defendants are entitled to the benefits of the Act as transferees from him, whether they are themselves agriculturists or not. This view is not correct as we have held that a person who claims to be entitled to the benefits of the Act must prove that he is an agriculturist within the meaning of the definition in S. 3 (ii). As the issues relating to this matter have not been determined by the Court below, they must now be investigated and if these defendants are proved to be agriculturists, the debt will have to be scaled down so far as they are concerned. In the result, the decree dismissing the suit is set aside and a preliminary mortgage decree will be passed by the Court below in the light of this judgment after determining issues 5 and 8. The appellant will have her costs here and below. The court-fee paid by the appellant will be refunded to her. As against defendants 2, 4, 5 and 8, the appellant will be entitled only to proportionate costs in the trial Court and here.

C.R.K./G.N. *Order accordingly.*

Lim. Act—

(a) ('42) Chitaley, S. 19, N. 5 Pt. 7; S. 20, N. 14 Pt. 2; S. 21, N. 6 Pts. 3, 6, 7, 8.
('38) Rustomji, Page 403 Pt. 9 ; Page 405 Pt. 3 ; Page 408 Pt. 1

3. (1862-63) 1 De. G. J. & S. 122 : 32 L. J. Ch. 219 : 9 Jur. (N. S.) 506 : 7 L. T. (N. S.) 812 : 11 W.R. 386 : 137 R.R. 174, Bolding v. Lane.
4. ('06) 33 Cal 1278: 11 CWN 107, Domilal v. Roshan.
5. ('18) 5 A.I.R. 1918 All 61: 47 I.C. 845: 41 All. 111: 16 A.L.J. 790, Raushanlal v. Kanhayalal.
6. ('33) 20 A.I.R. 1933 Pat. 1: 140 I.C. 145: 12 Pat. 93: 14 P.L.T. 6, Badri Das v. Pasupati.

A. I. R. (29) 1942 Madras 202

WADSWORTH AND PATANJALI SASTRI JJ.

Kakatur Linga Reddi

v.

Yerabolu Subbarami Reddi.

Civil Revn. Petn. No. 1846 and Appeal No. 389 of 1939, Decided on 4th August 1941.

Madras Agriculturists Relief Act (4 of 1938), S. 4 (f)—Object—Scope — Surety guaranteeing due discharge of his duties by trustee—Trustee committing breach—Surety is entitled to have his liability scaled down under Act.

The words "arising out of a breach of trust" in S. 4 (f) should not be read so as to cover any liability which is in any way connected with a breach of trust. The object of S. 4 (f) is not to place creditors who have lost money owing to a breach of trust in a more favourable position than creditors who have merely placed excessive confidence in their debtors. Section 4 (f) is based on grounds of public policy and its object is to prevent dishonest trustees from pleading the Act in order to retain the fruits of their dishonesty. When a third party gives security for the due discharge by a person under a fiduciary relationship of his duties, the surety incurs towards the beneficiary a contractual liability which is enforceable only in case the trustee commits a breach of trust; but the proximate or immediate basis of the surety's liability is the contract. The breach of trust is a more remote cause from which the liability can be said to arise only indirectly. The claim against the surety on breach of his obligations by the trustee is primarily based on the contractual liability undertaken by the surety, and hence in such a case the surety is entitled to have his liability scaled down under the Act. [P 203*d*,*e*,*f*,*g*]

K. Kuppuswamy — for Petitioner.

Wadsworth J.—These two matters both arise out of an application under S. 19 of the Madras Act, 4 of 1938. The question is as to the effect of S. 4 (f) of the Act which excludes from the operation of the Act liabilities of an agriculturist falling under the head of "any liability arising out of a breach of trust." The applicant was a surety for the next friend of certain minors who realised a sum of Rs. 6385 odd in a suit filed on behalf of the minors and drew this money out of Court on the strength of a security bond given under O. 32, R. 6, Civil P. C., by the present applicant. When the minors came of age they brought a suit against their guardians for an account, claiming this money as money to which they were entitled. In that suit the surety was impleaded and after a decree had been obtained against the guardians, I. A. No. 76 of 1937 was filed to enforce the security bond to the extent of the amount for which the guardians were found liable. The surety filed the present application under S. 19 to scale down the decree passed against him in I. A. No. 76 of 1937 and his application has been rejected by the learned District Judge on the ground that his liability under the security bond is a liability arising out of a breach of trust.

It seems to us that this decision is wrong. When a third party gives security for the due discharge by a person under a fiduciary relationship of his duties, the surety incurs towards the beneficiary a contractual liability which is enforceable only in case the trustee commits a breach of trust; but the proximate or immediate basis of the surety's liability is the contract. The breach of trust is a more remote cause from which the liability can be said to arise only indirectly. No doubt the surety will not be obliged to pay anything so long as the person whom he guarantees fulfils his obligations completely, but when the claim is made against the surety, it is made primarily on the basis of the contractual liability which the surety has undertaken, though the extent of the claim and the time at which it is made will be determined by the default of the person guaranteed. It seems to us that the words of this clause "arising out of a breach of trust" should not be read so as to cover any liability which is in any way connected with a breach of trust. As we read this clause, its object is not to place creditors who have lost money owing to a breach of trust in a more favourable position than creditors who have merely placed excessive confidence in their debtors. The object of this section must be to prevent dishonest trustees from pleading the Act in order to retain the fruits of their dishonesty, that is to say, this exception, just like the other exceptions enumerated in S. 4, is based on grounds of public policy, not on a desire to benefit one class of creditors as compared with another class of creditors. An attempt has been made to argue that in the circumstances of the case the surety must himself be deemed to have incurred a liability arising out of a breach of trust, because according to the affidavits the money drawn by the guardians on the strength of the surety bond was subsequently invested in a mortgage executed by the surety himself and it is alleged that the surety's default to the guardians is primarily responsible for the guardians' default to the minors.

There is no reference to this contention as having been raised before the learned District Judge and the necessary facts do not appear to have been established. Even assuming them to be as alleged, it seems to us apparent that there was no breach of trust on the part of the guardians in investing the money which they had drawn; and the failure of the person who has borrowed that money on a mortgage to pay his creditor, will certainly not amount to a breach of trust. It seems to us, therefore, that the decision of the learned District Judge rests on a misunderstanding of S. 4, cl. (f) and that the applicant is not, by reason of S. 4,

cl. (f) precluded from getting the benefits of S. 19 of the Act. The civil revision petition is, therefore, allowed with costs and the application is remitted to the trial Court for disposal in the light of this judgment. The civil miscellaneous appeal does not lie and is dismissed. No separate costs.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 204 (1)

WADSWORTH J.

Parameswara Menon — Petitioner

v.

Kotana Narayana Menon—Respondent.

Civil Revn. Petn. No. 1401 of 1939, Decided on 3rd October 1940, to revise order of Dist. Court, South Malabar, D/-11th March 1939.

Madras Agriculturists Relief Act (4 of 1938), Ss. 23 and 19—Applicability—Decree passed by foreign Court—Sale in British India in execution of decree—Sale cannot be set aside under S. 23.

Section 23 is available only to an agriculturist entitled to the benefits of the Act, with reference to the particular matter and not generally since the procedure of amending a decree under S. 19 can only be applied by the Court which passed the decree. Section 19 cannot apply to a decree passed by a foreign Court and therefore a sale of the judgment-debtor's property held in British India in execution of that decree cannot be set aside under S. 23 as the Act does not apply to such a decree. The judgment-debtor therefore cannot be regarded as an agriculturist entitled to the benefits of the Act. [P 204c,d]

K. Kuttikrishna Menon — for Petitioner.

K. Narayana Menon — for Respondent.

Order. — The petitioner was a decree-holder in a Court of the Cochin State, who executed his decree by the sale of properties in British India. The judgment-debtor applied under S.23 of Madras Act, 4 of 1938 to set aside that sale and the lower appellate Court has ordered it to be set aside. It seems to me that the order is wrong. Section 23 is available only to an agriculturist entitled to the benefits of the Act. This must mean that he is entitled to the benefits of the Act with reference to the particular matter and not generally. The judgment-debtor in question having got this sale set aside cannot apply for any benefit under the Act unless he can get the decree amended under S. 19. That cannot be done as the procedure under S. 19 can only be applied by the Court which passed the decree, i. e., in this case by the foreign Court to which this Act has no application. It seems to me to follow that the judgment-debtor is not an agriculturist entitled to the benefits of the Act. I may point out that to hold otherwise would still leave it open to the decree-holder to execute his decree again and cause a fresh sale to be held, to which sale S. 23 would have no application. A further objection which was not taken in the lower appellate Court is that no appeal lay: *vide* 50 M.L.W. 201.[1] But in the view that I have taken on the merits, it is unnecessary to go into that objection. The petition is allowed with costs throughout and the application under S. 23 of Act 4 of 1938 is dismissed.

C.R.K./G.N. *Petition allowed.*

1. ('39) 26 A.I.R. 1939 Mad. 796 : (1939) 2 M.L.J. 398 : 50 M.L.W. 201, Viswanatha Iyer v. Narayanaswami Iyer.

A. I. R. (29) 1942 Madras 204 (2)

WADSWORTH J.

Panuganti Seshayya and others — Petitioners

v.

Lankireddi Swamireddi and others — Respondents.

Civil Revn. Petn. No. 658 of 1939, Decided on 3rd October 1941, to revise decree of Sub-Judge, Tenali, D/- 28th February 1939.

Madras Agriculturists Relief Act (4 of 1938), Ss. 9 and 8 — Construction — Under S. 9 principal of debt cannot be treated as different from principal of contract sued on — Nor does S. 9 warrant procedure analogous to that of S. 8 except for reducing debts originating before 1st October 1932.

There is nothing in S. 9 which justifies the treatment of the principal of the debt as anything different from the principal of the contract actually sued on or as warranting a procedure analogous to that of S. 8 which S. 9 does not contemplate except for the specific purpose of reducing debts which originated before 1st October 1932. [P 205f]

In the suit on a promissory note dated 22nd September 1937 executed for the balance due on a mortgage bond in favour of the same creditor executed on 19th December 1932 by the defendant it was contended that under S. 9 the defendant was entitled to have the debt scaled down on the basis of the original mortgage advance of 1932, payments thereunder made towards interest being adjusted to interest on the original principal at five per cent:

Held that the debt could not be scaled down on the basis of the mortgage advance since S. 9 contained no machinery for scaling down debts originating after 1st October 1932 except on the basis of the actual contract sued on with such re-appropriation of payments towards interest as were expressly prescribed. [P 205c]

K. Kotayya — for Petitioners.

V. Subrahmanyam — for Respondents.

Order.—This civil revision petition raises the question of the interpretation of S. 9 (1) of Act 4 of 1938. The suit was brought on a promissory note dated 22nd September 1937 executed for the balance due on a mortgage bond in favour of the same creditor executed

on 19th December 1932 by the present defendants and some others. There had been considerable payments made under the mortgage bond. The contention of the defendant-petitioners here is that under S. 9, they are entitled to have the debt scaled down on the basis of the original mortgage advance of 1932, payments thereunder made towards interest being adjusted to interest on the original principal at five per cent. The contention is based on the language of the proviso to S. 9 (1) which states :

> Provided that any part of the debt which is found to be a renewal of a prior debt shall be deemed to be a debt contracted on the date on which such prior debt was incurred, and if such debt had been contracted prior to 1st October 1932, shall be dealt with under the provisions of S. 8.

Now, in the present case, the prior debt was not contracted before 1st October 1932 so that the last part of the proviso has no application. It is difficult to see how the debt can be scaled down on the basis of the mortgage advance, unless one can import into the first part of the proviso the explanation to S. 8 which treats the original principal as the principal for the purposes of S. 8. It has no doubt been held that when under the latter part of the proviso to S. 9 the debt is deemed to be a debt incurred before 1st October 1932 then the debt is to be scaled down in accordance with the provisions of S. 8 including the explanation thereto and the principal sum payable will be the principal sum originally advanced with any further sums advanced as principal. But S. 9 contains no machinery for scaling down debts originating after 1st October 1932 except on the basis of the actual contract sued on with such re-appropriation of payments towards interest as are expressly prescribed. The section does not seem to contemplate any going back to any earlier debt except for the single purpose of ascertaining what is the theoretical date of the debt in order to find out whether it has to be scaled down under S. 8 or not. The proviso certainly allows the Court to treat as the date of the debt the date of the original advance; but it is still dealing with the debt that is sued on and it is that debt which under the first clause is to be scaled down by the process of recalculating interest at five per cent., and adjusting to the interest so calculated the amount paid towards interest of that debt. In my opinion, the section does not contemplate the recalculation of interest on the antecedent debt and the re-appropriation of payments towards interest made under that antecedent debt. The process of going back to the earlier debt is a peculiar feature of S. 8 applicable only to debts which originated before 1st October 1932. Evidently the Legislature had in mind the date on which there was an economic upheaval which made it impossible for many agriculturists to pay their debts without some very drastic relief. Such debts, whether they subsist under the original document or under renewals, are dealt with under S. 8 on the basis of the original sum advanced. Debts originally incurred after this economic upheaval do not require such drastic treatment and for such debts the Legislature has provided only a moderate scaling down of interest by the process set forth in S. 9. There is nothing in S. 9 which, in my opinion, justifies the treatment of the principal of the debt as anything different from the principal of the contract actually sued on or as warranting a procedure analogous to that of S. 8 which S. 9 does not seem to contemplate except for the specific purpose of reducing debts which originated before 1st October 1932. In this view, I dismiss the civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 205

LEACH C. J. AND HAPPELL J.

R. Kailasa Ayyar — Petitioner

v.

Payyalur Gramam Vanchi Pattar's son Sundaram Pattar and others — Respondents.

Civil Revn. Petn. No. 1271 of 1939, Decided on 10th October 1941, to revise order of Sub-Judge, South Malabar at Palghat, D/- 8th February 1939.

(a) Court-fees Act (1870), S. 7 (i) — Applicability.

The plaint in a suit by a mortgagee or a person entitled to a charge on immovable property to recover what is due to him falls to be stamped under S. 7 (i). [P 207*b*]

(b) Court-fees Act (1870), S. 7 (ix)— Suit to enforce mortgage by sale does not fall under S. 7 (ix).

A suit to enforce a mortgage by a decree for sale obviously does not come within the purview of S. 7 (ix). [P 207*b*,*c*]

(c) Transfer of Property Act (1882), S. 67 (d) — Suit by co-mortgagee for his share of mortgage amount is maintainable—Value for court-fee and jurisdiction is same under S. 8, Suits Valuation Act — Court-fee must be paid on full amount of mortgage and not on plaintiff's share alone — Such payment does not result in hardship to plaintiff : 59 M. L. J. 928=('30) 17 A. I. R. 1930 Mad. 985=129 I. C. 45, *OVERRULED*.

One of several co-mortgagees who are in the position of tenants-in-common can sue to recover his own share of the mortgage, provided that he makes his co-mortgagees defendants, if they refuse to join

him as plaintiffs: 15 M.L.J. 496 and ('19) 6 A.I.R. 1919 P. C. 24, *Rel. on.* [P 207*d*]

The value of the claim in such suit for purposes of jurisdiction and court-fee is the same under S. 8, Suits Valuation Act. But the governing section in the matter of court-fee is S. 7, Court-fees Act, and not S. 8, Suits Valuation Act, and in deciding what court-fee is payable under S. 7, Court-fees Act, the Court must have regard to the real nature of the claim. [P 207*c* ; P 208*c*]

A co-mortgagee suing to recover his individual share of the mortgage must ask the Court to decide what is due on the mortgage as a whole and to fix a period for redemption of the mortgaged property in its entirety. He must ask for a preliminary mortgage decree in respect of the entire debt. There can be no redemption in part. Therefore the plaintiff cannot get his share until the mortgagor has paid into Court what he owes on the mortgage or the mortgaged properties have been sold under the preliminary decree. Consequently, in such suit the primary claim can only be taken to be the enforcement of payment of the full mortgage debt, and therefore the plaintiff must value his suit according to the full amount due under the mortgage and not according to his own share : 59 M. L. J. 928=('30) 17 A. I. R. 1930 Mad. 985 = 129 I. C. 45, *OVERRULED*; ('37) 24 A.I.R. 1937 Mad. 922, *Approved*; ('19) 6 A.I.R. 1919 P.C. 24, *Rel. on*; ('36) 23 A.I.R. 1936 Mad. 895, *Ref.* [P 206*c* ; P 208*c*,*d*]

To require a co-mortgagee suing alone to pay court-fees on the full amount of the mortgage debt will not result in hardship. If he obtains a mortgage decree he will be entitled to recover out of the money paid into Court by the mortgagor or out of the proceeds of the sale of the mortgaged property the full amount of which he has had to pay in court-fees. [P 208*e*]

(d) Court-fee—Determination of — Hardship is no factor.

Hardship cannot be regarded as a factor in the matter of determination of the court-fee payable. [P 208*e*]

N. R. Sesha Ayyar — for Petitioner.

K. Subba Rao — for Respondents.

Leach C. J.—This civil revision petition raises the question whether a co-mortgagee when suing to recover his individual share in the mortgage must value his suit according to the full amount due under the deed, or whether he may value it according to his own share. The question has arisen in other cases in this Court and there is a conflict of opinion. It is certainly one of some difficulty. In the present case there is a charge on immovable properties and not a mortgage, but the same principle admittedly will apply. In the year 1919 one Vanchi Pattar organised a chit fund, of which he constituted himself the manager. The subscriptions were to be paid to him and as security for the discharge of his obligation to the subscribers he created a charge on certain immovable properties. Rama Pattar, the father of the petitioner and of respondents 4 and 5, subscribed to the fund on behalf of his family, which was then joint. Eventually the family became entitled to withdraw from the fund Rs. 3032, but Rama Pattar died without receiving payment. After his death his sons separated and under the decree passed in a partition suit the petitioner became entitled to two-fifths, respondent 4 to two-fifths and respondent 5 to one-fifth of the Rs. 3032. With two exceptions all subscribers to the fund have now been paid. The two exceptions are Rama Pattar's family and one P. M. Krishna Ayyar.

In 1936 the petitioner filed a suit in the Court of the Subordinate Judge of South Malabar at Palghat to recover his two-fifths share of the Rs. 3032 by the enforcement of the charge created by Vanchi Pattar who is now dead. The defendants were respondents 1 and 2, who are the sons of Vanchi Pattar ; respondent 3, who is the alienee of the properties ; the petitioner's brothers and P. M. Krishna Ayyar. The amount due to P. M. Krishna Ayyar was Rs. 1429 and therefore at the time the suit was filed the properties remained charged in respect of a total sum of Rs. 4461. The petitioner prayed for a decree for Rs. 1212-6-4, the amount of his own share in the Rs. 3032, and stamped his plaint accordingly. As the amount claimed was less than Rs. 3000 the Subordinate Judge held that he had no jurisdiction to try the suit and returned the plaint to the petitioner to enable him to present it to the Court of the District Munsif of Alatur. In accordance with the decision of the Subordinate Judge the petitioner presented the plaint to the District Munsif, who accepted it, but in consequence of a plea raised by respondent 3 in his written statement—the District Munsif framed an issue on the question whether the suit had been properly valued for the purposes of court-fees and jurisdiction. The District Munsif considered that the suit should be valued in accordance with the full amount due under the document creating the charge and, therefore, ordered the plaint to be returned to the petitioner for presentation to the Court having jurisdiction; in other words to the Court of the Subordinate Judge. The petitioner then represented the plaint to the Subordinate Judge, who adhered to his previous decision and refused to accept it. In these circumstances the petitioner asks this Court, in the exercise of its revisional powers, to set aside the Subordinate Judge's order directing the plaint to be returned and compel him to try the suit. In representing the plaint to the Subordinate Judge the petitioner did not amend it

in any way and did not tender any additional court-fee. The petitioner admits that he must ask for the sale of all the properties included in the charge and that the total amount due to the members of his family and to P. M. Krishna Ayyar under the document creating it is Rs. 4461, but he says that notwithstanding he is entitled to sue in the Court of the Subordinate Judge on payment of a court-fee based on the amount of his own share only.

Section 7, Court-fees Act, and S. 8, Suits Valuation Act, contain the only relevant statutory provisions. Sub-section (i) of S. 7, Court-fees Act, states that in suits for money the amount of the court-fee shall be computed according to the amount claimed. It is common ground that when a mortgagee or a person entitled to a charge on immovable property sues to recover what is due to him the plaint falls to be stamped under this sub-section. Sub-section (ix) requires a suit against a mortgagee for the recovery of the mortgaged property or a suit by a mortgagee to foreclose the mortgage to be stamped according to the principal money expressed to be secured by the instrument of mortgage, but this sub-section goes no further and a suit to enforce a mortgage by a decree for sale obviously does not come within it. Section 8, Suits Valuation Act, states that where in suits other than those referred to in S. 7 (v), (vi), (ix) and (x) (d), Court-fees Act, court-fees are payable ad valorem under the Court-fees Act, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. Therefore in a suit like the one referred to in the petition it is the value of the claim which determines the forum, but it remains to be seen whether in such a suit the claim must be taken to be limited to the payment of the plaintiff's individual share or whether it is to be construed as one for the enforcement of the whole mortgage, and valued as such. It is not disputed, nor can it be in view of the authorities, that one of several co-mortgagees who are in the position of tenants-in-common can sue to recover his own share of the mortgage, provided that he makes his co-mortgagees defendants, if they refuse to join him as plaintiffs : *see* 15 M. L. J. 496[1] and 47 Cal. 175.[2] The last mentioned case was decided by the Privy Council and in delivering the judgment of the Board Lord Buckmaster said :

> Where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realize the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee-defendant and the mortgagor.

Neither in 15 M. L. J. 496[1] nor in 47 Cal. 175[2] did any question of court-fee or jurisdiction arise. Therefore, these cases leave open the question under discussion, although we consider that the observations of Lord Buckmaster just quoted greatly assist in the solution of the problem. We shall return to 47 Cal. 175[2] presently but at this stage it will be convenient to examine the judgments of this Court which are in conflict. They are the judgment delivered by Ramesam J. in 59 M. L. J. 928[3] and the judgment of Varadachariar J. in (1937) 2 M. L. J. 666.[4] The case in 59 M. L. J. 928[3] was decided by Ramesam J. sitting alone. The learned Judge held that S. 67 (d), T. P. Act, does not prevent a person interested in part only of the mortgaged property instituting a suit. He may institute a suit for the recovery of his share provided the reliefs he prays for relate to the entire property. In the course of his judgment the learned Judge observed :

> Thus, the real question in all such cases is not one of maintainability of the suit but what is the court-fee to be paid by the plaintiff in such cases and perhaps though the point does not arise now there is also the question of jurisdiction. In such cases, should the plaintiff pay court-fee upon the whole of the mortgage money or only upon his share ? It is true that for realizing his share of the mortgage money he has to pray for sale of the whole property . . . . . If the whole of the mortgaged property realized more than the amount due on the document to all the mortgagees, the plaintiff will be simply paid his amount and the rest of it will be held by the Court and will not be paid to the other co-mortgagees until they pay their court-fees. The fear that the Government will be deprived of the Government revenue while the whole of the mortgage amount is being realised and only a small amount is being paid as court-fee, is therefore illusory. After the trial of the case and the final decree is passed, the Court will make a provision directing the defendants mortgagees to pay their court-fees within a certain time and if they do not pay the court-fees the amount will be paid to the mortgagor after taking security. In such a case no mortgagee will allow his money to go back to

1. ('05) 15 M.L.J. 496, Atchamma v. Subbarayudu.
2. ('19) 6 A. I. R. 1919 P. C. 24 : 53 I. C. 131 : 47 Cal. 175 : 46 I. A. 272 (P. C.), Sunitabala Debi v. Dhara Sundari Debi.
3. ('30) 17 A. I. R. 1930 Mad. 985 : 129 I. C. 45 : 59 M. L. J. 928, Bansiram Jeshmal v. Gunnia Naga Iyer.
4. ('37) 24 A. I. R. 1937 Mad. 922 : 176 I. C. 995 : (1937) 2 M. L. J. 666, Peer Ammal v. Nallusami Pillai.

the mortgagor's hands owing to non-payment of court-fees, so that ultimately the Government will get the whole court-fee due upon the whole of the mortgage money.

It follows from these observations that Ramesam J. was of the opinion that the plaintiff could only be called upon to stamp his plaint according to the value of his share in the mortgage, and if this opinion is correct the petitioner has complied with the requirements of the law and the proper forum will be the District Munsif's Court. In (1937) 2 M.L.J. 666[4] Varadachariar J. sitting with Mockett J. indicated strong dissent from the opinion expressed by Ramesam J. in 59 M.L.J. 928.[3] In the course of his judgment the learned Judge said:

> Justice can be done between all the parties concerned only by providing in the decree for the distribution of the sale proceeds amongst the co-mortgagees. It accordingly seems to me more reasonable to regard the mortgage as a single cause of action at any rate for purposes of jurisdiction and in such a case under S. 8, Suits Valuation Act, the valuation for purposes of court-fee cannot be different. Ramesam J. suggests that as regards the defendant co-mortgagee's share, the Court may be able to collect the court-fees later on before distributing the monies to him. With great respect, I venture to doubt if there is anything in the Court-fees Act authorising the Court to do so.

With great respect we consider that the opinion of Varadachariar J. is to be preferred to that of Ramesam J. The governing section is S. 7, Court-fees Act, and not S. 8, Suits Valuation Act, but in deciding what court-fee is payable under S. 7, Court-fees Act, the Court must have regard to the real nature of the claim. A co-mortgagee suing alone for his share must ask for a preliminary mortgage decree in respect of the entire debt. As already pointed out, Lord Buckmaster in 47 Cal. 175[2] stated that where a co-mortgagee is suing alone he must ask for the proper decree which would provide for all the necessary accounts and payments, although a defendant mortgagee could not ask for judgment in his favour. This can only mean that the plaintiff must ask the Court to decide what is due on the mortgage as a whole and to fix a period for redemption of the mortgaged property in its entirety. There can be no redemption in part. Therefore the plaintiff cannot get his share until the mortgagor has paid into Court what he owes on the mortgage or the mortgaged properties have been sold under the preliminary decree. In these circumstances, it seems to us that the primary claim can only be taken to be the enforcement of payment of the full mortgage debt, which means that the plaint must be stamped accordingly. Although hardship cannot be regarded as a factor, it may be pointed out that to require a co-mortgagee suing alone to pay court-fees on the full amount of the mortgage debt will not result in hardship. If he obtains a mortgage decree he will be entitled to recover out of the money paid into Court by the mortgagor or out of the proceeds of the sale of the mortgaged property the full amount of which he has had to pay in court-fees.

The question of what would be the proper course for a mortgagee defendant to take to recover his share of the monies brought into Court as the result of a suit by a co-mortgagee does not arise in this case and the question can be left for decision until it does arise. In the course of his judgment the District Munsif referred to the decision of Pandrang Row J. in 44 M.L.W. 502[5] and the decision has been quoted to us in the course of the arguments. In that case a mortgage deed had been executed in favour of several creditors of the mortgagors for the aggregate amount of their dues, but it was the intention of the parties that there should be no separate payment to any of the co-mortgagees until the entire amount had been realised. Pandrang Row J. considered that the judgment of the Privy Council in 47 Cal. 175[2] did not apply and he held that one of the creditors could not bring a suit for his share. There are observations in the judgment which are open to criticism but it is not necessary to embark upon a discussion of the judgment because in this case it is common ground that 47 Cal. 175[2] does apply. The only contest is with regard to its bearing on the question raised by the petitioner. For the reasons given we hold that the petitioner should value his suit at Rs. 4461 and pay court-fees on that amount, which means that the proper Court to try this suit is that of the Subordinate Judge of Palghat, provided, of course, the plaint is properly stamped. The costs of this petition will be costs in the cause. The petitioner attached the plaint to his petition. The plaint will now be returned to him.

C.R.K./G.N. *Order accordingly.*

5. ('36) 23 A.I.R. 1936 Mad. 895 : 169 I.C. 352 : 44 M.L.W. 502, Ramachandra Iyer v. Sivarama Iyer.

A. I. R. (29) 1942 Madras 209

SOMAYYA J.

Muttapukuntla Chinnapareddi — *Appellant*

v.

Masineni Venkataramanappa and others — *Respondents.*

Second Appeal No. 803 of 1939, Decided on 9th September 1941, against decree of District Court, Anantapur, in A. S. No. 38 of 1938.

Transfer of Property Act (1882), Ss. 130 and 6 (e)—Sale set aside—Vendee's right to recover purchase money is actionable claim within S. 130 and not mere right to sue under S. 6 (e).

Where a sale is set aside a contract to repay the purchase money must be taken to be an implied term of the contract of sale between the vendor and the vendee. The right of the vendee to claim enforcement of this contract is an actionable claim within the meaning of S. 130 and is, therefore, clearly assignable. It is not a mere right to sue within the meaning of S. 6 (e) : ('32) 19 A. I. R. 1932 P. C. 32, *Rel. on.* [P 210*e*]

A. Lakshmayya — for Appellant.

K. Krishnaswami Ayyangar and N. Kotiswara Rao — for Respondents.

Judgment. — The appellant sold some properties to respondents 2 and 3. The sale was, however, set aside at the instance of two persons who claimed to be the real owners thereof. Their claim was upheld and the sale by the appellant in favour of respondents 2 and 3 was declared invalid. Thereafter respondents 2 and 3 assigned their right to get the purchase money from the appellant to respondent 1 (plaintiff) under Ex. A dated 9th February 1937. Respondent 1 then filed this suit for recovery of the purchase money from the appellant on the strength of Ex. A the deed of assignment in his favour. The sole question in the second appeal is whether Ex. A is a valid assignment. It was urged for the appellant who was the first and the contesting defendant that the right of respondents 2 and 3 which accrued to them as a result of the sale in their favour being set aside, was a right to sue for damages and that being a bare right to sue, it was not assignable at law being opposed to S. 6 (e), T. P. Act. Both the lower Courts held that the right which respondents 2 and 3 assigned in favour of plaintiff-respondent 1 was one to recover an ascertained amount and an actionable claim, and not a mere right to sue for damages. The suit was accordingly decreed by both the Courts.

In second appeal Mr. Lakshmayya, the learned advocate for the appellant, urges that the view taken by the lower Courts as to the nature of the right which accrued to respondents 2 and 3 by the sale to them being declared invalid has not been properly understood by both the Courts. If it is a bare right to sue that respondents 2 and 3 got on the sale in their favour being set aside, then it is obvious that a transfer of the same would be prohibited by S. 6 (e), T. P. Act, and that respondent 1 would have no right to sue. The question is not free from difficulty but I think it is covered by the decision of the Judicial Committee in 11 Pat 266.[1] A lease contained an agreement by the lessee to pay the Government revenue and there was a provision that if he committed a breach of the covenant, he should be liable to pay damages to the lessor. The lessee failed to pay certain instalments of revenue. Then the lessor sold the property to a third person who paid those instalments from out of the purchase money. Later, the lessor executed a document by which he assigned to the purchaser his right to recover the instalments from the lessee. The question was whether the right which the lessor obtained on the lessee committing default in the payment of the revenue to the Government which the lessor ultimately paid, was a bare right to sue, in which case the assignment of that right would not be a valid one. The suit was filed by the assignee to recover the instalments of revenue which remained unpaid by the lessee which as stated above he himself paid on behalf of the lessor. The suit was filed on the strength of the assignment which the lessor executed conveying his rights to recover the same from the lessee. The lessee committed default in payment of a further instalment which accrued due after the purchase of the property by the plaintiff. In so far as that instalment was concerned, he was the owner by that time and under the terms of the document having stepped into the lessor's shoes, he was held entitled to recover that instalment which accrued due after his purchase. As regards the right to recover the instalments which the lessee had failed to pay before the purchase by the plaintiff, the High Court held that it was a mere right to sue and that such a right was not transferable under the law. As extracted on p. 271 of the report, the High Court said this :

> What was assigned by defendant 2 to the plaintiff was his right to recover damages from defendant 1 on account of the latter's default in payment of the Government revenue and cesses. The right

1. ('32) 19 A. I. R. 1932 P. C. 32 : 135 I. C. 635 : 59 I. A. 41 : 11 Pat. 266 (P. C.), Manmathanath Mullick v. Hedait Ali.

to recover damages is a mere right to sue and such a right cannot be transferred under the law.

After setting out the above extract, the Judicial Committee referred to the relevant provision in the Transfer of Property Act, S. 6 (e) which is in these terms: "A mere right to sue cannot be transferred." The Judicial Committee held that what was assigned was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with Banerji to repay to him. This is what they say :

Their Lordships are clearly of opinion that this clause (Transfer of Property Act, S. 6 (e)) has no application to the facts of the present case. In their Lordships' opinion what was assigned to the appellant was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with Banerji to repay to him. This would, their Lordships think, be an actionable claim to which S. 130 of the Act would apply. The failure of the lessee to fulfil this obligation does not give rise to a claim of damages within the meaning of the clause in the lease on which the High Court found, but to a claim for reimbursement of the precise sum which the landlord had disbursed to meet the obligation.

In the present case, respondents 2 and 3 the purchasers from the appellant had a claim for reimbursement of the precise sum which they had paid as purchase money. This was a precise sum which they were entitled to get either on the view that the sale was void ab initio (the vendors having had no title from the very beginning) or on the ground of an existing consideration which afterwards failed. In either case, it is the purchase money that respondents 2 and 3 had a right to recover. It may be that they had a right to recover some other amount under some other head of claim but certainly they had the right to recover the purchase money which is a definite sum of money and the vendor the appellant was bound to repay this sum to his vendees, respondents 2 and 3. As in the case before the Judicial Committee, it must be taken that this was an implied term of the contract of sale. In the case before the Judicial Committee, the lease deed did not contain an express covenant to repay to the lessor the sum which he paid to the Government by way of Government revenue which the lessee had defaulted to pay. But, eventually, the Judicial Committee implied such a contract and that is what is referred to on p. 271 as a claim for a definite sum of money which the lessee was bound by his contract with Banerji to repay to him. The contract which is here referred to is obviously an implied term of the contract, namely the lease deed. On the same reasoning it must be held that there was in this case a contract to repay the purchase money between the vendor and the vendees. A right to claim enforcement of this contract would be in the words of the above decision an actionable claim to which S.130, T.P.Act, applies. This being so, the right was clearly assignable. Having regard to the above decision of the Judicial Committee, I think it is not profitable to refer to the other cases cited by either party. The second appeal fails and is therefore dismissed with costs. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 210

GENTLE J.

K. N. Ramakrishna Iyear — Applicant

v.

Official Liquidator, South Indian General Assurance Co., Ltd. (in liquidation) — Respondent.

O. P. No. 206 of 1940, (Application No. 1576 of 1941), Decided on 22nd August 1941.

Trusts—Creation of— Payment of money to insurance company for revival of policy—Company going into liquidation before policy revived —Receipt of money by company is not in fiduciary capacity and no question of trust arises.

In respect of a lapsed policy, the applicant paid certain money to the Insurance Company for revival of the policy. But before the policy was revived, the company went into liquidation. Thereupon applicant claimed to be treated as a preferential creditor to the extent of the money paid by him on the ground that a trust has been created :

Held that the payment to the Insurance Company of the sum was for a specific purpose which did not involve any payment by the company to any third person nor was it agreed that the money should be returned to the applicant upon the happening of any specified event. The object for which the payment was made and which was the consideration for the payment has failed inasmuch as the policy has not been revived since liquidation of the company took place before it could be effected. Therefore it could not be said that when the applicant paid the money to the company the company received this money in any fiduciary capacity. That being so, no question of trust arose : 32 Mad. 68, *Rel. on* ; 121 E. R. 12; (1857) 26 L. J. Ch. 710; ('40) 27 A.I.R. 1940 Mad. 441 and ('39) 26 A.I.R. 1939 Mad 337, *Disting.* [P 211*g*]

A. K. Sreeraman — for Applicant.

Order.—The applicant is creditor of the company which is being wound up. The Official Liquidator refused to place him in the list of preferential creditors and the object of this application is to obtain an order that he should be treated as such preferential creditor. The ground upon which preference is claimed is that a sum of Rs. 140

was paid by the applicant to the company in circumstances which created a trust, the company being the trustee and the applicant the *cestui que trust*. The applicant was the assignee of a policy of insurance issued by the company in respect of which about two years premia were in arrears and the policy had lapsed. After correspondence passing between the applicant and the company, Exs. P. 1 to P. 5, in which the company stated that upon payment of the amount of the premia in arrears amounting to Rs. 140 and a medical certificate being supplied in respect of the person insured by the policy, this would be revived. On 28th June 1940, the applicant sent a cheque for Rs. 140 to the company to meet the amount of the premia unpaid. The company acknowledged payment on 16th July 1940 stating that the medical certificate had not been forthcoming, but upon its receipt, it would consider revival of the policy and meanwhile, the sum of Rs. 140 was placed in the suspense account involving no risk to the company. In fact, the company did not place it in any account named "suspense," but in an account called "advance premium receipt account." Within a few days of payment, the liquidation of the company commenced and no further step was taken in regard to the policy or its revival.

Learned counsel for the applicant contends that this sum of Rs. 140 was paid for a specific purpose, namely, in order to obtain a revival of the policy and this purpose not having been fulfilled, the company then must have occupied a fiduciary position and it was their duty to return the money in full to the applicant, a trust having been created of which the company was the trustee and the applicant *cestui que trust*. In support of this argument, a number of authorities decided both in England and in India were cited : 121 E. R. 12;[1] (1857) 26 L. J. Ch. 710;[2] (1940) 1 M. L. J. 254[3] and (1939) 1 M.L.J. 209.[4] In these four cases, it was held that a trust existed, the circumstances in each being either money was paid to the payee, usually a banker, with instructions for the money to be paid to a specified third party or was money received by the payee upon the terms that it was to be repaid to the payee subject to certain conditions, the latter case being the amount of the security deposit paid by an employee to an employer in respect of his services and to be returned at the termination of the employment subject to any claim which the employer might have against the employee.

Whenever money is paid by one person to another it can be said that it is remitted for a specific purpose. The buyer paying to a seller of goods or a hirer for the hire of an article but because money is so paid that does not ipso facto make the recipient the trustee. If the goods are not delivered or the article hired is not supplied, as the case may be, there is failure of consideration and the one making the payment is entitled to recover the amount from the payee on an implied contract for the return of money, the consideration for which has wholly failed. In 32 Mad. 68,[5] it was held that a trust would exist when a banker is to collect and remit but not when he is to use and repay. In the four authorities to which learned counsel for the applicant referred, it was contemplated at the time of payment that the payee received the money in a fiduciary capacity. The payment to the Insurance Company of a sum of Rs. 140 was for a specific purpose which did not involve any payment by the company to any third person nor was it agreed that the money should be returned to the applicant upon the happening of any specified event. The object for which the payment was made and which was the consideration for the payment has failed inasmuch as the policy has not been revived since liquidation of the company took place before it could be effected. I cannot find that when the applicant paid to the company Rs. 140 the company received this money in any fiduciary capacity. That being so, no question of trust arose. The sole basis upon which the claim is made for the applicant to be treated as a preferential creditor is that he was the *cestui que trust* and the company was the trustee of the sum of Rs. 140. In my view, that is not the position. Consequently, this application fails and is dismissed. No order as to costs.

C.R.K./K.S. *Petition dismissed.*

1. 121 E. R. 12, Edwards v. Glynn.
2. (1857) 26 L. J. Ch. 710 : 3 Jur (NS) 532 : 5 W. R. 666, Farley v. Turner.
3. ('40) 27 A.I.R. 1940 Mad. 441 : 194 I. C. 728 : I.L.R. (1940) Mad 845 : (1940) 1 M. L. J. 254, Official Assignee of Madras v. Natesam Pillai.
4. ('39) 26 A.I.R. 1939 Mad 337 : 183 I. C. 203 : (1939) 1 M. L. J. 209, Gopalakrishna v. Official Liquidators, T. N. & Quilon Bank, Ltd.
5. ('09) 32 Mad 68 : 1 I. C. 712, Official Assignee of Madras v. G. Smith.

a

A. I. R. (29) 1942 Madras 212

VENKATARAMANA RAO J.

Saradambal — Appellant

v.

S. Subbarama Ayyar — Respondent.

Appeal No. 195 of 1940, Decided on 3rd October 1941, against appellate order of District Court, Coimbatore, D/- 6th September 1939.

(a) Hindu Women's Rights to Property Act (1937), S. 3 — Applicability.

The Act does not regulate succession to agricultural lands in the Governor's Provinces : ('41) 28 A.I.R. 1941 F.C. 72, *Foll.* [P 212*h*]

(b) Hindu Women's Rights to Property Act (1937), S. 3 — Construction — Property taken by widow is liable for her husdand's debts — b **Fact that property was given to her under her husband's will for maintenance cannot exonerate her liability for those debts.**

Under S. 3 the widow takes her husband's interest subject to the rights and obligations attached to that interest and subject to the restrictions placed on her powers by S. 3 (3) which leaves the right to partition untouched but restricts the right of alienation because the nature of the interest which she takes is a Hindu woman's interest. The Act has taken away the rule of survivorship and allowed the property to descend to the widow. Once the rule of survivorship no longer operates there is nothing to preclude a creditor from attaching the property. [P 213*b*, *c*, *d*, *f*]

Though the interest she takes is a limited interest of a Hindu woman, she is conferred the same c status as that of a male owner. The inheritance vests in her for the time being as fully as it vests in any male succeeding to the property but only with a restricted right of alienation : 5 Cal. 776 (P.C.), *Rel. on.* [P 213*d*, *e*]

The fact that a right of partition is conferred upon the widow goes to show that the property is taken by her subject to all the rights and liabilities which the husband would have had because it is the same interest that is conferred upon her. Therefore the property taken by her must be held to be liable for the payment of her husband's debts, and the fact that the properties were given to her under her husband's will for her maintenance cannot exonerate her liability to pay her husband's debts. [P 213*f*]

V. Subramaniam — for Appellant.

V. C. Veeraraghavan — for Respondent.

d **Judgment.** — This appeal raises a question relating to the construction of S. 3, cl. (2), Hindu Women's Rights to Property Act, 1937. The relevant facts are few. On 18th December 1935, the plaintiff obtained a decree for money in O. S. No. 1138 of 1935 on the file of the District Munsif of Coimbatore against defendant 1. Subsequent to the date of the decree defendant 1 died. His wife defendant 3 was brought on record as his legal representative. The plaintiff sought to implead the brother and the brother's son of defendant 1 besides defendant 3, but the Court allowed only defendant 3 to be brought on record and dismissed the application against the brother and the brother's son. e The order passed by the learned District Munsif is to the following effect :

To implead the widow he relies upon the Act 18 of 1937 by which a widow obtains an interest of her deceased husband. I do not think that the decree-holder can go both against the widow and against the brother and the brother's son. As the decree-holder is relying upon the Act 18 of 1937 I must presume that the widow has taken the husband's property and his interest in the joint property. The widow will therefore be added as legal representative and the brother and the brother's son are struck off the record.

Defendant 3 filed a statement of objections objecting to the execution being issued against her. She stated that her husband before his death left a will in her favour in and by f which he gave certain immovable properties to her for her maintenance which included also the suit properties and therefore they were not liable to be attached. The learned District Munsif took the view that the fact that the properties were given to her for her maintenance would not exonerate her liability to pay her husband's debt and he therefore allowed the execution to issue. On appeal, the learned District Judge took the view that if the properties were self-acquired, the will must be regarded as operative; but if the properties were regarded as joint family properties the share of the hus- g band which vested in defendant 3 under the Hindu Women's Rights to Property Act was liable to be attached. He confirmed the decision of the learned District Munsif. On appeal, Mr. Vedanta Subramaniam on behalf of defendant 3 contends that the view of the learned District Judge in regard to the Married Women's Rights to Property Act is not sound. His contention is that under the said Act the property would be taken by defendant 3 free from the liability to pay her husband's debt and that it was not the intention of the Act to enlarge the rights of the creditors. The question is whether this h contention is tenable. In view of the recent decision of the Federal Court in (1941) 2 M.L.J. 12,[1] that the said Act does not regulate succession to agricultural lands in the Governor's Provinces, of the properties that were attached which comprise 23 items in the schedule to the execution petition, only two items, namely items 22 and 23 will be governed by the Act. The provisions of the Act which are relevant for the present discussion are cls. (2) and (3) of S. 3 which run thus :

1. ('41) 28 A.I.R. 1941 F.C. 72 : 194 I.C. 357 : I.L.R. (1941) Kar.F.C. 148 : (1941) 2 M.L.J. 12, In the Matter of the Hindu Women's Rights to Property Act.

(2) When a Hindu governed by any school of Hindu law other than the Dayabhag School or by customary law dies intestate having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-s. (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided, however, that she shall have the same right of claiming partition as a male owner.

Under S. 3 (2) the interest taken by the widow is the same interest as the husband himself had, that is, the interest of an undivided member of a joint family in the joint family property. The said interest is capable of definition and so far as this presidency is concerned, it is liable to separation by partition and alienable inter vivos for valuable consideration and liable to be seized in execution of a decree for the personal debts of the member. Giving the language its plain meaning, the widow takes that interest subject to the rights and obligations attached to that interest and subject to the restrictions placed on her powers by cl. (3) of S. 3 of the Act. That clause leaves the right to partition untouched but restricts the right of alienation because the nature of the interest which she takes is a Hindu woman's interest. What a Hindu woman's interest is, is well defined in Hindu law, that is, she is competent to alienate that interest only for purposes sanctioned by Hindu law and that interest is liable to be seized in execution of decrees for the payment of the debts of the last male owner. Taking both the clauses together, the property taken by her is liable for the debts of her husband. The contention of Mr. Vedanta Subramaniam is that as the husband died undivided and the other creditor has not taken any steps during his lifetime to attach the said property, his remedy is lost. It is true that if the Act had not been passed, as the husband died without leaving a male issue the property would have gone by survivorship to his undivided brother and his brother's son and the doctrine of survivorship would prevent the creditor from attaching that property. But the Act has taken away that rule of survivorship and allowed the property to descend to his wife. Once the rule of survivorship no longer operates, there is nothing to preclude a creditor from attaching the property. Though the interest she takes is a limited interest of a Hindu woman, she is conferred the same status as that of a male owner. Even in the case of a female who takes a Hindu woman's estate, the inheritance vests in her for the time being as fully as it vests in any male succeeding to the property but only with a restricted right of alienation. As pointed out by the Judicial Committee in 5 Cal. 776[2] at p. 789, "the whole estate is for the time vested in her absolutely for some purposes, though in some respects for only a qualified interest." If for instance an undivided member dies leaving a son and also his widow, the property would devolve upon both of them and though, so far as the widow is concerned, her interest is limited no such limitation can be placed upon the interest taken by the son. It cannot be said that the interest of the son is attachable but not that of the widow. The fact that a right of partition is conferred upon the widow goes to show that the property is taken by her subject to all the rights and liabilities which the husband would have had because it is the same interest that is conferred upon her. Therefore, giving the language its plain meaning, the property taken by her must be held to be liable for the payment of her husband's debts and is liable to be attached by the plaintiff. The view taken by the learned District Judge is therefore correct. The learned District Munsif will issue execution in the light of the observations contained in the judgment. I direct each party to bear his own costs in this appeal. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

2. ('80) 5 Cal. 776 : 7 I. A. 115 : 4 Sar. 103 : 6 C. L. R. 322 (P. C.), Moniram Kalita v. Keri Kolitani.

A. I. R. (29) 1942 Madras 213

HORWILL J.

In re Kandasami Solagar —

Accused — Appellant.

Criminal Appeal No. 352 of 1941, Decided on 3rd September 1941, against order of Court of Session of West Tanjore Division at Tanjore, in C. C. No. 8 of 1941.

(a) Penal Code (1860), Ss. 300 and 304 Part 2 —Accused striking old woman of 55 with heavy stick and fracturing temporal bone into pieces —Woman dying instantaneously—Offence falls under S. 300 (3).

The accused being in bad temper and irritated picked up a very heavy stick and gave an old woman of 55 years such a heavy blow on the head so as to break her temporal bone into several pieces. The woman died instantaneously:

Held that the offence came within the purview of S. 300 (3) and not S. 304, second part. [P 215*h*; P 216*a*]

(b) Criminal trial — Sentence — Public Prosecutor representing that more serious offence not committed—Policy of Crown is not to press.

It is not the policy of the Crown to press for a conviction for a more serious offence if the local re-

presentative of the Crown has represented that such an offence was not committed. [P 216*a*]

M. Ranganatha Sastri — for Appellant.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

Judgment. — The appellant has been convicted by the Sessions Judge of West Tanjore of an offence punishable under S. 304, part 2, Penal Code, and sentenced to rigorous imprisonment for four years. The deceased was an old lady of 55 years of age and she, like her son P. W. 8 and his brother, were farm servants of the accused. On the day of offence, P. W. 8 and his mother came to the field of the accused without the brother of P. W. 8 and they were at once taken to task by the accused for not bringing him. P. W. 8 gave an excuse which obviously did not satisfy the accused; and so the accused attempted to beat him. Fortunately for P. W. 8, he was able to run away and received a mere glancing blow on the back which did not cause any injury. The deceased saw that the accused was attempting to strike her son and so she intervened on his behalf and scolded the accused for attacking her son. Unfortunately for her, the accused was very irritable because he had been beaten just before by P. WS. 5 and 11 and others. Being in a bad temper and irritated by her interference, he raised a stout ferruled stick which he had in his hand and gave her such a severe blow on the head as to cause her death. This is spoken to not only by P. W. 8, but by P. WS. 9 and 10, who were working in the neighbourhood.

As soon as his mother had fallen to the ground, P. W. 8 went to a village three miles away to inform his brother. The offence took place at about 10 o'clock; but by the time he had brought back his brother and they had together gone to the village munsif's house one and half mile away and found him absent and then traced him to the scene of offence, it was 5-30 P. M. The village Magistrate (P. W. 12) had gone to the scene of offence on the information of D. W. 1, the brother of the accused, and had taken a statement from the accused himself, who had said that a number of persons (seven in number)—including P. WS. 5 to 7 and 11—had attacked him and those working for him and had killed the deceased.

Most of the remaining prosecution witnesses speak to the incident which is referred to in the statement of the accused and which, if the prosecution story is true, is entirely irrelevant; because the incident in which the deceased met with her death had absolutely no connexion with what had happened before. The prosecution story as to the earlier incident is that P. WS. 5 and 11, who were in turn married to the niece of the accused and had paid the accused a bride's price, had subsequently been discarded in favour of another man, but the bride's price had not been returned. On the day in question, they went to the field where the accused was harvesting the crops and said that they would not allow the harvest to proceed unless the Rs. 50 which had been paid by them were returned. During the subsequent disturbance, P. WS. 5 and 11 received some blows but no serious injuries, while the accused had received a few cuts and other injuries. D. W. 1, the brother of the accused, had two contusions and D. W. 10, the son of the accused, also received an injury. P. WS. 5 to 7 and 9 to 11 say that after this disturbance most of the witnesses went away. P. WS. 9 and 10 returned to their fields, which adjoin the field in which this offence occurred. It was only after the fight was over, they say, that P. W. 8 and the deceased came on the scene.

One's first impulse is to suspect that there were not two incidents, separated by 20 minutes to three-fourth hour, but one incident, the fight in which so many persons were injured. It seems more plausible that the deceased met her death while she and P. W. 8 were taking their master's part and received her injuries at the hands of P. W. 5 or P. W. 11 or one of their friends. That suspicion receives confirmation from the fact that the accused remained at the scene of offence and implicated P. WS. 5 and 11 and their pangalies within an hour and a half of the commission of the offence. Further, it is pointed out that the statement which P.W. 8 made was as late as 5-30 P.M. and even then was rather vague and omitted many details given in the Sessions Court. However, there are serious difficulties in accepting this story of the accused, despite first impressions that there was something in it. It could not have been the case that P. WS. 5 and 11 and others came and deliberately attacked the deceased. She was an old woman and she herself could have taken no part in the affray. It is suggested by the learned counsel for the accused that some blow intended for some male conspirator of the accused may have fallen on her; but the nature of the injuries makes that view impossible. She received not merely one fatal blow but three substantial blows, each of which caused a severe injury. Her right temporal bone

was broken into pieces, in addition to that she had a contused puncture wound on her head and an injury to her arm, which shows that there was a deliberate attack made on her. This does not fit in very well with the accused's account of what happened that day in his field. The injuries are however easily explicable on the basis of the prosecution story; for the accused, having become angry on account of the incident 20 to 45 minutes earlier, was ready to vent his spleen on the deceased because she intervened to prevent him from beating P. W. 8.

Then, the evidence of the Village Magistrate is fatal to the accused's case. D. W. 1 came to him at about 11-30 A. M. and told him that the villagers were joining together and were going to beat the accused and that the latter had asked him to bring the Village Magistrate before they did so. This is consonant with the prosecution case that there had been a preliminary affray; for this messenger was sent to P. W. 12 because the accused apprehended that P. Ws. 5 and 11 would return in force with their pangalies and inflict a further beating. If the deceased had really been killed in the earlier fighting, D.W. 1 would certainly have told P. W. 12 so. It is argued that P. W. 12 is not completely trustworthy because he admits in cross-examination that he is related to P. Ws. 5 and 11 and others. Unfortunately, the prosecution did not ask P. W. 12 what exactly the relationship was or whether he was not also related to the accused; but it is in evidence that P. Ws. 5 and 11 are the first cousins once removed of the accused and so any person distantly related to P. Ws. 5 and 11 would also be related to the accused. Moreover, the conduct of P. W. 12 does not suggest that he was in any way partial. He acted on the information given to him by D. W. 1 and went to the scene of offence at once and recorded the statement of the accused. That statement he sent without any delay to the police, and it was on the accused's statement that the police came to the village. It was only when the police reached the village that the statement of P.W. 8 was handed over to the police. The head constable says that the statement of P. W. 8 was given to him at 10 P. M. and there is no reason to doubt the truth of his evidence; for it could have been a matter of no consequence to the police whether P.W. 11 was booked for this offence or the accused.

The prosecution story is spoken to by three witnesses. Although P. W. 9 may be interested and his evidence has to be accepted with caution, P. W. 10, a distant relative of the parties, seems to be quite disinterested. Finally, there is the evidence of P.W. 8, who was the farm servant of the accused and who, if the accused's story is true, was present with his mother and helping the accused. If his mother had been killed and he struck, as D. W. 1 says, by P. W. 11, he would have been only too eager to complain against P.W. 11 for dealing these savage blows at his mother. The accused has attempted to show that P. W. 8 was bought over. It is said that P. W. 5 sold a piece of land to P. W. 7, that P. W. 7 subsequently transferred the land to a distant relative of P. W. 8, and that P. W. 8 attested the document. No evidence that is worthy of any credence has been adduced to show that P. W. 8 received any benefit from these transactions. Moreover, these transactions took place long after the offence was committed. If P. W. 8's support was bought, he must have been persuaded before 5-30 P.M. —or at any rate before 10 P.M.—on the day of the offence. He obviously could not have accepted the overtures of the prosecution party without consulting his brother, and by the time he had brought his brother and had gone to the village Munsif's house and brought other pangalies — as he apparently did—there was little time left for him to enter into negotiations with the prosecution party to exculpate P. W. 11 and to foist the case on the accused. A number of witnesses were examined in the Sessions Court for the defence, but they did not figure very well in the witness box; and so the learned counsel for the appellant has rightly not sought to place any reliance on their evidence. I am therefore satisfied that the learned Sessions Judge came to the correct conclusion that it was the accused who caused this fatal injury.

To pick up a stick which is said to be three fingers in diameter with a ferrule at the end and which, from the nature of the injuries, must have been a very heavy one, and to give an old woman such a heavy blow on the head so as to break her temporal bone into several pieces — is certainly, in the words of cl. (3) of S. 300, Penal Code, "to do an act with the intention of causing such bodily injury to the deceased," as was found in the post mortem examination. That injury was undoubtedly sufficient, in the words of the same clause, "in the ordinary course of nature, to cause death." In fact, it would have been most remarkable if she had survived such a severe beating. Death was inevitable, and the evidence shows that she died almost instantaneously. The accused therefore committed murder and the learned

a Sessions Judge was wrong in convicting him only under S. 304, Part 2. However the learned Sessions Judge has taken shelter behind his Public Prosecutor: and it is not the policy of the Crown to press for a conviction for a more serious offence if the local representative of the Crown has represented that such an offence was not committed. No notice has therefore gone to the accused to show cause why the sentence should not be enhanced. The sentence in the circumstances is a light one. The conviction and sentence are affirmed and the appeal dismissed.

C.R.K./G.N. *Appeal dismissed.*

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b

* A. I. R. (29) 1942 Madras 216

KING AND LAKSHMANA RAO JJ.

Official Receiver, Ramnad at Madura — Appellant

v.

Sivasuriya Narayanaswami Thevar and others — Respondents.

Appeal No. 339 of 1939, Decided on 28th October 1941, against order of the Sub-Judge, Ramnad at Madura, D/- 15th September 1938.

*** (a) Limitation Act (1908), Art. 182 (5)—Final order — Meaning of explained — Order requiring applicant to do something so that Court may proceed with application is not final order.**

c The expression "final order" in Art. 182 (5) means an order putting an end to the application in respect of which it is made and not merely the last order in point of time. An order requiring the petitioner to do something in order that the Court may proceed with his application does not even contemplate the end of the execution petition. Therefore an order returning a petition for attending to the directions given by Court that prayer for time should be moved by means of an application supported by an affidavit, is not a final order within the meaning of Art. 182 (5) as further action on the petition was contemplated : ('39) 26 A.I.R. 1939 Mad 841, *Applied* ; ('41) 28 A.I.R. 1941 Mad. 731, *Disting.* [P 217*g*,*h*]

*** (b) Civil P. C. (1908), O. 21, R. 17—Application returned for amendment represented after inordinately long period without application to** d **excuse delay—Execution application cannot be deemed to be pending or revived.**

If an execution petition is returned to the decree-holder for some amendment or compliance with some requisition, it is his duty to represent it within the time allowed or to get an extension of the time allowed, or to show cause why he should not comply with the requisition, or to pursue the matter in some way until he gets what can properly be described as the final order upon it. If, having received back the petition, he takes no further action upon it, then he should be treated as if he had never put in his petition at all. It is not permissible for a decree-holder to extend the period of limitation by simply failing to represent an execution petition returned for rectification and the proper way to deal with such a petition as that is to treat it as not having come into existence at all. The suspension of the proceedings in such cases is due to the act or default of the decree-holder in not representing the petition and the petition has no e judicial existence pending its representation. If it is represented within time, the date of the original presentation will be the date of the execution petition, and the same position would result if it is represented late with an application to excuse the delay and the delay is excused. It cannot be deemed to be pending if it is withheld for an inordinately long period and represented without any application to excuse delay merely in the hope of saving limitation for a fresh application : ('39) 26 A.I.R. 1939 Mad. 841 ; ('40) 27 A.I.R. 1940 Mad. 215 and ('40) 27 A.I.R. 1940 Mad. 281, *Rel. on* ; 27 All. 334 (P.C.), *Disting.*; C. M. S. A. No. 193 of 1939, *Dissent.* [P 218*d*,*e*,*f*]

T. M. Krishnaswami Ayyar and A. Balasubramania Ayyar—for Appellant.

V. Ramaswami Ayyar—for Respondents.

f **Judgment.**—This is an appeal against the decision of the Subordinate Judge of Ramnad dismissing E. P. No. 72 of 1937 as barred by limitation, and declining to revive a prior unregistered petition for execution returned on 15th January 1935 for compliance with a direction of 29th November 1934, and represented along with E. P. No. 72 of 1937 on 18th August 1937 with a prayer to revive it if necessary. The decree sought to be executed is the final decree for sale on a mortgage passed on 21st October 1932, and an application for execution was filed in 1933 (E. P. No. 19 of 1933). Notice was ordered and the petition was dismissed for nonpay- g ment of batta. The next petition is the unregistered petition, and it was filed on 23rd August 1934. The application was made by the appellant the Official Receiver in whom the estate of the decree-holder had vested, and it was returned on 13th September 1934 with the endorsement :

Affidavits in support of the transfer of the decree and also the vesting order should be filed. Sale papers and encumbrance certificate and Union tax should be filed. Columns G and H should be revised. Vakil's fee claimed is excessive. Serial number of this petition should be stated in the cause title.

Two weeks were allowed for complying with the directions, and the petition was h represented on 27th September with the endorsement :

Represented. Encumbrance certificates have been applied for and not received yet. It is prayed that two weeks' time may be granted for filing the sale papers etc.

The petition was returned on 28th September with an endorsement that prayer for time should be made by means of an application supported by an affidavit, and it was represented on 9th October with the endorsement :

Represented. The vesting order and other main records are reported by the Official Receiver to have been sent by him to the High Court and that it may take a long time for the High Court to

return them. Inasmuch as the Official Receiver a responsible officer of this Honourable Court has made statements in columns D and J about the vesting in him and he being a transferee decree-holder, i.e,, by operation of law, the filing of any affidavit may be dispensed with. The filing of the vesting order may also be dispensed with for the present. If the defendants deny the vesting, then it may be ordered to be produced. Vakil's fee has been claimed as per R. 84 on p. 253 of Vol. 1 Civil Rules of Practice on the amount due as shown in column G. If it is pointed out how the calculation is wrong, I am ready to amend it. Serial number of this petition can be known only after it is filed and as soon as it is filed the serial number will be given. As regards sale papers, I have since obtained encumbrance certificates. It may take sometime for the original decree-holder to arrange for preparing other sale papers. I pray for two weeks time for the same and I am presenting an application for more time.

An application for time (E. A. No. 401 of 1934) was also filed, and time was granted till 23rd October. The petition was represented on 23rd October with the endorsement, "complied with and represented," and it was returned on 25th October with the endorsement

vakil's fee on Rs. 19,424 comes to Rs. 170-10-11. Judgment-debtor's interest has not been stated in col. (J). As regards item 2, to state whether the judgment-debtor has got both warams or melwaram only, what is the jama for the village as per account.

Two weeks were allowed for compliance and the petition was represented on 8th November with the endorsement

Represented. The fees portion has been amended. For the rest, the Village Munsif of Athiyathur has been addressed by the Official Receiver. Since it may take some time for getting the reply, if the execution petition is now filed, the information will be given on or before the date fixed for notice to defendants.

The petition was returned on 13th November with the endorsement "Direction No. 2 has not been attended to. Time two weeks" and it was represented on 27th November with the endorsement

Represented. When a letter was written by the Official Receiver of Ramnad to the Village Munsif of Athiyathur, asking him to give particulars regarding the jama, direction No. 2 and the warams belonging to the defandants, the said Village Munsif without giving the said particulars, has reported that defendants 1 to 4 have no claim over item 2 of property. It is therefore necessary that further two weeks time should be granted for writing to the said Village Munsif again and ascertaining the particulars regarding jama and waram.

The petition was returned on 29th November with the endorsement "Prayer for time should be moved by means of an application supported by an affidavit" and it was represented on 20th December with the endorsement

Represented. In spite of the best efforts of the Official Receiver, Ramnad, he is not able to get the information as regards the jama and warams. The Official Receiver has no objection for fixing any amount as the upset price for item 2. In these circumstances the petition may be filed without the information as regards the jama and the warams and without any further information.

The petition was returned on 21st December with the endorsement

Extension of time has not been applied for by means of an application to represent this on 20th December and the directions called for on 25th October have not been attended to,

and it was represented on 11th January 1935 with the endorsement

Represented. In view of the reply of 20th December the filing of a petition for extension of time may be excused. The directions of 25th October have been attended to, viz., by amending the vakil's fee portion (*vide* representation dated 8th November) and by saying that other information is not available (*vide* representation of 20th December).

The petition was again returned on 15th January with the endorsement that the direction of 29th November had not been attended to, and it was not represented till 18th August 1937 when it was filed along with E. P. No. 72 of 1937. The present application (E. P. No. 72 of 1937) was filed more than three years after the dismissal of E. P. No. 19 of 1933 and it would be barred by limitation unless the order of 15th January 1935 on the unregistered petition is the final order thereon within the meaning of clause (5) of Art. 182, Limitation Act, or the unregistered petition filed on 23rd August 1934 should be deemed to be pending. The initial question therefore is whether the order of 15th January is a final order and as pointed out in I. L. R. (1940) Mad. 60[1] in which all the previous decisions were considered, the expression "final order" means an order putting an end to the application in respect of which it is made and not merely the last order in point of time. An order requiring the petitioner to do something in order that the Court may proceed with his application does not even contemplate the end of the execution petition, and the unregistered petition in this case was returned on 15th January for attending to the directions of 29th November that prayer for time should be moved by means of an application supported by an affidavit. Further action on the petition was contemplated and the decision in (1941) 1 M. L. J. 837[2] is clearly distinguishable. In that case on an application filed in 1932 to transmit the decree to Bombay for execution,

1. ('39) 26 A. I. R. 1939 Mad. 841 : 189 I. C. 411 : I. L. R. (1940) Mad. 60 : (1939) 2 M. L. J. 671, Chidambaram v. Murugesan.
2. ('41) 28 A. I. R. 1941 Mad. 731 : 197 I. C. 261 : (1941) 1 M. L. J. 837, Kandasami Chetti v. Gokuldoss Madanji & Co.

an order of transmission was made in August 1932 and another application was filed in February 1935, to transmit the decree again to Bombay for execution. The decree had not been received from Bombay and the application was returned on 27th February 1935, with the endorsement "Copy of the decree has not been received from the High Court, Bombay — returned." The petition was not returned for remedying any defect nor was any action required to be done by the applicant. Nothing could have been done until the decree was received from Bombay, and it was held that in the circumstances the only interpretation that can reasonably be given to the language was that the Court had decided that it would have nothing further to do with the application. Such an order would be a final order, but it is impossible to give the same interpretation to the order of 15th January in this case. The petition was required to attend to the directions of 29th November and the order was in no sense a final order on the petition.

The order of 15th January 1935 is thus of no avail and it remains to consider whether the unregistered petition should be deemed to be pending. No doubt the petition did conform to the requirements of Rr. 11 to 14 of O. 21, Civil P. C., but the amount claimed towards vakil's fees was incorrect and the vesting order had not been filed. The petition had to be returned on that account, and the sale papers which should not properly be called for till a later stage were also required. Exception was not taken to this course and the vakil's fee was amended on 8th November 1934 after further returns. Time was requested on 27th November for furnishing information regarding the interest of the judgment-debtor in item 2 and the petition was returned on 29th November with the endorsement that prayer for time should be moved by means of an application supported by an affidavit. The petition was represented on 20th December and it was returned on 21st December for attending among other things to the direction, regarding the filing of an application for time. The petition was represented on 11th January with a request to excuse the filing of a petition for extension of time and it was returned on 15th January with an endorsement that the direction of 29th November had not been attended to. The petition was not represented thereafter and as pointed out in I.L.R. (1940) Mad. 60[1] at p. 66, if the petition is returned to the decree-holder for some amendment or compliance with some requisition, it is his duty to represent it within the time allowed or to get an extension of the time allowed, or to show cause why he should not comply with the requisition, or to pursue the matter in some way until he gets what can properly be described as the final order upon it. If, having received back the petition, he takes no further action upon it, then he should be treated as if he had never put in his petition at all. It is not permissible for a decree-holder to extend the period of limitation by simply failing to represent an execution petition returned for rectification and the proper way to deal with such a petition as that is to treat it as not having come into existence at all. The suspension of the proceedings in such cases is due to the act or default of the decree-holder in not representing the petition, and as held in (1939) 2 M. L. J. 864[3] at p. 866, the petition had no judicial existence pending its representation. If it is represented within time, the date of the original presentation will be the date of the execution petition, and the same position would result if it is represented late with an application to excuse the delay and the delay is excused. It cannot be deemed to be pending if it is withheld for an inordinately long period and represented without any application to excuse delay merely in the hope of saving limitation for a fresh application, and we are unable to subscribe to the view taken in C. M. S. A. No. 193 of 1939, that even in such cases the application should be deemed to be pending. As pointed out in (1939) 2 M. L. J. 469[4] at page 472, an application returned for complying with certain requirements and not represented within a reasonable time even if none was fixed by the Court cannot be held to be of any avail, and no question of improper disposal or illegal dismissal arises here as in (1939) 2 M. L. J. 469[4] and C. M. S. A. No. 193 of 1939.

The unregistered petition was returned on 15th January 1935 for compliance with the direction of 29th November 1934 and it was not represented till 8th August 1937 when it was filed along with E. P. No. 72 of 1937. It was not accompanied by any application to excuse the delay nor was the Court requested to excuse the delay. The reason for the delay was not even stated and execution of the decree was barred by that time. The

3. ('40) 27 A. I. R. 1940 Mad. 215 : 189 I. C. 822 : (1939) 2 M. L. J. 864, G. R. Naidu v. Venkataswami Naidu.

4. ('40) 27 A. I. R. 1940 Mad. 281 : 189 I. C. 185 : (1939) 2 M.L.J. 469, Krishnamachari v. Chengalraya Naidu.

suspension of the proceedings till then was due to the act or default of the decree-holder in not representing the petition, and the decision in 27 ALL. 334[5] is not applicable. In the circumstances the unregistered petition cannot be deemed to be pending or revived and the decision of the Subordinate Judge is correct. The appeal therefore fails and is dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

5. ('05) 27 All. 334 : 32 I. A. 102 : 8 Sar. 810 : 2 A. L. J. 397 (P.C.), Kamaruddin v. Jawahirlal.

Lim. Act—
(a) ('42) Chitaley, Art. 182 N. 129 Pt. 18.
('38) Rustomji, Page 1741, Pts. 1 and 3.
C. P. C.—
(b) ('40) Chitaley, O. 21, R. 17, N. 4.
('41) Mulla, Page 777, Pt. (s).

A. I. R. (29) 1942 Madras 219

PATANJALI SASTRI J.

V. S. Velayutha Pandaram — *Appellant*

v.

S. Suryamurthi Pillai — *Respondent.*

Second Appeal No. 626 of 1939, Decided on 6th December 1940, against decree of Dist. Court, West Tanjore at Tanjore, D/- 29th July 1939.

Hindu law—Marriage — Brahma and Asura forms — Marriage must be presumed to be in Brahma form—Presumption can be rebutted.

Prima facie every marriage under the Hindu law must be presumed to have taken place according to the Brahma form. This presumption can, of course, be rebutted by evidence. Gift of jewels or money made to the bride does not make the marriage an asura : ('35) 22 A. I. R. 1935 Mad. 740, *Rel. on.* [P 219*e,f,h*]

A stipulation by the father for a dowry for, or a present of jewels to, the girl as a condition of giving her in marriage cannot turn such dowry or present into a "bride price" and make the marriage an Asura, the distinctive feature of which is "the giving of money or money's worth to the bride's father for his benefit or as a consideration for giving the girl in marriage." The fact that the father had intended to present his daughter with jewels and abandoned the idea subsequently in view of the payment received for the purpose from the bridegroom cannot affect the character of the marriage in Brahma form : ('35) 22 A. I. R. 1935 Mad. 740, *Approved* ; ('26) 13 A. I. R. 1926 Mad. 37, *Distinguished and doubted.* [P 220*c,f,g,h*]

T. M. Krishnaswami Iyer and A. Balasubramania Iyer — for Appellant.

R. Sundaralingam — for Respondent.

Judgment. — This is an appeal brought by the defendant from a decree of the District Court of West Tanjore made in favour of the respondent in a suit for recovery of the plaint mentioned jewels or their value Rs. 1400 with interest. The jewels belonged to one Sundarambal who was the daughter of the appellant and the wife of the respondent. She died without leaving any issue and the dispute relates to the respondent's right to succeed to the jewels as her heir. This depends, of course, under the Hindu law, upon the form of Sundarambal's marriage to the respondent. The trial Court held that it was in the Asura form and dismissed the respondent's claim. On appeal, the learned District Judge came to the conclusion that it was in the Brahma form and accordingly decreed the suit. The appellant challenges the correctness of that conclusion in this appeal.

It is well settled that prima facie every marriage under the Hindu law must be presumed to have taken place according to the Brahma form. This presumption can, of course, be rebutted by evidence and it is sought in this case to rebut it by showing that the appellant before giving Sundarambal in marriage stipulated for payment of Rs. 500 from the respondent as bride price. The respondent admits the payment of Rs. 500 to the appellant, but his case is that it was paid not for the appellant's own benefit but for the specific purpose of making jewels for the bride and they were accordingly made. This case was accepted by the trial Court and the finding was not challenged in the Court below or before me in this second appeal. The trial Court however took the view that the marriage was in the Asura form because the payment was not a voluntary payment by the bridegroom for making ornaments for the bride but was the result of bargain and stipulation. According to the learned District Munsif, a Brahma marriage involves a pure gift of the girl (Kanyadanam), and though a voluntary gift of money or jewels to the bride out of courtesy or affection may not be inconsistent with such form of marriage, a stipulation for such gifts as a condition of giving the girl in marriage, though intended entirely for the benefit of the bride, makes it an Asura marriage as understood in the Hindu law. This view has been pressed before me by Mr. T. M. Krishnaswami Ayyar for the appellant and the question is whether it is well founded.

It has been held, and this is not disputed by Mr. Krishnaswami Ayyar, that gift of jewels or money made to the bride does not make the marriage an Asura (58 Mad. 488[1]), but he maintains that even such gifts if they are not purely voluntary but are made

1. ('35) 22 A. I. R. 1935 Mad 740: 159 I. C. 845: 58 Mad. 488: 69 M.L.J. 142, Kailasanatha Mudaliar v. Vadivanni.

in fulfilment of stipulations in that behalf, bring it within that category. There is no direct decision on this point, at any rate none was cited at the bar, but the principles applicable are, to my mind, perfectly plain. Marriage, according to Hindu shastras, is a holy sacrament and the gift of a girl to a suitable person is a sacred duty enjoined upon the father which, if duly performed, is held to confer upon him great spiritual benefit. Manu laid down :

> No father learned in the shastras shall receive even a particle (of money) for giving his daughter in marriage. By receiving such money out of avarice he becomes a seller of his offspring. (Chapter 3, Verse 51).

The rishis thus discountenanced a father exploiting his power of disposal of his girl in marriage for his own pecuniary benefit in disregard of his parental duty of bestowing her on a duly qualified person. The vice of the discredited Asura form consists therefore in the father out of his greed turning his fiduciary obligation into a source of profit for himself thereby transforming a sacrament into a commercial bargain. Such being the object and principle underlying the prohibition of the Asura form, there is no apparent reason why a stipulation by the father for a dowry for the girl as a condition of giving her in marriage, should be viewed as involving a breach of his parental duty and amounting to a sale of his offspring (apatya vikraya). On the other hand, verse 54 of the same chapter of Manu indicates that the acceptance of a dowry from the bridegroom does not turn the marriage into a sale. It says :

> When the sulka given for the damsel is not taken by the kinsmen for their own use, there is no sale. It is only honouring (arhanam) the bride, and is totally free from sin.

Medhatithi, in his commentary on this text, points out that the receipt of money or money's worth for the benefit of the girl (kanyarthe) does not amount to her sale, and is desirable as it tends to enhance her self-esteem and also raises her in the estimation of others, and concludes with the observation that receipt of a dowry for the girl (kanyartham dhanagrahanam) is prescribed by thus stating the good arising from it (arthavadena). This would seem to clinch the matter, for if the receipt of a dowry for the girl is to be regarded as a thing prescribed (vidhiyate) by the shastras, it would be part of the father's duty to obtain it for her if possible, and a stipulation for its payment by the bridegroom cannot have the effect of making the marriage an asura which is as already observed, essentially founded on a breach of parental duty. Reference was made to the decision in 58 Mad. 488[1] where Varadachariar J. delivering the judgment of the Court observed :

> The form or value of the jewel was not even the subject of a bargain, but merely left to the pleasure of the bridegroom's father. This can in no sense be called "bride price."

Here the learned Judge was merely emphasizing that in no view was it possible, in the circumstances of that case, to hold that the marriage there in question was in the Asura form, and I cannot regard the passage as involving a decision that a bargain or a stipulation made with the bridegroom in regard to the present of jewels to the bride turns such present into a "bride price" and makes the marriage an asura, especially as the learned Judge has stated in the sentence next following that the distinctive feature of the asura form is

> the giving of money or money's worth to the bride's father for his benefit or as a consideration for giving the girl in marriage.

Mr. T. M. Krishnaswami Iyer argued that the appellant had intended to make jewels for his daughter himself and that by stipulating for and receiving the sum of Rs. 500 from the respondent, he was relieved from the expenses of making such jewels and thus indirectly benefited himself, and reference was made to 49 M.L.J. 554[2] in support of this argument. I see no force in this contention. In the first place, this was not the case of the appellant at all. He alleged that the money was received only in consideration of his giving his daughter in marriage to the respondent and this has been found to be false. The money, as already observed, was found to have been received by the appellant for the specific purpose of making jewels for his daughter, and I cannot agree, in such circumstances, that even if the appellant had intended to present his daughter with jewels and abandoned the idea subsequently in view of the payment received for the purpose from the respondent, that would affect the character of the marriage. The appellant was under no obligation to make any jewels for his daughter before the receipt of the money, and there can be no question of his being relieved from any obligation by such receipt. In 49 M.L.J. 554,[2] the father of the bride received a contribution from the bridegroom's party towards the expenses of the marriage, and Ramesam J. held that as the father was benefited by such contribution in that he

2. ('26) 13 A.I.R. 1926 Mad. 37 : 91 I.C. 561 : 49 M.L.J. 554, Samu Asari v. Anachi Ammal.

was relieved to that extent from defraying such expenses himself, the marriage was one in the Asura form. This view has been criticised in the latest edition of Mayne's Hindu Law as not really warranted by the Hindu law texts, and the point may have to be reconsidered when it arises. The decision has no application to the facts of the present case which are entirely different. For the reasons indicated, I have no hesitation in holding that the marriage of Sundarambal to the respondent was in the Brahma form and the respondent is her heir. The second appeal is accordingly dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

Hindu Law —
('38) Gour, S. 14 N. 337 Pt. 1; S. 28 N. 451.
('40) Mulla, S. 428 Pt. (m); S. 429 Pt. (r).

A. I. R. (29) 1942 Madras 221 (1)

HORWILL J.

In re Kumaraswamy Kalinga Rayar and others — Petitioners.

Criminal Revn. Case No. 538 and Petn. No. 507 of 1941, Decided on 10th September 1941, to revise order of Second Class Magistrate, Kumbakonam, D/- 4th June 1941.

(a) Criminal P. C. (1898), S. 528—Notice.

The transfer of a case on application of one of the accused to another Magistrate without notice to the other accused is not illegal. [P 221*e*]

(b) Criminal P. C. (1898), S. 350 (1), Proviso (a) — Transfer of case to another Magistrate—Accused have no right to have witnesses re-called.

Where a case is transferred from one Magistrate to another, the accused have no right to have witnesses re-called and the Magistrate can reject their request for proper reasons. [P 221*c*]

T. S. Raghavachariar — for Petitioners.
Public Prosecutor — for the Crown.

FACTS.—The accused several in number were charged of an offence under Ss. 144, 342, 366 and 448, Penal Code. The second class Magistrate, Papanasam, enquired into the case and 13 witnesses were examined. At that stage one of the accused applied to the Sub-Collector, Kumbakonam for a transfer of the case and the case was transferred to the second class Magistrate, Kumbakonam. The petitioners in the High Court who were also accused had no notice of this petition for transfer. The petitioners objected to the enquiry by the second class Magistrate, Kumbakonam for want of notice and also claimed de novo trial and asked that all the 13 witnesses should be summoned once again by the Court. The Magistrate passed an order rejecting both the requests. Against this order the present revision petition was filed on the ground that the transfer without notice was illegal and that S. 350, cl. (1), Proviso (a) applied to the case.

Order. — The transfer of the case to another Magistrate without notice to the petitioners was not illegal. The petitioners had no right to have witnesses re-called. The Magistrate gave reasons for not wishing to do so. The petition is dismissed.

C.R.K./K.S. *Petition dismissed.*

Cr. P. C. —
(a) ('41) Chitaley, S. 192, N. 10, Pt. 1 and S. 528, N. 13, Pt. 2.
('41) Mitra, Page 1740, N. 1393.
(b) ('41) Chitaley, S. 350, N. 7, Pts. 3a and 4.
('41) Mitra, Page 1175, N. 1015.

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* A. I. R. (29) 1942 Madras 221 (2)

LEACH C. J. AND HAPPELL J.

In re V. Bhuvaraha Iyengar — Accused — Petitioner.

Criminal Misc. Petn. No. 1162 of 1941, Decided on 31st October 1941.

*** (a) Defence of India Act (1939), S. 2, rules under, R. 130A (b) — Rule 130A is not ultra vires—Reasons stated.**

Rule 130A (b) was contended to be ultra vires on the grounds that that provision contravenes the fundamental principle of English law that a person is presumed to be innocent until it is proved that he is guilty and that the Defence of India Act and the rules framed thereunder do not permit of a departure from the provisions of the Code of Criminal Procedure with regard to bail applications:

Held that neither the Defence of India Act nor the rules indicate any attempt to depart from the principle of English justice that a person is presumed to be innocent until he has been proved to be guilty. Rule 130A merely indicates that where a person is accused of an offence under the rules the Court may not liberate him on bail pending the trial, except when it has reasonable ground to believe that he is innocent. When the Court comes to decide the case it must acquit the accused if the prosecution has failed to establish the charge: [P 222*g*]

Held further that the fact that the specified matters in S. 2 (2) of the Act do not include bail applications does not mean that the Central Government cannot make rules with regard to bail applications if it considers that in the public interest it is necessary to do so. The general power conferred by sub-section (1) is left entirely unaffected by what is stated in sub-s. (2). Further, sub-s. (3) in itself appears to be wide enough to cover R. 130A without any recourse to sub-s. (1). For power is given to make rules with regard to the trial under sub-s. (3) and that implies power to make rules with regard to the custody of the accused pending trial. Therefore R. 130A is not ultra vires. [P 222*h*; P 223*a*]

(b) Defence of India Act (1939), S. 2, rules under, Rule 130A (b) — Bail — Provisions of Criminal Procedure Code do not apply.

In respect of offences which come within the rules framed under the Defence of India Act, that

Act governs all other statutory provisions and therefore the provisions of the Code of Criminal Procedure with regard to bail do not apply.

[P 223*c*, *d*]

K. Bhashyam Ayyangar and J. R. Gundappa Rao — for Petitioner.

Advocate-General and Public Prosecutor — for the Crown.

Leach C. J. — On 1st October 1941 the petitioner delivered a speech at a meeting held in open air at Negapatam and in the course of it made statements which it is alleged constituted offences specified in the rules framed under the Defence of India Act. A police officer was present at the meeting and it is said that he made notes of the petitioner's statements. On 16th October the police filed in the Court of the Joint Magistrate of Negapatam a first information report in which the statements alleged to have been made by the petitioner on this occasion were set out. Immediately after the report had been presented the petitioner was arrested and a charge sheet prepared in which it was alleged that the petitioner had committed offences under R. 34 (6) (e) (g) (k) and (p) read with R. 38 (1) (a). Rule 38 (1) (a) states that no person shall, without lawful authority or excuse, do any prejudicial act. Sub-rule (6) of R. 34 indicates what is meant by a "prejudicial act." Clause (e) of that sub-rule says that it is a prejudicial act to bring into hatred or contempt, or to excite disaffection towards His Majesty or the Crown Representative or the Government established by law in British India, or in any other part of His Majesty's dominions. Clause (g) states that it is a prejudicial act to cause fear or alarm to the public or to any section of the public. Clause (k) provides that it is a prejudicial act to influence the conduct or attitude of the public or of any section of the public in a manner likely to be prejudicial to the defence of British India or to the efficient prosecution of war. Clause (p) says that it is a prejudicial act otherwise to prejudice the efficient prosecution of the war and the defence of British India, or the public safety or interest. The statements alleged to have been made by the petitioner would appear to come within these rules. On 20th October the petitioner applied for bail, but his application was rejected by the Joint Magistrate by reason of the provisions of Rule 130A and the Sessions Judge agreed with the Joint Magistrate when a similar application was made to him. The petitioner asks this Court in the exercise of its revisional powers to set aside the orders of the Joint Magistrate and the Sessions Judge and grant him bail. The basis of the petition is the allegation that R. 130A (b) is ultra vires the Central Government. The rule reads as follows :

> Notwithstanding anything contained in the Code of Criminal Procedure, 1898, no person accused or convicted of a contravention of these rules shall, if in custody, be released on bail or on his own bond, unless—
>
> (a) the prosecution has been given an opportunity to oppose the application for such release; and (b) where the contravention is of any such provision of these rules as the Central Government may by notified order specify in this behalf, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such contravention.

If cl. (b) contains a valid provision the Court must be satisfied that there are reasonable grounds for believing that the accused is innocent before releasing him on bail. It is said that this provision contravenes the fundamental principle of English law that a person is presumed to be innocent until it is proved that he is guilty and that the Defence of India Act and the rules framed thereunder do not permit of a departure from the provisions of the Code of Criminal Procedure with regard to bail applications. With regard to the first contention, it is to be observed that neither the Act nor the rules indicate any attempt to depart from the principle of English justice that a person is presumed to be innocent until he has been proved to be guilty. Rule 130A merely indicates that where a person is accused of an offence under the rules the Court may not liberate him on bail pending the trial, except when it has reasonable ground to believe that he is innocent. When the Court comes to decide the case, it must acquit the accused if the prosecution has failed to establish the charge.

Examination of Ss. 2 and 3 leaves no doubt in our minds that R. 130A is intra vires. Sub-section (1) of S. 2 states that the Central Government may, by notification in the official Gazette make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. Sub-section (2) says that without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for, or may empower an authority to make orders providing for, all or any of certain specified matters. The fact that the specified matters do not include bail applications does not mean that the Central

Government cannot make rules with regard to bail applications if it considers that in the public interest it is necessary to do so. The general power conferred by sub-s. (1) is left entirely unaffected by what is stated in sub-s. (2). Moreover sub-s. (3) (i) of S. 2 says that the rules made under sub-s. (1) may further provide for the arrest and trial of persons contravening any of the rules. This provision in itself appears to be wide enough to cover R. 130A without any recourse to sub-s. (1). If power is given to make rules with regard to the trial does this not imply power to make rules with regard to the custody of the accused pending trial? But even if it does not, the scope of the general powers conferred by sub-s. (1) remains unaffected. Mr. Bhashyam Ayyangar has laid great stress on S. 14 which reads as follows:

> Save as otherwise expressly provided by or under this Act, the ordinary criminal and civil Courts shall continue to exercise jurisdiction.

This section has been inserted because power is given to the Provincial Government in Chap. 3 which embraces Ss. 8 to 13, to constitute special tribunals to try offences under the rules framed by the Central Government by virtue of its powers under the Defence of India Act. Special tribunals have not been set up and all offences under the Defence of India Act are still tried in the ordinary criminal Courts. That does not, however, mean that trials in the ordinary criminal Courts are not subject to the special provisions of the Act. Section 3 states that a rule made under S. 2 or an order made under such a rule, shall have effect notwithstanding anything inconsistent therewith is contained in an enactment other than the Defence of India Act or in an instrument having effect by virtue of an enactment other than the Act. In respect of offences which come within the rules framed under the Defence of India Act that Act governs all other statutory provisions and therefore the provisions of the Code of Criminal Procedure with regard to bail do not here apply if R. 130A is intra vires, which we hold it to be.

It is conceded that in placing the Defence of India Act in the statute book the Central Legislature acted within its powers. Therefore the Joint Magistrate and the Sessions Judge acted in accordance with law in rejecting the petitioner's application for bail. In the first information report and the charge sheet grave charges are alleged against the petitioner by a responsible police officer and at the stage at which the applications for bail were made it was impossible for the Magistrate or the Sessions Judge to be satisfied that there were reasonable grounds for believing that the petitioner was not guilty of a contravention of the rules, and that is the position now. Therefore the petitioner is not entitled to ask the Court to release him on bail. In these circumstances the petition will be dismissed.

C.R.K./K.S. *Petition dismissed.*

Cr. P. C. —
(b) ('41) Chitaley, S. 1, N. 5 pt. 14 and S. 496 (new point).

A. I. R. (29) 1942 Madras 223

HORWILL J.

In re K. K. Narayanan Nambiar — *Petitioner.*

Criminal Revn. Case No. 739 and Petn. No. 694 of 1941, Decided on 24th September 1941, to revise judgment of Court of Session, South Malabar Division at Calicut, D/- 21st July 1941.

(a) Criminal P. C. (1898), S. 540 — Scope — Prosecution under S. 409, Penal Code — Court allowing stamp vendor to be called as prosecution witness to explain how name of person who had not purchased stamp could appear as vendee at back of stamp—Discretion under S. 540 held properly exercised.

Section 540 is extremely wide in its provisions and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and, where it is essential to the just decision of the case, he is bound to do so. The summoning of a person as a witness whom the Court considers necessary for giving a just finding cannot be said to be an improper exercise of the powers under S. 540 merely because the evidence supports the case of the prosecution and not that of the accused. Section 540 is not limited for the benefit of the accused only, and the Court has power under S. 540 to examine a witness even to rebut defence evidence; but those powers should be sparingly invoked for such a purpose. The Court is not precluded from exercising its discretion under S. 540 merely because somebody asks it to do so. [P 224*e* ; P 225*d*,*e*,*g*]

In a prosecution under S. 409, I. P. C., the stamp papers alleged to have been purchased by the accused were found to bear the name of a different person on the reverse side. The defence produced a person who admitted that he bore the name appearing on the stamps and was a purchaser of the same. The Court allowed the prosecution under S. 540 to call the stamp vendor to explain how the name of a person could appear as vendee at the back of a stamp paper when that person had not purchased it:

Held that the discretion under S. 540 in permitting stamp vendor to be called as witness was properly exercised: *Case law referred.* [P 225*h*]

(b) Criminal P. C. (1898), S. 540 — Witness allowed to be examined under S. 540 at instance of party—Notice to other party is not necessary.

In order to examine a witness under S. 540 at the instance of a party notice to the other party is not legally necessary, but if the other party is suddenly called upon to meet evidence which he

does not know is going to be adduced, he may well be prejudiced. [P 226*a*]

V. V. Srinivasa Ayyangar and M. C. Sridharan — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The petitioner was convicted under S. 409, Penal Code, of committing criminal breach of trust by dishonestly misappropriating a sum Rs. 118-15-0 entrusted to him in his capacity as Head Clerk, District Court, North Malabar; and the offence is said to have been committed between 2nd December 1940 and the 17th of that month. His appeal was dismissed, the conviction and sentence being affirmed. The principal question which arises in this petition is whether the learned Magistrate, purporting to act under S. 540, Criminal P. C., exercised his discretion improperly in admitting the evidence of a person who was examined as C. W. 1. The prosecution let in evidence through P. Ws. 8 and 9 that on 14th December 1940, the petitioner took a sum of Rs. 2 out of the bag in which he kept his money as Head Clerk and gave it to P. W. 9 to purchase seven stamp papers, which were subsequently handed over to P. W. 8. Formal evidence was given to this effect and there was not much cross-examination on this point. The reverse sides of the stamp papers however show that six of them were purchased in the name of one Appu Nair and one in the name of a still different person. There was therefore a possibility that the Court might be unable to accept the evidence of P. W. 9 in the face of the endorsements of the stamp vendor. The seventh paper was dated 4th December 1940, ten days before P. W. 9 is said to have made the purchase. Not unnaturally, the accused exploited these endorsements and examined a man who bore the name of Appu Nair and who deposed that he had purchased these papers. Faced with the possibility that P. Ws. 8 and 9 might be disbelieved because of an apparent discrepancy which he knew could be easily explained, the public prosecutor filed an application in the Magistrate's Court asking him to exercise his discretion under S. 540, Criminal P. C., and examine the stamp vendor as a witness. He did so; and the stamp vendor explained how it was possible for a person to purchase a stamp paper and yet for one to find some other name on the reverse. He also deposed that the Appu Nair whose name appeared on the reverse of six of the stamp papers was not D. W. 6, but an Appu Nair residing in an entirely different village to that in which D. W. 6 was living.

As will be seen from the wording of S. 540, Criminal P. C., it is extremely wide in its provisions and enables a Magistrate at any stage of any proceeding to examine any person as a witness; and, where it is essential to the just decision of the case, he is bound to do so. The very width of the powers given to the Magistrate require, however, a corresponding caution in using these powers. In the many cases cited by Mr. Srinivasa Ayyangar on behalf of the petitioner, various views have been expressed with regard to the power of the Court to examine witnesses after the defence case has been closed; but, in all those cases, it was obvious that the power had been misused. In (1927) 2 K.B. 587,[1] the Recorder permitted the examination as a court witness of a co-accused who had throughout the trial been standing in the dock by the side of the accused against whom this evidence was let in and who was admittedly an accomplice. Avory J. who delivered the judgment of the Court, quotes at p. 594 the rule laid down by Tindall J. in (1839) 9 C. & P. 129[2]:

> There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins, but if any matter arises ex improviso, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex improviso may not be answered by contrary evidence on the part of the Crown.

However, in expressing the considered opinion of the Bench, Avory J. himself lays no restricting rule. He says:

> In the circumstances, without laying down that in no case can an additional witness be called by the Judge at the close of the trial after the case for the defence has been closed, we are of opinion that in this particular case the course that was adopted was irregular, and was calculated to do injustice to the appellant.

In India we are governed by the express provisions of S. 540, Criminal P. C., which, as I have said, is extremely wide in its terms. In 12 A.L.J. 15,[3] after the prosecution case had been closed, the prosecution put in an entirely fresh list of witnesses to be called, and the learned Judge held that that was an abuse of S. 540, Criminal P. C. In A.I.R. 1937

1. (1927) 2 K B 587 : 96 L.J.K.B. 1069 : 137 L.T. 535 : 28 Cox. C. C. 432 : 20 Cr. App. Rep. 86 : 91 J.P. 152 : 43 T.L.R. 774, Rex. v. Dora Harris.
2. (1839) 9 C. & P. 129 : 4 St. Tr. (N.S.) 86 : 2 Moody C. C. 140, Rex. v. Frost.
3. ('14) 1 A.I.R. 1914 All. 526 : 21 I.C. 1002 : 14 Cr.L.J. 682 : 12 A.L.J. 15, Sital Singh v. Dalganjan Singh.

Pat. 246,[4] the learned Judge found that the object of the additional evidence was merely to fill in an important gap in the prosecution case and that it would be wrong for a Court to invoke S. 540, Criminal P. C., for that purpose. In 25 M.L.W. 151,[5] Curgenven J. found that the prosecution evidence as originally let in disclosed no case against the accused at all and that the Court had based its finding against the accused exclusively on evidence adduced subsequently. In 1929 M.W.N. 395,[6] the Prosecuting Inspector had deliberately refrained from examining the wife of the accused because he knew that she would not give evidence in support of the prosecution. He therefore adopted the plan of persuading the Judge to examine her as a court witness, so that he could cross-examine her. It was held that that was a gross abuse of the exercise of the powers given to the Magistrate under S. 540, Criminal P. C. Nevertheless, it was found that there was abundant other evidence, and the convictions were confirmed. In A.I.R. 1923 Cal. 690[7] some general remarks on the use of S. 540 are found, but no reasons are given for the particular decision arrived at. In A.I.R. 1923 Cal. 463[8] the abuse of S. 540, Criminal P. C., was of the same nature as in 1929 M.W.N. 395.[6] In 10 Lah. 790[9] the Magistrate, after hearing the evidence of both sides and the arguments, when nothing remained but to pronounce judgment, suddenly decided to hold a local inspection and, without any notice either to the prosecution or the accused, examined four witnesses at the scene of offence.

Mr. Srinivasa Ayyangar particularly relies on some remarks to be found in 12 A.L.J. 15[3] that no witnesses should be examined at the bidding of any person; and he argues in this case that this C. W. 1 was examined at the bidding of the prosecution and that therefore the accused was prejudiced. I cannot, however, see how a Court is precluded from exercising its discretion under S. 540, Criminal P. C., merely because somebody asks it to do so. It is also argued that S. 540, Criminal P. C., is intended only for the benefit of the accused. I see no reason why S. 540, Criminal P. C., should be so limited. It is in the interests of justice that a guilty person should be convicted just as it is in the interests of justice that an innocent person should be acquitted. If the Court thinks that in order to give a just finding it is necessary to examine a witness, then it could not be an improper exercise of the powers of the Court to summon that witness under S. 540, Criminal P. C., merely because the evidence supports the case of the prosecution and not that of the accused. It is possible to argue that the Public Prosecutor should have foreseen that there was a discrepancy between what P. W. 9 was going to speak to and the endorsements on the stamp papers, which the accused would be certain to exploit, and that he should therefore have examined the stamp vendor to explain this discrepancy; but I do not think that this lack of foresight on the part of the prosecution should preclude the Court from examining the stamp vendor and clearing up the point. It is true that C. W. 1 not only gave evidence to explain the apparent discrepancy but contradicted D. W. 6 by saying that the Appu Nair whose name appeared on the reverse of the stamp papers was not this witness.

I am of opinion that the Court has power under S. 540, Criminal P. C., to examine a witness even to rebut defence evidence; but clearly those powers should be sparingly invoked for such a purpose. If a witness were examined under S. 540 to contradict defence witnesses, then the accused might demand that further witnesses should be examined by the Court under the same section to contradict the prior witness examined and thus lead to that improper prolonging of a case so strongly condemned in the Allahabad case. If, in the present case, the learned Magistrate had examined C. W. 1 for the sole purpose of contradicting D. W. 6, I might have been inclined to hold that he had not exercised his powers under S. 540 judicially; but the main object of his examination was undoubtedly to explain how the name of a person could appear as vendee on the back of a stamp paper when that person had not purchased it. I am unable to say therefore that the Magistrate did not exercise his discretion properly in examining C. W. 1. It has been said that no notice was given to

4. ('37) 24 A.I.R. 1937 Pat. 246 : 168 I.C. 979 : 38 Cr.L.J. 657: 18 P.L.T. 483, Ramachandra Prasad v. Emperor.

5. ('27) 14 A.I.R. 1927 Mad. 361 : 100 I.C. 123 : 28 Cr.L.J. 251 : 52 M.L.J. 118 : 25 M.L.W. 151, Narayana Nair v. Bhargavi Amma.

6. ('29) 1929 M.W.N. 395, Collett v. Emperor.

7. ('23) 10 A.I.R. 1923 Cal. 690 : 75 I.C. 541 : 24 Cr.L.J. 957 : 37 C.L.J. 415 : 27 C.W.N. 675, Natabar Ghose v. Adaya Nath.

8. ('23) 10 A.I.R. 1923 Cal 463 : 71 I C 657 : 24 Cr.L.J. 193 : 37 C.L.J. 173, Emperor v. Satyendra Kumar.

9. ('29) 16 A.I.R. 1929 Lah 120 : 122 I.C. 95 : 31 Cr.L.J. 346 : 10 Lah 790 : 31 P.L.R. 39, Udho Ram v. Emperor.

a the accused of the intention of the Court to examine C. W. 1. That is not legally necessary; but if an accused person is suddenly called upon to meet evidence which he does not know is going to be adduced, he may well be prejudiced. The order here was passed on 12th May and he was not examined until 26th May and, as can be seen from the cross-examination of that witness, the learned counsel for the accused was quite prepared to meet this additional evidence. On the appreciation of the evidence of the prosecution witnesses, the defence witnesses, and the court witness, I see no reason to interfere. There are concurrent findings of b fact in the Magistrate's Court and in the Sessions Court. The petition is accordingly dismissed.

C.R.K./G.N. *Petition dismissed.*

Cr. P. C. —
(a) ('41) Chitaley, S. 540 N. 4 Pts. 1 and 3a; N. 5 Pt 1; N. 9 Pt. 1.
('41) Mitra, Page 1768 N. 1411.
(b) ('41) Chitaley, S. 540 N. 6.
('41) Mitra, Page 1770 N. 1411.

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* A. I. R. (29) 1942 Madras 226

LEACH C. J. AND HAPPELL J.

K. V. Narayanaswami Ayyar — *Appellant*

v.

Sevadappa Goundar—*Respondent.*

Letters Patent Appeal No. 9 of 1940, Decided on 25th November 1940, against order and judgment of King J., *Reported in* ('40) 27 A. I. R. 1940 Mad. 564.

• Res judicata—Cross-suits or applications—Suit on mortgage effected by insolvent and application to set it aside by Official Receiver heard together and disposed by one judgment holding mortgage to be valid—Official Receiver filing no appeal from mortgage decree but only from order of dismissal of his application—Appeal is not barred by res judicata — Fact that appeal from mortgage decree and that from d order of dismissal of application lay to different Courts does not matter : (1940) 1 M. L. J. 647= ('40) 27 A. I. R. 1940 Mad. 564 = 192 I. C. 810, *REVERSED.*

An appellate tribunal is not precluded from dealing with a question which comes before it merely because an inferior Court on the same facts in a case other than that under appeal had given a decision which had not been appealed against at the same time as the decision under appeal. [P 227*b*,*c*]

A suit by the mortgagee on a mortgage effected by an insolvent and an application to set aside the mortgage filed by the Official Receiver under Ss. 4 and 53, Provincial Insolvency Act, were heard together and disposed of by one judgment holding the mortgage to be valid with the result that the mortgagee was given a preliminary decree and the application of the Official Receiver was dismissed. The Official Receiver filed an appeal to the District Judge from the order of dismissal of his application but no appeal from the preliminary decree was filed. It was contended that the rule of res judicata applied : e

Held that the appeal was not barred by the principle of res judicata. [P 227*e*]

Held further that the fact that the appeal in the mortgage suit was directly to the High Court and in the insolvency proceedings to the District Judge in the first instance did not make any difference : (1940) 1 M. L. J. 647=('40) 27 A. I. R. 1940 Mad. 564=192 I. C. 810, *Reversed*; 29 Mad. 333 (F. B.), *Applied*; ('16) 3 A.I.R. 1916 Mad. 1133 and ('35) 22 A. I. R. 1935 Mad. 214, *Rel. on.* [P 227*d*,*e*]

K. Bhashyam Ayyangar, C. V. Subramania Iyer and T. R. Srinivasan — for Appellant.

K. V. Krishnaswami Ayyar and M. Krishna Bharathi — for Respondent. f

Leach C. J.—The question in this appeal is whether the case falls within the Full Bench decision of this Court in 29 Mad. 333.[1] The appeal is under Clause 15 of the Letters Patent from a judgment of King J. The learned Judge considered that the case did not fall within that decision, but gave a certificate permitting the filing of this appeal. After a careful consideration of the facts and the judgment in 29 Mad. 333,[1] we are of the opinion that this appeal should be allowed. The facts are these. On 25th October 1930 one Sengoda Mudaliar was adjudicated an g insolvent in the Court of the Subordinate Judge of Coimbatore. On 9th December 1927 the insolvent mortgaged certain immovable property belonging to him to the respondent to secure a sum of Rs. 7000. On 23rd June 1931 the mortgagee instituted a suit in the same Court to enforce the mortgage and made the appellant who is the special receiver in the insolvency a party. On 20th August 1931 the appellant applied to the Subordinate Judge in the insolvency proceedings for an order setting aside the mortgage under the provisions of Ss. 4 and 53, Provincial Insolvency Act. The respondent's suit and the appellant's application were h heard together and by a judgment dated 9th October 1934 the Subordinate Judge held that the mortgage was valid. The consequence was, he granted the respondent a preliminary decree and dismissed the appellant's application under Ss. 4 and 53, Provincial Insolvency Act. The appellant appealed to the District Judge of Coimbatore against the order dismissing his application, but filed no appeal against the preliminary decree. The District Judge reversed the decision of the Subordinate Judge and this resulted in the respon-

1. ('06) 29 Mad. 333 : 16 M. L. J. 63 (F. B.), Panchanada Velan v. Veithinatha Sastrial.

dent appealing to this Court. His contention was that inasmuch as the appellant had not appealed against the mortgage decree the judgment of the Subordinate Judge in the suit operated as res judicata and King J. held that it did.

In 29 Mad. 333[1] the facts were as follows : A tenant filed a suit under the Madras Rent Recovery Act to compel the tender of a patta by the landholder. The landholder filed a cross-suit to compel the tenant to accept the patta offered by him. The suits were tried together and were disposed of in the same judgment. The result was that the tenant's suit was dismissed and the landholder's suit decreed. The tenant then filed an appeal in his suit, but not in the landholder's suit and the question was whether the decision in the landholder's suit operated as res judicata and prevented the tenant proceeding with his appeal. This Court was of the opinion that the case did not fall within the contemplation of S. 13 of the Code of 1882, which corresponds to S. 11 of the present Code. The Court said that it would lead to startling results if it were to hold that an appellate tribunal was precluded from dealing with a question which comes before it because an inferior Court on the same facts in a case other than that under appeal had given a decision which had not been appealed against at the same time as the decision under appeal. This principle was followed in 29 M.L.J. 551[2] and in 67 M.L.J. 364.[3] The latter case is on all fours with the present case. There was a suit and an original petition in insolvency proceedings in which the same question arose for decision between the same parties. Both matters came up for hearing before the Additional Subordinate Judge of Tinnevelly and were heard together. A creditor, who was affected by the decision appealed, but only against the order on the petition, not against the decree. Beasley C. J. had no hesitation in holding that the case fell within the four corners of 29 Mad. 333.[1]

In the present case King J. has held that the decision in 29 Mad. 333[1] does not apply because the appeal in the mortgage suit was directly to the High Court and in the insolvency proceedings to the District Judge in the first instance. That is shortly the effect of his decision. We fail to see what difference this makes. There was an appeal to this Court in both the cases. We are not called upon to say whether 29 Mad. 333[1] was rightly decided. That decision is binding upon us and the reasons for holding that the doctrine of res judicata did not operate in that case apply equally in the present case, and the appeal must be allowed. The learned Judge did not decide a second objection taken by the respondent to the decision of the District Judge. The respondent's second contention was that the insolvency Court had no jurisdiction to set aside the mortgage because it did not fall within S. 53, Provincial Insolvency Act, and the special receiver could not in such an application call in aid S. 53, T. P. Act. The respondent's objections in this connexion are set out in paras. 6, 7, 8 and 9 of his memorandum of appeal. This question remains open and the case will be remanded to King J. to decide it. The appellant having succeeded in this Court, he is entitled to his costs.

C.R.K./K.S. *Appeal allowed.*

2. ('16) 3 A.I.R. 1916 Mad. 1133 : 31 I.C. 216 : 29 M. L. J. 551, Ramaswami Chetti v. Karuppan Chetti.

3. ('35) 22 A. I. R. 1935 Mad. 214 : 152 I. C. 114 : 67 M. L. J. 364, Lakshmi Ammal v. Official Receiver, Tinnevelly.

C. P. C. —
('40) Chitaley, S. 11 N. 29 Pt. 10.
('41) Mulla, page 38 Pt. (b).

A. I. R. (29) 1942 Madras 227

HORWILL J.

In re Karuppayya Thevar — Accused — Appellant.

Criminal Appeal No. 255 of 1941, Decided on 2nd September 1941, against order of Court of Session, East Tanjore Division at Negapatam, in C. C. No. 14 of 1941.

(a) Criminal trial — Evidence — Statements by expert medical witnesses as to nature of blows causing injuries — Court need not try to reconcile statements — Court should consider whether medical evidence precludes prosecution story.

It is not necessary for the Court to try to reconcile the various statements made by expert medical witnesses with regard to the nature of the blows which caused the injuries. The Court should consider whether the medical evidence precludes the prosecution story. [P 228 *f*,*g*]

(b) Criminal trial—Evidence — Postal stamp.

The probative value of a postal stamp on a postcard is not very high. [P 228 *h*]

(c) Penal Code (1860), S. 300 — Person can be guilty of murder even though death is not necessary consequence of blow given — Heavy blow on head fracturing skull and proving fatal —Accused must be presumed to have intended probable consequence of such blow — Injury caused being sufficient in ordinary course of nature to cause death accused is guilty of murder.

A person can be guilty of murder even though death is not a necessary consequence of the blow given. A person commits the offence of murder if

the act he does is done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. An accused who strikes a heavy blow on the head resulting in extensive fracture of the skull and proving fatal must be presumed to have intended the probable consequence of such a blow and the injury so caused being sufficient in the ordinary course of nature to cause death, the accused commits the offence of murder. [P 229*d*,*e*,*f*]

(d) Criminal trial — Public Prosecutor — Duty of.

No doubt a Public Prosecutor should be fair to an accused person and should not press for a conviction of a graver offence if he thinks a lesser one has been committed; still it is his duty to put before the Sessions Judge all that can be said in support of the charge. [P 229*g*]

V. T. Rangaswami Ayyangar — for Accused.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

Judgment. — The learned Sessions Judge of East Tanjore charged the appellant with the murder of Visalakshi Ammal by striking her on the head with a heavy stick and causing an extensive fracture of the skull. He, however, found him guilty only under S. 304, para. 2, Penal Code, and sentenced him to seven years' rigorous imprisonment. According to the prosecution evidence, there was a quarrel because P. W. 7 had stolen a chisel from Rangaswami Asari, a relative of the accused, when Rangaswami Asari failed to pay P. W. 7 his wages. On 11th September P. W. 7 was beaten by the accused, and on the following day, i. e., on the 12th, Murugayya and Rangaswami Asari went to P. W. 8's house and continued the quarrel. There was also a disturbance in the early evening of the 13th. The actual attack which resulted in the murder took place at about 8 P. M.; and it arose because P. W. 4, a respectable man in the village, went to the persons who were quarrelling and attempted to pacify them. He was accompanied by his aged father (P. W. 6) and his mother, the deceased. The accused, a young man of 22 or so, seems to have got incensed at the interference. Finding it easier to deal with a woman than with a man, he struck the deceased with his stick, fracturing her skull. He then ran after P. W. 8, another elderly woman; but she was fortunately able to escape into her house and secure the door. The murder is spoken to by as many as six eye-witnesses. Although P. Ws. 4 and 6 are closely related to the deceased, there is no reason why their evidence should not be accepted. On the contrary, it seems most unlikely that P. Ws. 4 and 6, with whom the deceased went to pacify the accused, would foist this murder on the accused, with whom they had no quarrel whatsoever. The dispute was between P. Ws. 7 and 8 on the one hand and Rangaswami Asari and Murugayya on the other. P. Ws. 4 and 6 had no concern with the matter at all, except as elders asked to intervene. P. Ws. 9 and 10 are also trustworthy witnesses.

The learned advocate for the appellant has relied on certain discrepancies in the medical evidence, and has argued that—contrary to the prosecution story—the deceased probably received two blows; because she had one injury on the forehead to the left side of the middle line and also what is commonly known as a black eye on the other side. The young Lady Assistant Surgeon was quite sure that these were due to two distinct blows; but the two much older men doctors (P. Ws. 3 and 5) were of opinion that they might well have been caused by one blow; for one of the fractures radiating from a central depressed fracture extended to the right orbital cavity. This particular radial fracture might well have led to an extravasation of blood which would have made the skin appear blue. It was not, however, necessary for the Court to have tried to reconcile the various statements made by expert witnesses with regard to the nature of the blows which caused the injuries; it should have asked itself whether the medical evidence precluded the prosecution story. The prosecution witnesses stated that there was only one blow; and although the evidence of P. W. 2 may be said to be inconsistent with that, yet reading the medical evidence as a whole, it cannot be said to render the prosecution story unworthy of credit.

Considerable reliance has been placed on the defence evidence of alibi, which is to the effect that the accused was laid up with typhoid fever at the time when this offence was committed. The learned advocate for the appellant does not go so far as to say in this Court that the accused has satisfactorily proved that he was laid up with typhoid fever, but he does rely on two post-cards dated 9th and 11th September written by the father of the accused to D. W. 1 at Alathur. These post-cards indicate that the accused was staying with D. W. 1 when those cards were written. One of the post marks on the second letter, Ex. 14 is "Memisal, 11-30 A.M., 13th September 1940." The probative value of a postal stamp is not very high; but if it was true, it was probable that when that post-card arrived, the accused was staying

at Alathur, which is about three-fourth of a mile from the post office.

The learned advocate for the appellant contends that if the accused was there at noon on the day of the offence, it is most unlikely that he was present at the village of offence (Ettugudi) when the witnesses say. The question is not however whether it was probable or not that the accused was present but whether one can be absolutely sure that the accused was not present. No evidence as to the exact distance from Alathur to Ettugudi has been given; but D. W. 2 says that one has to go 5 miles by cart, 22 miles by bus, 6 hours by railway, and then 6 miles by cart, and that it would take 12 hours to do this. I am not however prepared to conclude, merely on D.W. 2's evidence, that that is the only and the quickest way of getting to Ettugudi; and so, even if the post-cards are true and the accused was in the village of Alathur at noon on the day of offence, I am not prepared to say that he could not have been in Ettugudi by 8 P.M. The fact that the accused was not seen at any of the earlier quarrels on the day of offence or on the previous day makes it not improbable that he left for his village only after receiving EX. 14. If these post-cards are true, the evidence of P. Ws. 7 and 8 with regard to the incident on the 11th cannot be true; but that is not material to the consideration of what happened when this murder was committed. That is spoken to by a number of persons who do not say that they saw the accused in the village on the 11th. I therefore find no reason for not agreeing with the learned Sessions Judge that it was the accused who had committed this offence.

The accused put forward a theory that the deceased fell on a survey stone, but there is no evidence at all that she did so. It is unworthy of consideration in the face of the evidence of so many eye-witnesses. The learned Sessions Judge, instead of finding the accused guilty of murder, has found him guilty only under S. 304, para. 2, Penal Code, holding that although the accused should have known that death was a likely result of such a blow, death was not the necessary consequence of it. He seeks support for that conclusion from the evidence of P. W. 5, one of the doctors examined. P. Ws. 2 and 3 say that death was the necessary consequence of the blow; but P.W. 5 says that it was not a necessary result but only likely. He appears to have used the word "likely" in contradistinction to "necessary." A person can be guilty of murder even though death is not a necessary consequence of the blow given. Persons make remarkable recoveries at times from severe injuries that ordinarily lead to death. P.W. 5 does not explain how the deceased could have recovered from a depressed and extensively radiating fracture; but perhaps the piece of bone that was depressed could have been removed by operation. Ordinarily, however, an injury of the nature caused to the deceased ends fatally. Even P. W. 5 says that death might have resulted instantaneously from such an injury, and it is one's experience that injuries of this kind ordinarily end fatally. A person commits the offence of murder if the act he does is done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The blow given to the deceased must have been a very heavy one to have caused such a severe injury, and the accused must be presumed to have intended the probable consequence of such a blow. The injury so caused being sufficient in the ordinary course of nature to cause death, the accused committed the offence of murder and should have been convicted accordingly.

The learned Public Prosecutor thinks that the learned Sessions Judge may have felt himself restrained by an apparent admission of the Public Prosecutor of East Tanjore that the offence committed was not that of murder. If the local Public Prosecutor made such a statement, he did wrongly. One expects a Public Prosecutor to be fair to an accused person and not to press for a conviction of a graver offence if he thinks a lesser has been committed. On the other hand, it is his duty to put before the Sessions Judge all that can be said in support of the charge. To do the Public Prosecutor justice however I very much doubt whether the learned Sessions Judge felt himself restrained in any way by anything that the learned local Public Prosecutor said. The conviction and sentence are affirmed and the appeal dismissed.

C.R.K./G.N. *Appeal dismissed.*

Cr. P. C. —
(a) ('41) Chitaley, S. 367 N. 6.
('41) Mitra, Page 1646 N. 1327.
(d) ('41) Chitaley, S. 286 N. 13 Pts. 4 to 6.
('41) Mitra, Page 984 N. 893 and Page 1605 N. 1300.

Penal Code —
(c) ('36) Ratanlal, Page 719 Pts. 4 to 6 and Page 757 Pt. 1.
('36) Gour, Page 986 Para. 3286.

A. I. R. (29) 1942 Madras 230

VENKATARAMANA RAO J.

Thiruvengadam Pillai and others — *Appellants*

v.

Koolai alias Muthusami Pillai and others — *Respondents.*

Second Appeal No. 471 of 1939, Decided on 12th September 1941, against decree of Court of Small Causes, Trichinopoly, in A. S. No. 17 of 1938.

(a) Madras Revenue Recovery Act (2 of 1864), Ss. 25 to 47 — Sale of land in default of payment of revenue — Defaulter dying before sale—Sale is infructuous—Proper procedure to be followed by Collector in such case, stated.

In the case of a sale in default of payment of arrears of revenue the Act contemplates the continued existence of the defaulter till the date of sale and if before the date of sale the defaulter dies, the sale would be infructuous and would pass no title to the purchaser. Until the property is sold, the title of the defaulter to the land is not lost, and the Government could have the property sold only by due course of law, that is, by following the appropriate procedure provided by the Act and until the property is sold, it continues in the defaulter. On the death of the defaulter before the sale, the property ceases to be his and therefore what is sold is the right of a dead man and the sale would pass no title to the purchaser. Though, strictly speaking, there is no provision in the Act for substituting his legal representative, still when the defaulter who was a party to a proceeding under the Act is dead, there can be no valid legal proceeding against him : 22 Mad. 119, *Rel. on*; 6 Mad. 303; 7 Mad. 405; ('17) 4 A.I.R. 1917 Mad. 984 and 34 Mad. 493, *Approved*; ('32) 19 A.I.R. 1932 Mad. 664, *Ref.* [P 232*a*,*c*,*d*,*e*]

The proper procedure to be adopted by the Collector on the death of the defaulter before the date of the sale is to substitute the names of his legal representatives in the registry, fix a fresh date of sale, issue a fresh notification under S. 36 of the Act and serve a copy on the legal representative and proceed with the sale or commence the whole procedure de novo by issuing a fresh demand under S. 25 of the Act on the legal representative and in default of compliance with it, take further steps as provided in the Act. [P 232*e*,*f*]

(b) Madras Revenue Recovery Act (2 of 1864), S. 2 — "Land" in S. 2 — Meaning of.

The land in Sec. 2 means the land of the landholder. [P 231*b*]

(c) Ownership — Dead persons.

The moment a man dies, the ownership which he had in the property is lost. Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives and are now as destitute of rights as they are free from liabilities. They do not even remain the owners of their property until their successors enter upon the inheritance. [P 232*b*]

S. Parthasarathy and V. K. Thiruvenkatachari — for Appellants.

T. V. Muthukrishna Ayyar — for Respondents.

Judgment.—The question for decision in this second appeal relates to the validity of a revenue sale. The relevant facts are these. The suit properties belonged to one Ramanarayana Pillai in whose name the patta stood in the revenue registry and the total extent of land sold was about 14 acres. There was default in the payment of arrears of revenue for Fasli 1340 amounting to Rs. 11-5-0. On 10th September 1931 a notice (Ex. 3) was issued under S. 25, Revenue Recovery Act, calling upon the said Ramanarayana Pillai to pay the arrears within ten days. The notice was not personally served on him but was affixed to his house. A copy of the notice was also affixed on the land and published in the District Gazette. In the notice it was stated that the sale would take place on 12th November 1931. Ramanarayana Pillai died on 27th October 1931 leaving the plaintiffs his sons who were then minors. The property was sold on 12th November 1931 and purchased for Rs. 11-12-0 by defendant 1 who has since transferred the property to defendant 3. This suit was filed by the plaintiffs for a declaration that the sale is null and void. It was attacked on various grounds but both the lower Courts decided against the plaintiff and held that the sale was valid. Mr. Thiruvenkatachari, the learned counsel for the plaintiffs, has confined himself only to one ground, namely that Ramanarayana Pillai having died before the date of sale, the sale must be held to be null and void and in support of his contention he relied on some observations of the learned Judges in 55 Mad. 876[1] at p. 881. In that case the registered pattadar was dead and his legal representative the widow was not registered in his place. His widow was, however, paying the assessment but she committed default in Fasli 1331. The Collector took steps for realizing the same. The requisite notices under the Revenue Recovery Act were issued in the name of the dead man and affixed to the property and the property was sold. It was held that the sale was invalid. The learned Judges observed thus :

> The whole procedure in connexion with sale of immovable property is based on the assumption that there is "a default," i. e., in the case of a human being a living person who is in default . . . To go through, with the name of a dead man, the procedure intended for giving living men a chance of saving their property is a farce and futility . . . . The sale proceedings were of no force and effect by reason of the absence of the fundamental requisite for giving the revenue authorities jurisdiction to conduct a sale, i. e., that there should be a defaulter living who can receive the notices and avoid the sale by payment of the arrears.

1. ('32) 19 A.I.R. 1932 Mad. 664: 139 I.C. 426: 55 Mad. 876: 63 M.L.J. 249, Marukolandai Ammal v. Secretary of State.

Mr. Muthukrishna Iyer for the contesting respondent contends that this case was distinguishable on the ground that the defaulter in that case was dead even before the proceedings were initiated, whereas in the present case all the requisite notices were served on the defaulter and all that remained was to sell the property and therefore the jurisdiction of the revenue Court could not be said to have been taken away by the mere fact that the defaulter died, that after service of the requisite notices the jurisdiction to sell the property was complete and that there is no procedure for bringing on record in the proceedings the legal representatives of the deceased defaulter.

The question is which of these contentions is tenable. A close analysis of the various provisions of the Act leads me to the conclusion that the Act contemplates the continued existence of the defaulter till the date of sale and if before the date of sale the defaulter dies, the sale would be infructuous and would pass no title to the purchaser. Section 2 of the Act says, "the land, the buildings upon it, and its products, shall be regarded as the security of the public revenue." The land in that section means the land of the landholder and in the present case the ryotwari interest of the proprietor Ramanarayana Pillai. If there was default in the payment of arrears of revenue, the Act empowers Government to initiate proceedings for realising the said revenue by sale of the defaulter's moveable or immovable property which would include land in respect whereof there has been default in the payment of revenue, or by execution against the person of the defaulter. Sections 25 to 44 deal with the procedure which the Collector is enjoined to adopt if he decides to sell the land in respect whereof arrears are due or the other immovable property of the defaulter, and these provisions undoubtedly indicate that what will be sold will be "the land of the defaulter." Sections 26 and 44 clearly provide what it is the Collector is empowered to sell. Section 26 says, "he shall proceed to recover the arrear by the attachment and sale of the defaulter's land." Section 44 says :

> It shall be lawful for the Collector, or other officer empowered by the Collector in that behalf to sell the whole or any portion of the land of a defaulter in discharge of arrear of revenue.

In 6 Mad. 303,[2] Innes J., explained thus the rights of the Government in regard to the realisation of revenue when default was committed (p. 310) :

> On non-payment of the Government dues, the right to the land would be liable to forfeiture, and the Collector might proceed according to law to sell the lands. Until such procedure was taken, it is difficult to see how the mirasdars could have forfeited their right to the land . . . For the right of the Government is only a right to a charge on the land, and a right to forfeit by due course of law, the title of the person holding the land who does not pay the charge.

Therefore until the property is sold, the title of the defaulter to the land is not lost, and the Government could have the property sold only by due course of law, that is, by following the appropriate procedure provided by the Act. What would be sold and what would pass at the revenue sale is only the proprietary interest of the registered pattadar. That is clear from the declaration which has to be made by the Collector after the issue of a sale certificate. Under S. 39 of the Act, the Collector has to advertise

> the name of the purchaser and the date of purchase together with a declaration of the lawful succession of such purchaser to all the rights and property of the former landholder in the said lands.

Construing this section, Turner C. J., in 7 Mad. 405[3] at p. 406 observed :

> According to S. 3 it is the proprietor that is liable for the payment of the revenue. According to S. 39 it is his right and property that passes by the revenue sale.

(*Vide* also the observations of Wallis C. J., in 40 Mad 93[4] at p. 96.) The form of declaration framed by the Board of Revenue and which is actually published establishes this beyond doubt. The form in the Board of Revenue Standing Orders Volume 2, page 393 (From No. 10) runs thus :

> It is hereby publicly notified for general information that AB, of village in Taluk of the District has purchased on 191 at a public auction the undermentioned lands sold for arrears of revenue due by , landholder in the undermentioned village, and has paid the full purchase money, viz., Rupees , and that the lands have been registered in his name. It is therefore, declared that the said AB has succeeded to all the rights and property of the present registered holder in the said lands.

This view is further strengthened by S. 36 (4) of the Act which provides that where a resale takes place in consequence of the non-payment by the purchaser of the purchase money and where the lands may on the second sale sell for a higher price than at the first sale, the difference or increase shall be the property of him on whose account the said first sale was made. This clearly indicates that what was sold is only the proprietary interest of the defaulter and that until the pro-

2. ('83) 6 Mad. 303, Subbaraya v. Sub-Collector of Chingleput.

3. ('84) 7 Mad. 405, Zamorin of Calicut v. Sitarama.

4. ('17) 4 A.I.R. 1917 Mad. 984 : 32 I.C. 971 : 40 Mad. 93 : 30 M.L.J. 387, Subbaraya Goundan v. Ranganatha Mudaliar.

perty is sold it continues in the defaulter. That the law contemplates the continued existence of the defaulter down to the date of sale is also clear from Ss. 37 and 47 of the Act, which provide that it is open to the defaulter to pay up the arrears before the date of sale or tender security to avert the sale. As observed in 34 Mad. 493[5] at p. 495, in the eye of the law the land must be his property at the time of the sale. The question therefore is, can it be considered to be Ramanarayana Pillai's property on the date of sale in this case? He having died, his property vested in his sons and therefore on the date of sale the property belonged to them. No doubt they took the property subject to the obligation of paying the arrears of revenue; nevertheless it was their property. The moment a man dies, the ownership which he had in the property is lost. That is the fundamental principle of jurisprudence (*vide* Holland's Jurisprudence, Edn. 13, p. 222). As Salmond observes in his book on Jurisprudence :

> Dead men are no longer persons in the eye of the law. They have laid down their legal personality with their lives and are now as destitute of rights as they are free from liabilities . . . . . They do not even remain the owners of their property until their successors enter upon the inheritance : (Page 332, Edn. 8.)

So when the land is sold as the property of the defaulter, what was sold was the right of the dead man and the sale would pass no title to the purchaser. I would respectfully adopt the following observations in 22 Mad. 119[6] at page 125 though they were made in connexion with a sale in execution of a decree of Court :

> The only thing sold was the right of a dead man which passes no property, as the dead man has no right at the time of the sale, the rights of the dead man being at the time of the sale in his legal representatives and their rights were not sold or in any way affected because they were not on the record.

According to the declaration under S. 39 of the Act, the purchaser succeeds to the rights and property of the "present registered holder." When the registered holder is dead, there could be no present registered holder to whose rights the purchaser can succeed. It is contended by Mr. Muthukrishna Iyer that there is no procedure for bringing on record the legal representatives of a defaulter under the Revenue Recovery Act, and that a revenue sale cannot be rendered invalid on that account. I quite agree; but there can be no doubt that the proceedings taken by the Collector under the Act are legal proceedings to which the defaulter must be deemed to be a party. Though strictly speaking there is no provision for substituting his legal representative, still when a party to a proceeding is dead, there can be no valid legal proceeding against him. A duty is enjoined on revenue officers to substitute the legal representatives in the registry. What the Collector should have done was to substitute the names of the minors in the registry, fix a fresh date of sale, issue a fresh notification under S. 36 of the Act and serve a copy on the mother, the legal guardian of the minors and proceed with the sale or commence the whole procedure de novo by issuing a fresh demand under S. 25 of the Act, on the mother as the guardian of the minors and in default of compliance with it, take further steps as provided in the Act. As neither procedure was adopted by the Collector in this case, I must hold that the sale was invalid and therefore passed no title to the purchaser, defendant 1.

In the result the decrees of both the lower Courts are set aside and there will be a decree in favour of the plaintiffs. The plaintiffs are directed to pay Rs. 100 to defendant 3 as and for the improvements effected by him. The plaintiffs are entitled to get delivery of possession of the property only after payment to defendant 3 of the said sum of Rs. 100 has been made. The plaintiffs are given leave to deposit the said sum into Court. Having regard to the circumstances of this case, I direct each party to bear his own costs of the litigation throughout. There will be no order in regard to mesne profits. Leave to appeal is refused.

C.R.K./G.N. *Appeal allowed.*

5. ('11) 34 Mad. 493 : 8 I.C. 414 : 20 M.L.J. 794 : 8 M.L.T. 323, Secretary of State v. P. Sankaraayya.
6. ('99) 22 Mad. 119 : 8 M. L. J. 288, Groves v. Administrator-General.

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* A. I. R. (29) 1942 Madras 232

LEACH C. J. AND CHANDRASEKHARA AYYAR J.

Paramanand Doss Chota Doss & Sons, Firm and others — Appellants

v.

Nannulal Kanji and others — Respondents.

Appeals Nos. 18 and 31 of 1940, Decided on 25th September 1941, from judgment and decree of Somayya J., D/- 30th January 1940.

(a) Hindu law—Joint family — Alienation by father—Suit to set aside by sons—Suit instigated by father—Effect.

The fact that the institution of a suit by the sons to set aside alienation by their father has been

instigated by their father does not prevent the plaintiffs from being granted the reliefs to which they are entitled in law. [P 234*e*]

(b) Hindu law—Joint family—Alienation — Mortgage by manager of property in Madras — Mortgagor can confer power of sale on mortgagee without recourse to Court — Reasons stated.

A manager of an undivided Hindu family in creating for a family purpose a mortgage of immovable property in one of the towns mentioned under S. 69, T. P. Act, like Madras may confer on the mortgagee a power of sale which can be exercised without recourse to the Court for the following reasons : (1) Section 69 applies to Hindus and there is no indication in the Act that the Legislature intended to exclude a mortgage created by the managing member of an undivided Hindu family, (2) the power to mortgage in itself implies a power in the mortgagor to confer upon the mortgagee a right to sell the mortgaged property without the intervention of the Court, and (3) the manager of an undivided Hindu family has the power to sell as well as to mortgage : 52 E. R. 9 ; 53 E. R. 267 ; ('27) 14 A. I. R. 1927 P. C. 121 and ('23) 10 A.I.R. 1923 P. C. 114, *Rel. on.* [P 235*g*,*h*]

(c) Transfer of Property Act (1882), S. 69 — Mortgagor can give power of sale to second mortgagee, though such power not given to first mortgagee.

There is nothing in S. 69 to prevent a mortgagor giving to a second mortgagee, if he likes to do so, a power of sale, even when he has not given one to the first mortgagee. [P 236*b*]

V. V. Srinivasa Ayyangar, M. S. Venkatarama Iyer, L. Krishna Das, K. Rajah Ayyar and V. Seshadri — for Appellants.

K. Bhashyam Ayyangar, S. P. Duraiswami, S. Ramanujachari, K. P. Bhat and M. Sundaram Aiyar — for Respondents.

Leach C. J. — These two appeals which arise out of the same judgment raise an important question of law and questions of fact. The question of law is whether a manager of an undivided Hindu family in creating for a family purpose a mortgage of immovable property in Madras may confer on the mortgagee a power of sale which can be exercised without recourse to the Court. The appeals have been heard together and can be dealt with conveniently in one judgment. The suit was filed on the original side of this Court by respondents 1 to 7, all of whom are minors. Respondents 1 and 2 are the sons of defendant 1 in the suit. Respondent 3 is the son of Mulji Lala, the brother of defendants 1 and 2. Mulji Lala died before the institution of the suit. Respondents 4 to 7 are the sons of defendant 2. Defendants 1 and 2 and Mulji Lala constituted an undivided Hindu family and the family remained joint after Mulji Lala's death, which occurred in 1928. Defendant 1 has, at all times material to the issues, been the manager of the family. The family is a business family and during the period with which this suit is concerned its activities were confined to building contracts entered into with railways. The family owned immovable properties in Madras, in the native State of Sachin and in the district of Surat. The Madras properties consisted of land and premises known as Nos. 34 and 35 Gollever Agraharam, Tondiarpet, and land and premises known as Nos. 9 and 10 Hunters Road, Vepery. For the sake of convenience I shall refer to the former property as "the Tondiarpet property" and the latter as "the Vepery property."

On 23rd October 1931 defendant 1, as manager of the family, mortgaged the Tondiarpet property with the firm of Paramanand Doss Chota Doss & Sons, defendant 3, to secure a loan of Rs. 15,000. The mortgage deed contained a power of sale. On 27th March 1935, defendants 1 and 2 created a second mortgage on the Tondiarpet property in favour of defendant 7 for a sum of Rs. 1000 and on 15th April 1935 a third mortgage in his favour for the like amount. On 16th November 1935, defendant 3 exercised the power of sale under the mortgage and the property was purchased by defendant 8 for the sum of Rs. 16,300. On 13th October 1932, defendants 1 and 2 deposited with defendant 5 by way of equitable mortgage to secure a loan of Rs. 20,000, the title deeds of the Vepery property. The deposit was evidenced by a memorandum executed on the same day. On 12th May 1933, defendant 1 created a second mortgage in favour of defendant 4 to secure a loan of Rs. 5000. This deed also contained a power of sale, which was exercised on 9th April 1935, when the property was purchased by defendant 6 for Rs. 28,500. The plaintiffs allege that all these mortgages are invalid so far as their respective interests in the properties are concerned. It is denied that the monies were required for the business of the family or for any family purpose. They allege that defendants 1 and 2 are addicted to drink, profligacy and gambling and that the moneys raised on the mortgages were spent on vice. They aver that the manager of an undivided Hindu family cannot, even when mortgaging family property for a family necessity, confer upon the mortgagee a power of sale.

The suit was tried by Somayya J. who held that S. 69, T. P. Act, does not extend to the manager of a Hindu family when mortgaging family property. On the evidence he found that the mortgage of the Tondiarpet property to defendant 3 was binding on

the family to the extent of Rs. 6000, that of the Rs. 15,000 advanced by defendant 3 Rs. 10,000 had been repaid, that the first mortgage to defendant 5 of the Vepery property was valid so far as the family was concerned to the extent of Rs. 10,000 (half the amount of the loan) and that the second mortgage of the Vepery property in favour of defendant 4 was not binding on the family at all. Defendant 7 in whose favour the second and third mortgages of the Tondiarpet property had been created led no evidence in support of his mortgages and in these circumstances the learned Judge held that they were not binding on the plaintiffs. In the end, the learned Judge declared that the plaintiffs were entitled to their shares in the Tondiarpet and Vepery properties, and, as I read his judgment, free from all liability. Appeal No. 18 of 1940 has been filed by defendants 3 and 8 and Appeal No. 31 of 1940 has been filed by defendant 4. Defendants 5 and 6 have filed memoranda of cross objections in Appeal No. 31 of 1940.

It is manifest that the persons who are responsible for this suit are defendants 1 and 2. Defendant 1 has gone so far as to give evidence in support of his sons' allegation against him of immorality and he allowed his motor-car driver to be called to give the names of women with whom it is said he had immoral relations. It is a regrettable fact that the Courts of this Province are not infrequently called upon to decide cases in which Hindu fathers have set their sons up to plead parental immorality in order to defeat alienees of family properties, but until this case came into Court I had never met with a case where a father had gone to the length of supporting by his own evidence a plea of immorality made against him by his son. When the Vepery property was sold on 9th April 1935, defendants 1 and 2 wrote to the purchaser offering to buy back the property from him for Rupees 500 more than he had agreed to pay for it. There was no suggestion in the letter that the power of sale had been unlawfully exercised. The notice which preceded the exercise of the power of sale was dated 30th November 1934 and no reply was sent. On 2nd August 1935, defendant 6, the purchaser of the Vepery property, filed a suit against defendants 1 and 2 to recover possession of it, and on 30th November 1935, he obtained a decree. On 17th February 1936, the present suit was filed and there can be no doubt that its immediate object was to defeat defendant 6. The fact that the institution of the present suit had been instigated by the two fathers does not, of course, prevent the plaintiffs from being granted the reliefs to which they are entitled in law, but it is important to bear in mind that the fathers are behind this suit when it comes to consider the evidence relating to the issues of fact.

It will be convenient now to decide the question whether the manager of a Hindu family may lawfully create a mortgage which confers upon the mortgagee a power of sale when the money is required for a family necessity. Somayya J. is emphatic in his opinion that the manager of a Hindu family is outside the scope of S. 69, T. P. Act. Obviously the learned Judge was greatly impressed by the fact that a power of sale embodied in a mortgage created by the manager of a Hindu family might mean, that the other members of the family would not have recourse to the property should the mortgage prove to be invalid and they would have to be content with a money decree which might not be enforceable. The learned Judge's reasons for holding that the manager of a Hindu family is outside the scope of S. 69 are that the section was passed in the interests of the commercial community, that it does not profess to affect or modify the rules of Hindu law, and that there is no authority in the manager of the family to delegate his powers. Accepting all this to be true, it does not follow that the manager of a Hindu family cannot avail himself of S. 69 when he has occasion to mortgage family property for a family necessity.

The section applies to Hindus and the manager of an undivided Hindu family is himself always a Hindu. The wording of the section is free from ambiguity. It says that notwithstanding anything contained in the Trustees' and Mortgagees' Powers Act, a mortgagee or any other person acting on his behalf, shall subject to the provisions of the section have power to sell or concur in selling the mortgaged property or any part of it, in default of payment of the mortgage money, without the intervention of the Court in certain specified cases. One of the cases specified is where a power of sale without the intervention of Court is expressly conferred on the mortgagee by the mortgage deed and the mortgaged property or any part of it was on the date of the execution of the mortgage deed situate within certain towns, of which Madras is one of those named. The section goes on to provide that the power shall not be exercised until (a) notice in writing requiring payment of the

principal money has been served on the mortgagor or on one of several mortgagors and default has been made in payment of the principal money or part of it for three months after the service of the notice or (b) some interest under the mortgage amounting at least to Rs. 500 is in arrear and unpaid for three months after becoming due. In passing, it may be mentioned that it is not suggested that the notices which were served by defendants 3 and 4 were in any way defective. There is nothing in the section itself or in any part of the Act which indicates that it does not apply to a mortgage created by a managing member of a Hindu family and, this being the case, the Court is bound to give effect to it, even if there is a manifest hardship in its application. I do not suggest that the section works any hardship in this case, but supposing that it did the Court could not take the hardship into consideration. The case must be decided on what the section says. Of course there must be a power to mortgage. Unless money is required for the purposes of the family the manager has no power to mortgage, and if a mortgage is itself invalid the deed cannot confer a power to sell. This has been freely conceded by the appellants. But the matter can be carried further. A power to mortgage in itself implies a power to give the mortgagee a right of sale, if the conditions in the mortgage with regard to repayment are not fulfilled. The power can undoubtedly be taken away by statute, but in the case of a mortgage of property by deed in one of the specified towns the right to give such a power has in fact been recognized by the inclusion of S. 69 in the Transfer of Property Act. In 52 E. R. 9[1] Romilly M. R. said :

> The power of sale given to a mortgagee must, I think, be considered, not as the delegation of the power entrusted to the executor, which is a power to sell for the benefit of his cestui que trust, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage; that is, a power to render the mortgage effectual ; and I think that the right to create this power is incidental to the authority of the executor to mortgage.

In that case the question was whether an executor could give a power of sale when mortgaging property of the estate. It was contended that he could not, but this contention was emphatically overruled and the opinion expressed by Romilly M. R. has been accepted as a correct statement of the law. In 53 E. R. 267,[2] Romilly M. R. had occasion to refer again to this question. In that case he observed :

> I think that no objection can be taken before me that the power of mortgaging was executed by means of a mortgage, which contained a power of sale, because I think that such a power is incident to the power to mortgage unless expressly excluded.

In 8 Lah. 597,[3] the Privy Council held that it was for the manager to decide whether he should mortgage or sell. In delivering the judgment of the Board, Sir John Wallis said:

> The learned Judges of the High Court were of opinion that as in this case the business had recently resulted in loss the managing member was not justified in putting more money into it, and that in any case he should have raised money by mortgage instead of sale. As regards the latter question, it is not clear that borrowing probably at a high rate of interest, would have been more beneficial than sale. In any case this was a question for the manager to decide.

As the manager of an undivided Hindu family may sell or mortgage as he deems fit for the purpose of raising money for a family necessity it follows that, apart from any statutory provision to the contrary, he has the right to confer upon a mortgagee a power of sale. Of course where the Transfer of Property Act is in force the mortgage must be one of those specified in S. 69. In 4 Lah. 284,[4] the Privy Council held that a power of sale embodied in a mortgage of property situate in a part of India where the Transfer of Property Act did not apply was a lawful provision. Therefore, we have these factors in favour of the contention of the appellants : (1) Sec. 69 applies to Hindus and there is no indication in the Act that the Legislature intended to exclude a mortgage created by the managing member of an undivided Hindu family; (2) the power to mortgage in itself implies a power in the mortgagor to confer upon the mortgagee a right to sell the mortgaged property without the intervention of the Court; and (3) the manager of an undivided Hindu family has the power to sell as well as to mortgage. This being the position it seems to me that the considerations which weighed with Somayya J. must be ignored. It follows that I consider that the learned Judge misread S. 69. Should it be found that the section results in hardship to members of joint Hindu families, the remedy lies with the Legislature, but it must be remembered that

1. 52 E. R. 9, Russell v. Plaice.
2. 53 E. R. 267, Bridges v. Longman.

3. ('27) 14 A.I.R. 1927 P. C. 121 : 101 I. C. 373 : 54 I. A. 211 : 8 Lah. 597 (P.C.), Naimat Rai v. Din Dayal.
4. ('23) 10 A.I.R. 1923 P. C. 114 : 75 I. C. 7 : 50 I. A. 162 : 4 Lah. 284 (P.C.), Kanhayalal v. National Bank of India Ltd.

the section does not apply to mofussil mortgages, and comparatively speaking there is little scope for the misuse of it.

The plaintiffs contend that even if the mortgagee of the Vepery property was entitled to exercise the power of sale mentioned in the deed there could in law be no sale of the mortgaged property without the intervention of the Court. This contention is based on the fact that the power of sale was only conferred on the second mortgagee. The first mortgagee admittedly concurred in the exercise of the power by the second mortgagee, of course, on the understanding that he was paid first. The plaintiffs say that the first mortgagee had no right to concur in the sale by the second mortgagee, but here again the provisions of S. 69, T. P. Act, are overlooked. There is nothing in the section to prevent a mortgagor giving to a second mortgagee, if he likes to do so, a power of sale, even when he has not given one to the first mortgagee. Sub-section (1) of the section says that a mortgagee or a person acting on his behalf shall, subject to the provisions of the section, have power to sell or concur in selling the mortgaged property. There can be nothing plainer than this and the first mortgagee in this case did in fact concur. Therefore if the second mortgage was lawfully created the sale of the Vepery property to defendant 6 cannot be disturbed.

I now come to the findings of fact and I will commence with the findings of the learned Judge with regard to the mortgage of the Tondiarpet property. As already mentioned, the appellants here are defendants 3 and 8. Mr. V. V. Srinivasa Ayyangar on their behalf has given no reason for challenging the finding of the learned Judge that only Rs. 6000 out of the Rs. 15,000 advanced by defendant 3 on this mortgage can be regarded as binding on the family. In fact he has made no attempt whatever to dispute the correctness of the learned Judge's conclusion. Therefore the finding must be accepted. It is equally clear that the learned Judge was right in holding that there remains only Rs. 5000 of the principal sum advanced on this mortgage. On 2nd November 1938, Rs. 10,000 of the Rs. 15,000 was repaid. It is not disputed that the Rs. 10,000 came out of moneys belonging to the family and this being the case the family liability of Rs. 6000 was discharged. But as the property has been lawfully sold the plaintiffs have lost their interests in it. Their rights are now restricted to the proceeds of the sale.

Sub-section (4) of S. 69 says that the money which is received by the mortgagee arising from the sale, after discharge of prior incumbrances, if any, to which the sale is not made subject, or after payment into Court under S. 57 of a sum to meet a prior incumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied, first in payment of all costs, charges and expenses incurred in connexion with the sale; and secondly, in discharge of the mortgage money and costs and any other money due under the mortgage; and the residue shall be paid to the person entitled to the mortgaged property. Consequently, the plaintiffs are merely entitled to payment of their shares in the balance of the Rs. 16,300 which was realized by the sale of the property, after the expenses of the sale have been met and the mortgagee has received all which he is entitled to in law as against the plaintiffs. (His Lordship dwelt on the findings and concluded.) The result is that the decree passed by the learned Judge will be set aside and the suit remanded to the original side for the taking of an account of what the plaintiffs are entitled to receive out of the proceeds of the sales of the properties. During the arguments, the Court indicated that this course might be adopted should it consider that the learned Judge had misread S. 69, T. P. Act, and find that the mortgages are binding, either in whole or in part, on the family. No objection was raised to this course being adopted and the parties accepted the position that if the plaintiffs have lost all interest in the properties themselves they are entitled to have recourse to the sale proceeds in this suit. The account will be taken in the light of this judgment and regard will be had to considerations arising out of the personal law of the minors, such as their liability under the pious obligation rule. When the account has been taken the trial Court will pass a fresh decree.

The appellants in each appeal are entitled to their costs against respondents 1 to 9 and I consider that defendant 5 should have his cost on Rs. 4556-11-11 in respect of his cross-objections but that no costs should be awarded on the memorandum of objections filed by defendant 6. The plaintiffs have sued in forma pauperis. The question of the court-fee will be decided by the learned trial Judge when he is giving directions for the drawing up of the new decree. He will also decide the question of the costs to be awarded in the trial Court.

Chandrasekhara Ayyar J. — I agree and have nothing to add.

C.R.K./K.S. *Case remanded.*

Hindu Law —

(b) ('40) Mulla, S. 246.

T. P. Act —

('36) Mulla, Page 440 Note "Power of sale without intervention of the Court."

('34) Mitra, Page 435 Note 425 (A).

(c) ('36) Mulla, Page 441 Note "Who may exercise the power."

('34) Mitra, Page 436 Note 427.

A. I. R. (29) 1942 Madras 237

BURN AND MOCKETT JJ.

In re Annika Lakshmudu and others
Accused — Appellants.

Referred Trial No. 19 and Criminal Appeal No. 86 of 1941, Decided on 11th March 1941, referred by Court of Session, East Godavari, D/- 24th January 1941.

(a) Evidence Act (1872), S. 24—Murder case — Statement by accused to police held came under S. 24.

In a murder case the police after arresting the accused questioned him as follows: 'Did you commit the offence? Produce the sticks and knives used by you? You need not be afraid if you do so.' Thereupon the accused said 'we admit the offence' and the police officer took down the statements of the accused :

Held that since the statements by the accused were made in answer to a direct inducement, namely that a promise that nothing would happen to them if they produced the sticks and knives which were used and that request was preceded by the words 'Did you commit the offence?' the statements were inadmissible in evidence under S. 24. [P 239*d*]

(b) Evidence Act (1872), S. 27—Statement to police made while producing materials used by accused in committing offence are inadmissible.

A statement to the police by the accused while producing the materials used by him in committing the offence is inadmissible since it cannot be said to be a statement in consequence of which a fact was discovered. [P 239*e*]

(c) Criminal trial—Murder—Sentence—Mitigating circumstance — Primitive character of accused not using deadly weapon but joining in murder held justified transportation.

The five accused men of primitive character who were all waiting with the intention of committing the most violent assault upon the deceased, attacked the deceased and caused injuries with sticks and a deadly weapon. Only one of them had used a deadly weapon :

Held that in the case of the accused who used the deadly weapon, the sentence of death should be confirmed but in the case of others in view of their primitive character the sentence of transportation was enough in the interests of justice. [P 240*b*,*c*]

E. T. Chockammal — for Accused.

Public Prosecutor — for the Crown.

Mockett J. — The five appellants have been convicted and sentenced to death by the learned Sessions Judge of East Godavari for the murder on 25th September 1940 of Chinki Asahayudu. The deceased and the accused lived in the village of Siddavaripalem which is shown on the plan and all that it is necessary to note on the plan is that, as is in evidence, any one who wishes to visit the shandy which is used by the people of this village must pass through a forest and later through a village called Erakapuram to reach that shandy and consequently on returning from the shandy they will take the same way in the opposite direction. There is a history of the parties in this case which may be shortly noticed although it is of no very great importance. The deceased was the husband of P.W. 4 who had been married when she was young but had not joined her husband. Then P. W. 4 lived with P. W. 7 and married him but remained with him only for a year. She then left him and went to live with the deceased. P. W. 7 married again one Chinnammi who bore him two children and then this Chinnammi joined Asahayudu.

Naturally this action of the deceased in attracting two women from the house of P.W. 7 into his own caused trouble in the village and a panchayat was held and Asahayudu was directed to pay Rs. 116 to the caste elders for distribution to the aggrieved parties. The amount was reduced to Rs. 40 of which P.W. 7 received Rs. 20 and the rest of his casiemen the other Rs. 20 between them. We mention this narrative because it is suggested in this case that the relations of Annika Nukayya were much aggrieved because of the action of the deceased who had taken two women from P. W. 7 and it was thought the particular caste was thrown into disrepute. That is alleged to be the reason why Asahayudu was murdered by accused 1 to 5. Naturally to attach any great importance to this circumstance would be to attach importance to matters which must be purely conjectural. But they do at any rate make intelligible what did happen on that evening as was found by the trial Court. P. W. 4 was returning from the shandy to the village of Siddavaripalem and she had reached a tadi tree marked on the plan which is in a jungle. P. W. 4 was walking in front carrying the shandy purchase and the deceased was walking behind. She heard a rustling sound and turning round states that she saw the following scene which we reproduce in her own words :

I saw accused 1, Annika Lakshmudu, cutting
a Asahayudu on the leg. Accused 1 next cut Asahayudu on the left side of the forehead. The other four accused belaboured and thrashed Asahayudu with sticks. The knife used by accused 1, Lakshmudu, was like M. O. 1. The sticks held and used by accused 2, 3, 4 and 5 were like M. Os. 2, 4, 6 and 7. I bowed and clasped hands crying, 'Babu, Babu,' and then accused 3, Tenke Bennayya hit me on the right thumb and accused 2, Masara Venkanna, hit me on the left shoulder.

That is her statement and description of what happened. It is convenient now to pause for a moment and see what were the wounds found upon this man. The doctor Venkataraman, P. W. 3, held the post mortem examination on the deceased at 6-15
b P. M., on 29th September. He said he found five injuries on the body; (1) a cut exposing the skull bone $2\frac{1}{2}''$ by $\frac{3}{4}''$; (2) a simple fracture of the middle third of the left upper arm; (3) a compound fracture of upper third of right upper arm; (4) a simple comminuted fracture of lower third of left radius and a simple fracture of lower end of the shaft of left ulna bone; and (5) a compound comminuted fracture of lower third of left tibia with the lower end of the upper fragment protruding through a wound. There was also a fracture of the middle third of the shaft of left fibula. On an examination of
c the head he found a cross shaped fracture on the left side of the frontal bone and on opening the skull bone he found that the left three-fourths of the horizontal fracture and the lower three-fourths of the vertical fracture were visible inside also. He states that injuries 2, 3, 4 and 5 could have been caused by a blunt instrument like a stick and NO. 1 could have been caused by a sharp instrument like M. O. 1. He thinks that the sticks could have caused the fractures. So, it will be seen that the injuries found upon the deceased correspond with the account of the attack upon him as described by P. W. 4.
d She herself had two injuries on her which are described by the doctor as follows: (1) a swelling on the other part of dorsum of right hand with swelling of the upper part of the thumb, and (2) a contused swelling on the lower portion of front of left shoulder. So it will also be seen that both as regards the injuries which she describes she saw inflicted on the deceased and the injuries that she states she herself actually received she is corroborated by the medical testimony.

It is naturally of great importance in a case of this sort to examine the subsequent conduct of the principal witness who is P. W. 4. She was described by the learned Sessions Judge quite rightly as "a frightened ambushed woman." She threw down her
e basket and ran away home and she sent word through one Kesavayya who has been described as a boy. He called her son-in-law, P. W. 5, and when he came, which he did according to P. Ws. 4 and 5, she told him what had happened and in much the same words as have been set out above. P. W. 5 according to her, went to the spot and what happened there will be described when dealing with his evidence. Now the village of Siddavaripalem is a lonely place and the inhabitants do not venture out at night for fear of wild animals and so no message was sent to the authorities until the next day. The next day P. W. 5 went to the Village
f Munsif at a village called Peda Mallapuram and he came to Siddavaripalem about noon. He examined P. W. 4 and she made a statement to him which is marked EX. F in this case. An examination of that statement shows that she described consistently with her evidence in the Court the incidents of the night before. She assigns to the various accused the weapons and the use of the particular weapons in each case.

P. W. 5, the son-in-law, tells how he was summoned by being told that he was urgently required and he went home and then P. W. 4
g told him again in similar terms to those which we have already set out how her husband had been attacked by these five accused and with those weapons and in that manner. But he adds that P. W. 4 asked him, 'go and fetch the deceased home.' This he did. He states that the deceased said to him, "Annika Lakshmayya cut me with a knife. Mosara Venkanna, Tenke Benayya, Tenke Butchayya, Annika Injappa beat me with sticks. I do not hope to survive." There has been some criticism of this witness with regard to whether he can be believed when he says this statement was made for reasons which we will deal with presently.
h P. W. 5 proceeded to the village of Peda Mallapuram and he made a report to the Village Munsif. The Village Munsif came back to Siddavaripalem and at the village he recorded from P. W. 5 EX. G. Exhibit G gives an account which is similar to that which has already been given by P. W. 4, but the statement which P. W. 5 made to the Munsif does not mention that the deceased made the dying declaration which we have set out. It does however say that the deceased said "he (the deceased) asked me to take him home" and that with the assistance of villagers he was brought home. It is not suggested that any other statement

was made by the deceased who died soon after. At this point we may deal with the criticism which Miss Chockammal levelled at EX. G, namely, the omission to refer to the dying declaration. There is this to be said about it. It is quite clear from EX. G that P. W. 5 told the Village Munsif that the deceased was able to speak because he said "he asked me to take him home." That being so, the probabilities that he also told him what had happened are great. Of course it may be said that knowing already from P. W. 4 what had happened he may have at the trial thought fit to add it to his evidence but we do not consider that the omission from EX. G of the statement seriously affects the credibility of P. W. 5 as a whole.

The accused were arrested on 29th September and P. W. 10, the Village Munsif, describes what happened. This witness describes how he was summoned to Siddavaripalem and saw the dead man and he also describes how he took the statement EX. G from P. W. 5 and EX. F from P. W. 4. He seems to have sent this report promptly and in this case there has been no cross-examination to suggest that there was any manipulation or preparation of the evidence at Siddavaripalem. When the police arrested the accused the Munsif states that the following occurred :

> Accused 1 Lakshmudu first was questioned by the Sub-Inspector in these words 'Did you commit the offence? Produce the sticks and knives used by you ? You need not be afraid if you do so.' All the five said 'we admit the offence.'

Thereupon the Sub-Inspector took them to the house of accused 1 and they made statements, A-1 producing a knife and A-2, A-3, A-4 and A-5 sticks. These statements which are of a confessional nature were received in evidence and used by the learned Sessions Judge. Now it is obvious that on one ground alone they are inadmissible. Section 24, Evidence Act, states "A confession made by an accused person is irrelevant" and therefore inadmissible in evidence "in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement, threat or promise." It is quite obvious that it must have appeared to the Court as it does to us that these statements as proved by P. W. 10 were made in answer to a direct inducement, namely that a promise that nothing would happen to them if they produced the sticks and knives which were used and that request was preceded by the words "Did you commit the offence ?" The learned Sessions Judge while recognizing that there was an inducement as proved by the Village Munsif expresses the quite incomprehensible view that such inducement "will not take away from the essential truth of the statements made by them and their production of the weapons used by them." The statements are of course not receivable in evidence at all and therefore their truth could not be the subject of enquiry. Mr. Ethiraj has quite rightly conceded that on this ground alone the statements should have been excluded but in addition an examination of them shows that they were, as far as can be gathered, statements made whilst producing the material objects concerned and therefore not statements in consequence of which a fact was discovered. We use the expression "as far as can be gathered" because we have been put to some inconvenience in this case by the learned Judge recording in Telugu characters the precise statements. The learned Judge is entitled to record answers in English and the proper and usual course is to do so. If the learned Judge considers that it is necessary for any particular purpose to record the statements in the language spoken, a translation should be added. But in the case of A-1 who brought out the knife there is a record of what he said in Telugu but no translation. Excluding these statements, the result is that the case against these men rests on the evidence of P. W. 4 as corroborated by EX. F and her conduct and by P. W. 5 and in the case of P. W. 5 by his conduct and his statement, EX. G. No serious criticism can be levelled at the conduct of either of these witnesses. The woman having seen her husband murdered says she immediately went home, sought the aid of the most obvious person, her son-in-law, told him what happened, sent him to fetch the injured man. The son-in-law in his turn at the earliest opportunity ran and reported to the Village Munsif what had happened and immediately the Munsif came to the spot, the statements, EXS. F and G were recorded and apart from the omission in EX. G to which reference has been made no criticism worth the name has been launched against him.

The accused in this case who are men of primitive character give no assistance. They content themselves with a denial both at the Magistrate's Court and at the Sessions Court, saying that the case has been fabricated by the police. We have therefore no opportunity of judging whether there is any question of considering their whereabouts that night or any alternative story. We are satisfied that the evidence of P. WS. 4 and 5 is

reliable and was properly accepted by the learned Sessions Judge. There is no circumstance of suspicion in this case at all to suggest that this story—really a very simple story when one comes to examine it — was not the entire truth. The learned Public Prosecutor has quite rightly touched on an aspect of the case namely as to whether the evidence in this case is sufficient to prove the intention under S. 34 of the Code, namely whether murder was the common intention of all these five people or whether a conviction would not be more appropriate under S. 302 read with S. 149, Penal Code. We do not consider it necessary to pursue this topic further because the result will be academic for the following reasons. It relates to a matter of sentence. The accused were all undoubtedly waiting with the intention of committing the most violent assault upon the deceased and it has been proved that one of them used a weapon which, in spite of the contentions of the defence, we regard as an obviously deadly weapon, namely M.O. 1. We consider that in his case the sentence of death should be confirmed. In the case of others having, as we have already indicated, regard to the sort of people they are, we think it will be enough in the interests of justice, if, instead of the sentence of death, a sentence of transportation for life is substituted.

The result will, therefore, be that we consider the conviction of all these five persons for murder was correct and so far as their appeals are concerned they are dismissed. We confirm the sentence of death in the case of accused 1 but we set aside the sentence of death in the case of accused 2 to 5 inclusive and instead sentence them to transportation for life.

C.R.K./G.N. *Order accordingly.*

Cr. P. C.—
(a) ('41) Chitaley, S. 163 N. 5 Pt. 12.
('41) Mitra, Page 509 N. 507.
(b) ('41) Chitaley, S. 162 N. 5.
('41) Mitra, Page 488 N 510-A.

A. I. R. (29) 1942 Madras 240

HORWILL J.

Maddipatla Narayanaswami and others — *Petitioners*

v.

Edala Narayya — *Respondent.*

Criminal Revn. Case No. 346 and Petn. No. 329 of 1941, Decided on 30th July 1941, to revise judgment of First Class Bench of Magistrates, Rajahmundry, D/- 13th February 1941.

(a) Criminal trial — Judgment — Validity — Three Bench Magistrates considering case—At later hearing fourth Magistrate joining — At final hearing three Magistrates present two of whom had sat throughout—Order passed by Bench held illegal.

Three Bench Magistrates sat to consider a case. At a later hearing of the case a fourth Magistrate joined. At the final hearing there were only three Magistrates present; of whom two had sat throughout.

Held that the Magistrate who did not sit at all the hearings had no legal power to participate in the disposal of the case and as three Magistrates constituted a quorum and only two Magistrates sat throughout, they could not have passed a legal order. [P 240*g*]

(b) Criminal trial — Review — Bench Court cannot correct errors in its judgment or review its illegal order—High Court alone has power.

A Bench Court has no power to correct errors in its judgments or to review its own illegal order. Such power vests only in the High Court. [P 240*h*]

G. Balaparameswari Rao — for Petitioners.

T. Venkatadri — for Respondent.

Public Prosecutor — for the Crown.

Order.—Three Bench Magistrates sat to consider C. C. NO. 1931 of 1940 on the file of the First Class Bench Court of Rajahmundry. At a later hearing of the case a fourth Magistrate joined. At the final hearing there were only three Magistrates present, of whom two had sat throughout. So it is clear that the Magistrate who did not sit at the first hearing had no legal power to participate in the disposal of the case. As three Magistrates constitute a quorum and only two Magistrates sat throughout, they could not have passed a legal order. On the date of the final disposal of this case the complainant was absent and so the case was dismissed under Sec. 247, Criminal P. C. Later, the Magistrates realized that they had passed an illegal order and so proceeded to rectify it by hearing the case once again. The trial is proceeding. The accused has therefore filed the present petition for revision. A Bench Court has no power to correct errors in its judgments or to review its own illegal order. Such power vests only in the High Court. The present trial is therefore illegal; and although the order of acquittal passed by the three Bench Magistrates was also illegal, it stands until set aside.

The only question that now arises is whether, after quashing the proceedings now taking place, I should order a retrial or, bearing in mind what has taken place, I should allow the order of acquittal, illegal though it may be, to stand. The case was dismissed because the complainant did not attend; and it seems unlikely that even if

the Magistrate who had been present at the beginning had sat throughout, the case would have taken a different turn. It would almost certainly have been dismissed just as it was by the improperly constituted Bench. I do not think therefore that the interests of justice require that the accused, who was acquitted so long ago as 5th February 1941, should now be called upon to stand his trial afresh. The revision petition is allowed and the present proceedings quashed.

C.R.K./G.N. *Petition allowed.*

Cr. P. C.—
(a) ('41) Chitaley, S. 350A, N. 2; N. 4 Pt. 1.
('41) Mitra, Pages 1181, 1182 ; N. 1019.
(b) ('41) Chitaley, S. 369, N. 2 and N. 5.
('41) Mitra, Page 1225, N. 1053.

A. I. R. (29) 1942 Madras 241

HORWILL J.

Namberumal Naidu — Petitioner

v.

Muthukalathi Mudali — Respondent.

Criminal Revn. Case No. 417 and Petn. No. 394 of 1941, Decided on 23rd September 1941, to revise order of Joint Magistrate, Tirupattur, D/- 17th March 1941.

Criminal P. C. (1898), Ss. 250 and 342—Complainant showing cause under S. 250 — Magistrate need not record actual words used by complainant—Proper procedure indicated.

Under S. 250, it is not necessary to record the actual words used by the complainant in showing cause under that section separately as in the case of an accused under S. 342. It is however necessary that the Magistrate should at least indicate in his judgment that he asked the requisite questions and he should set out the explanation the complainant gave and say whether he thought the explanation satisfactory, and if so, why. Even in a simple case where the complainant says nothing more than that the evidence let in is true, the Magistrate should note in his judgment that the complainant had no explanation to offer : ('38) 25 A.I.R. 1938 Rang. 161 and ('38) 25 A.I.R. 1938 Rang. 247, *Not approved.* [P 241 *f*,*g*]

V. T. Rangaswami Ayyangar — for Petitioner.
Public Prosecutor — for the Crown.

Order. — The accused in C. C. No. 17 of 1941 on the file of the joint Magistrate of Tirupattur was charged under S. 409, Penal Code, with misappropriating amounts paid to him as village munsif by the petitioner as kist. In passing an order of discharge, the joint Magistrate wrote :

I find that P. W. 1 (petitioner) has not only failed to prove the charges but also admitted in effect that they are false, frivolous, and vexatious. I therefore discharge the accused under S. 253 (1), Criminal P. C., and direct that P. W. 1 shall pay the accused a compensation of Rs. 30.

The only question that arises is whether the joint Magistrate has complied with the provisions of S. 250, Criminal P. C., which requires of him that if he considers the case to be false, frivolous or vexatious, he should call upon the complainant to show cause why he should not pay compensation. Sub-section (2) requires that :

The Magistrate shall record and consider any cause which such complainant. . . . may show, and if he is satisfied that the accusation was false and either frivolous or vexatious may, for reasons to be recorded, direct that compensation. . . . be paid by such complainant.

Counsel on both sides have been through the records and they have found nothing there which suggests that the learned joint Magistrate asked the questions and made the record that he was required to under sub-ss. 1 and 2 of S. 250, Criminal P. C. I do not think it necessary to go as far as Baguley J. did in A.I.R. 1938 Rang. 161[1] and in A.I.R. 1938 Rang. 247[2] and say that the actual words used by the complainant should be recorded separately as in the case of an accused under S. 342, Criminal P. C. It is however necessary that the Magistrate should at least indicate in his judgment that he asked the requisite questions and he should set out the explanation the complainant gave and say whether he thought the explanation satisfactory, and if so, why. In most cases, the complainant says nothing more than that the evidence let in is true. Even in such a simple case as that, the Magistrate should note in his judgment that the complainant had no explanation to offer. For the above reasons, it is necessary to set aside the order of compensation; and as it is unlikely that the Magistrate would remember after the lapse of more than six months exactly what he asked the complainant and what the complainant said in reply, it would be necessary, if remand were ordered, for the Magistrate to question the complainant afresh; but in the circumstances, I do not think such a step is necessary in view of the fact that the complainant admittedly had a receipt for the money which he says he paid. The Magistrate seems to have accepted the evidence of the karnam and the statement of the accused that it was customary to grant the ryots receipts in advance which would serve as a kind of demand notice. I find it difficult to believe that such a dangerous practice exists. Without therefore disagreeing with the find-

1. ('38) 25 A.I.R. 1938 Rang. 161 : 175 I.C. 639 : 39 Cr.L.J. 642, The King v. Maung Thoung Shwe.
2. ('38) 25 A.I.R. 1938 Rang. 247 : 176 I.C. 508 : 39 Cr.L.J. 743 : 1938 R.L.R. 163, Ma E Myaing v. The King.

ing which led to the discharge of the accused, I think that the nature of the evidence makes it unnecessary to remand the matter for fresh consideration. The order of compensation is set aside and the money which, I understand, is in the joint Magistrate's Court, should be refunded.

C.R.K./G.N. *Order accordingly.*

Cr. P. C.—
('41) Chitaley, S. 250, N. 11 Pt. 1.
('41) Mitra, Page 897, N. 814.

A. I. R. (29) 1942 Madras 242 (1)

HORWILL J.

In re A. V. Srinivasalu Reddiar — Petitioner.

Criminal Revn. Case No. 488 and Petn. No. 461 of 1941, Decided on 23rd September 1941, to revise order of Sub-Divisional Magistrate, Tindivanam, D/- 28th April 1941.

Criminal P. C. (1898), S. 112—Court can pass supplementary order.

There is nothing in the Criminal Procedure Code which prohibits the issuing of a supplementary order under S. 112 relying upon the subsequent conduct of the party though the persons affected by the second notice should of course have sufficient time to consider it. [P 242*f*]

V. T. Rangaswami Ayyangar and E. V. Sundara Reddi — for Petitioner.

Public Prosecutor — for the Crown.

Order. — A preliminary order under Sec. 112, Criminal P. C., was issued by the Joint Magistrate of Tindivanam, calling upon the petitioner and eight others to show cause why they should not be bound over to keep the peace for a period of 12 months, and ten instances were cited of acts which tended to show that it was necessary to bind them over. The Magistrate began the enquiry; and after one witness had been examined in chief, the police represented to the Court that even after the institution of the proceedings the petitioner and the others had committed a number of other misdeeds which also showed that it was necessary to bind them over. The police therefore asked the Court to pass a supplementary order under S. 112. The Joint Magistrate acceded to the request of the police and the question that arises in revision is whether that practice is illegal or objectionable.

It would be unfortunate if a Court could not take judicial notice of what had taken place after the institution of proceedings of this nature; for the behaviour of a person who was subject to these proceedings after the institution of the proceedings is a very relevant factor to help the Court to determine what order it should pass. The behaviour and action of the person against whom a notice under S. 112 has been issued may be such as to lead the Magistrate to conclude that even though his behaviour before the issue of the notice had been reprehensible, yet, in view of the evidence of his good intentions and good behaviour since the institution of the proceedings, it was not necessary to bind him over. If, on the other hand, the subsequent conduct of such a person indicates that despite the existence of these proceedings and his having been called upon to show cause why he should not be bound over to keep the peace and be of good behaviour, he continues to flout the law and to commit illegal acts, it would seem most desirable that the Court should take notice of this and be influenced by it in framing its final order. Admittedly, there is nothing in the Code which prohibits the issuing of a supplementary order under Sec. 112, and it can be open to no objection that I can think of. The persons affected by the second notice should of course have sufficient time to consider it; and such time has been given to the petitioner in this case. I do not consider that the petitioner is in any way aggrieved. The petition is accordingly dismissed.

C.R.K./G.N. *Petition dismissed.*

Cr. P. C. —
('41) Chitaley, S. 112 N. 6 Pt. 2a.
('41) Mitra, Page 264 N. 294.

A. I. R. (29) 1942 Madras 242 (2)

LEACH C. J. AND CHANDRASEKHARA AYYAR J.

Narikkal Chathan of Muthuvannacha Amsom and desom — Appellant

v.

Veethiyottillath Kesavan Namboodiri Karnavan and manager of his illom of Muthuvannacha Amsom and desom — Respondent.

Second Appeal No. 580 of 1938, Decided on 31st July 1941, against decree of Dist. Court, North Malabar, D/- 13th November 1937.

Malabar Tenancy Act (14 of 1930), S. 20 (5)—Words "requires the holding bona fide" mean genuine intention to cultivate and not real need to do so : (1941) 2 M. L. J. 456*n*=('41) 28 A. I. R. 1941 Mad. 816 = 197 I. C. 488, *OVERRULED.*

The words "requires the holding bona fide" in S. 20 (5) mean a genuine intention on the part of the genmi to cultivate and not a real need to do so. If the Court is convinced that the jenmi has really the intention of cultivating the land he is entitled to be put into possession of it. The fact that he has sufficient land under cultivation elsewhere to provide for the needs of himself and his family

matters not : S. A. No. 538 of 1939, *Approved*; (1941) 2 M. L. J. 456*n*=('41) 28 A.I.R. 1941 Mad. 816 = 197 I. C. 488, *OVERRULED* ; ('23) 10 A. I. R. 1923 Cal. 223, *Disting.* [P 243*g*]

P. Govinda Menon — for Appellant.

D. H. Nambudripad — for Respondent.

Leach C. J.—This second appeal has been placed before a Bench because there are conflicting decisions of Judges sitting alone with regard to the interpretation of S. 20, cl. (5), Malabar Tenancy Act, 1929. Section 20 opens with these words :

> No suit for eviction of a customary verumpattamdar, kuzhikanamdar or kanamdar shall lie at the instance of his landlord except on the following grounds :

There are six clauses in which the grounds are set out and cl. (5) is in these terms :

> that the period of the verumpattam, kanam or kuzhikanam, as the case may be, has expired and there has been no renewal and the landlord requires the holding bona fide for his own cultivation or for that of any member of his family or tarwad or tavazhi who has a proprietary and beneficial interest therein.

The question which falls for decision is whether the words "requires the holding bona fide" mean that the jenmi may, in the circumstances stated at the beginning of the clause, resume occupation if there is a genuine intention to cultivate or whether he must show a real need to do so. In S. A. No. 42 of 1939,[1] an unreported case, Venkataramana Rao J. held that a mere desire on the part of the landlord to have the land for his own cultivation, even if bona fide is not enough. The learned Judge said that in coming to a conclusion on the question of the landlord's need being bona fide, the Court should in each case consider whether the circumstances are such that the land must be restored to the landlord for his own cultivation or cultivation by any member of the family or tarwad, the test being the need of the landlord. In forming this opinion the learned Judge placed reliance on the decision of the Calcutta High Court in 26 C. W. N. 499.[2] That was a case under the Calcutta Rent Act, S. 11 of which prohibited a landlord from recovering possession from a tenant so long as the tenant paid the rent to the full extent allowable by the Act and performed the conditions of the tenancy. The section incorporated a proviso giving the landlord the right to resume possession if the premises were required by him bona fide for purposes of building or rebuilding or for his own occupation or the occupation of any person for whose benefit the premises were held. A landlord wished to get possession of the premises from his tenant. The evidence disclosed that the landlord had let out the premises in which he was living to tenants and that the reason which he gave for requiring possession of the premises in suit, namely his wife's health, was not the real reason. We do not regard that decision as being really applicable. The Calcutta Rent Act was a measure designed to prevent profiteering in houses, the war of 1914-18 having resulted in a shortage of residential accommodation. The measure was merely intended to meet a position which was of a temporary nature. It is true that the Malabar Tenancy Act has the object of creating permanent tenancies but the circumstances are in no way analogous and we are unable to read the Malabar Tenancy Act in the same way as the Calcutta Rent Act was read in the case just referred to. The same question arose in this Court in S. A. No. 538 of 1939,[3] which was decided by King J. This judgment is also unreported. King J. in discussing the meaning to be attached to "bona fide" said :

> The expression 'bona fide' cannot apply to a state of circumstances but only to the statements or intentions or actions of a human being. All therefore that is necessary in my opinion is for the Court to decide whether, when the landlord demands or asks for or sues for any land on the ground that he wishes to cultivate it himself, his statement that he wishes to cultivate it himself is a statement made bona fide.

We consider that this interpretation is the correct one. If the Court is convinced that the jenmi has really the intention of cultivating the land he is entitled to be put into possession of it. The fact that he has sufficient land under cultivation elsewhere to provide for the needs of himself and his family matters not. It is his land and if he really wants to cultivate it, he is entitled to regain possession when the kanom has expired and there has been no renewal. In the present case both the Courts below have held that the jenmi had the bona fide intention of cultivating the land. That being so, the decree which has been granted to him cannot in our opinion be disturbed and the appeal will have to be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

1. *Reported in* ('41) 28 A. I. R. 1941 Mad. 816 : 197 I. C. 488 : (1941) 2 M. L. J. 456*n*, Raman Nayar v. Kesavan Embarandiri.
2. ('23) 10 A. I. R. 1923 Cal. 223 : 69 I. C. 963 : 26 C. W. N. 499, Rekhabchand Doogar v. J. R. D'cruz.
3. S. A. No. 538 of 1939, Earaji Achuthan v. P. P. Katheeja Bi.

A. I. R. (29) 1942 Madras 244

SOMAYYA J.

Secretary of State — Appellant

v.

Sait Jodaraj Dhupajee and others — Respondents.

Second Appeal No. 508 of 1939 and Civil Revn. Petn. No. 204 of 1941, Decided on 1st September 1941, against decree of Sub-Judge, Amalapuram, in A. S. No. 85 of 1938.

(a) Madras Land Encroachment Act (3 of 1905), S. 9 — Sale of defaulter's property for assessment and penalty passes property free of encumbrances.

Where the Legislature says that the amount of penalty and penal assessment shall be deemed to be land revenue, though it is not in reality land revenue, it must be taken to be land revenue for the purposes of the Act : ('30) 17 A. I. R. 1930 P. C. 54, *Rel. on.* [P 244*f*,*g*]

Since the amount levied as penal assessment and penalty under S. 9 is to be deemed to be land revenue and is to be recovered as such, a sale of the defaulter's property for such an amount passes the property free of all encumbrances : 34 Mad. 493; ('19) 6 A. I. R. 1919 Mad. 590 and ('15) 2 A. I. R. 1915 Mad. 481, *Rel. on*; 7 Mad. 434; 28 Mad. 420 and 26 Mad 230, *Disting.* [P 244*h*; P 246*c*,*d*,*f*,*h*]

(b) Madras Land Encroachment Act (3 of 1905), S. 9—Object of Act stated.

The object of the passing of the Madras Land Encroachment Act was to negative the Full Bench decision in 27 Mad. 386, which had held that the provisions of Madras Act, 2 of 1864 could not be applied to recovery of penalties and other amounts of like nature from persons who were not landholders and who were treated by the Government as trespassers. It is because the Full Bench held that the impost in such cases was not land revenue that Madras Act, 3 of 1905 was passed wherein the Legislature has expressed in the clearest terms possible that for the purpose of recovery, penal assessment is land revenue and that being so S. 42, Madras Act, 2 of 1864 applies. [P 246*f*,*g*]

Government Solicitor — for Appellant.

Ch. Raghavarao for G. Chandrasekhara Sastri — for Respondents.

Judgment. — *S. A. No. 508 of 1939* — The question involved in this second appeal is whether a sale held for recovery of penal assessment imposed under Madras Land Encroachment Act, 3 of 1905, prevails over prior encumbrances. A sum of Rs. 1182 odd was the assessment and penalty imposed by the Government for the encroachments of certain lands belonging to the Government by one Venkata Sattayya. The plaintiff in the suit had obtained two mortgages from Sattayya on his properties and had filed a suit and obtained a final decree on foot of those mortgages. As the Government was bringing the property to sale under the provisions of Madras Act 3 of 1905 read with Madras Act 2 of 1864 the plaintiff protested that the land should be sold subject to his mortgages. But the Government ordered the sale to be held free of all prior encumbrances. The plaintiff then paid the amount under protest and filed the present suit for recovery of the sum. If a sale for penal assessment and penalty imposed under Madras Act 3 of 1905 does not prevail over prior encumbrances of the defaulter's properties, then the plaintiff is entitled to recover the sum which he paid under protest in order to save the property from being sold for such penal assessment and penalty. Section 9, Madras Land Encroachment Act, 3 of 1905, lays down :

> The amount of assessment and penalty imposed under this Act on any person unauthorisedly occupying any land shall be deemed to be land revenue and may be recovered from him as arrears of land revenue under the provisions of the Madras Revenue Recovery Act, 1864, or the Madras City Land Revenue (Amendment) Act, 1867, as the case may be.

This section provides that the amount of assessment and penalty imposed under this Act should be deemed to be the land revenue and it provides further that such amount may be recovered as arrears of land revenue under the provisions of the Madras Revenue Recovery Act. Where the Legislature says that the amount of penalty and penal assessment shall be deemed to be land revenue, though it is not in reality land revenue, we must take it that it is land revenue for the purposes of the Act. The Judicial Committee had to consider a similar case under the Income-tax Act. By S. 43 of the Act,

> any person employed by or on behalf of a person residing out of British India, or having any business connexion with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for the purposes of this Act, be deemed to be such agent.

The Judicial Committee say this in 54 Bom. 216[1] at page 223 :

> Now when a person is "deemed to be" something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were.

Therefore though the penal assessment and penalty are not in fact land revenue, we must take them to be land revenue. The next portion of S. 9 makes the matter further clear by providing that the amount may be recovered as arrears of land revenue under the provisions of the Madras Revenue

1. ('30) 17 A. I. R. 1930 P. C. 54: 121 I. C. 532: 54 Bom. 216: 57 I. A. 49 (P.C.), Commissioner of Income-tax Bombay Presidency v. Bombay Trust Corporation Ltd.

Recovery Act. Thus, the amount is to be deemed to be land revenue and may be recovered as arrears of land revenue. This being so, it is difficult to escape the conclusion that all the consequences which result in the case of a sale under the Revenue Recovery Act for arrears of land revenue strictly so called also result in the case of a sale for recovery of penal assessment and penalty levied under Madras Act 3 of 1905. Reliance is placed by Mr. Raghava Rao upon various decisions of this Court which have considered the effect of sales under the Abkari Act or the Income-tax Act—whether they pass the property free of prior encumbrances or only subject to the encumbrances then existing. The earliest of these cases is the case in 7 Mad. 434.[2] The sale was held under the provisions of S. 10, Madras Abkari Act, which provided that the Collectors may proceed against abkari renters or other persons licensed under the Act for the recovery of arrears due by them "in like manner as for the recovery of arrears of land revenue." Turner C. J. and Muthuswami Ayyar J., held that such a sale did not pass the property free of prior encumbrances. They held that it was only the procedure laid down in Madras Act 2 of 1864 that was to be followed for recovering arrears due by an abkari renter and that a sale under the Abkari Act did not carry the consequences provided by S. 42, Madras Revenue Recovery Act, 2 of 1864. Emphasis was laid on the expression "in like manner as for the recovery of arrears of land revenue." After referring to the various sections of Madras Act 2 of 1864 the Judges said this :

> Section 42 declares that all lands brought to sale on account of arrears of revenue shall be sold free of all encumbrances. Taking these sections together, the intention is clear that the purchase is free of prior encumbrances only when the arrear is of public revenue of which the land is the first security by statutory declaration. . . . . The question is — has S. 42 been extended by S. 52 to sales for arrears of Abkari revenue? We must certainly answer it in the negative. The expression, "In like manner as for the recovery of arrears of land revenue," indicates only that the same procedure is to be followed, and the language used in S. 52 is to the same effect.

In 28 Mad 420,[3] Benson and Boddam JJ. followed the decision just cited and held that a purchaser at a sale for arrears due by an abkari renter did not pass the land free of encumbrances as in the case of a sale for arrears of land revenue. In the old Abkari Act of 1864, the provision was that the arrears may be recovered in like manner as for recovery of arrears of land revenue. In the Abkari Act 1 of 1886 the provision was that abkari arrears may be recovered as if they were arrears of land revenue: *see* S. 28 of Madras Act 1 of 1886. It was held that this change did not affect the applicability of the decision in 7 Mad. 434.[2] Cases of sales under the provisions of the Income-tax Act came up for decision more than once. In 26 Mad. 230[4] this Court had to deal with the provisions of the Income-tax Act then in force (Act 2 of 1886). Under S. 30 of that Act :

> The Collector may in default of payment of the tax recover the amounts as if they were arrears of land revenue or by any process applicable to the recovery of a municipal or local tax or may pass an order for recovery of the amount from the defaulter, and such order may be executed as a decree for payment of money passed under the Civil Procedure Code.

Act 2 of 1886 is an Imperial Act and the question was whether a sale under S. 30 of that Act which provided that the tax may be collected by the Collector as if it was arrear of land revenue passed the property free of encumbrances. The Judges applied the principle of the decision in 7 Mad. 434[2] and pointed out that the difference in the wording between the provisions of the Income-tax Act and the Abkari Act was merely verbal. They say this at page 233 :

> We are clearly of opinion that S. 30, Income-tax Act, has not the effect of converting income-tax into an arrear of land revenue in respect of the land which may be brought to sale for realization of the income-tax, but that its effect simply is to extend the procedure prescribed by (Madras) Act 2 of 1864 and (India) Act 1 of 1890, to the recovery of arrears of income-tax.

Section 46 (2), Income-tax Act of 1922, provides :

> The Income-tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears due from an assessee, and the Collector, on receipt of such certificate, shall proceed to recover from such assessee the amount specified therein as if it were an arrear of land revenue,

and the same result would follow even in respect of sales held under the present Income-tax Act. The question has next been considered with reference to loans granted under the Land Improvement Loans Act (19 of 1883). Section 7 of that Act provides for the recovery of the loan. It was held by this Court in 41 Mad. 691[5] that a sale held under S. 7 (1) (c) of that Act passed the property free of encumbrances. This is a decision

2. ('84) 7 Mad. 434, Ramachandra v Pichaikanni.
3. ('05) 28 Mad. 420, Ibrahim Khan Sahib v. Rangasami Naicken.
4. ('03) 26 Mad. 230 : 12 M.L.J. 368, Kadir Mohideen Marakayar v. Muthukrishna Iyer.
5. ('19) 6 A.I.R. 1919 Mad. 590 : 47 I. C. 301 : 41 Mad. 691 : 34 M. L. J. 446, Sankaran Nambudripad v. Ramaswami Ayyar.

on the other side of the line. Mr. Raghava Rao urges that the decision in 7 Mad. 434[2] and the cases following it, proceed upon the principle that it is only where a land is sold for arrears of land revenue accruing on that very land, that the sale passes the property free of encumbrances and not where the sale is for recovery of an amount due on another land of the landholder. In 34 Mad. 493[6] Miller and Munroe JJ. decided that for the arrears of land revenue due on the land included in one patta, the land in another patta in another village may be sold free of encumbrances. They pointed out that under S. 5, Revenue Recovery Act, all the lands and buildings of the defaulter are a charge. This view of Miller and Munroe JJ. was followed by this Court in 41 Mad. 691.[5] Seshagiri Ayyar J. says at page 700:

> During the course of the argument I felt some doubt as to whether the decision of Miller and Munroe JJ. in 34 Mad. 493[6] was right. But on closely examining the sections of the Revenue Recovery Act, I feel that the effect of S. 42 is not only to discharge pre-existing encumbrances upon the property on which the arrear is due but also pre-existing encumbrances upon every property which is brought to sale for arrears of revenue due from the defaulter.

See also 27 M. L. J. 295.[7] Therefore, though the amount which is sought to be recovered did not accrue in respect of the land which is now sought to be proceeded against, the Government has the right to proceed against that property and to enforce all the rights given to them under the Madras Revenue Recovery Act. No doubt in the case of arrears under the Abkari Act or the Income-tax Act, they do not accrue on any land of the defaulter. So, likewise in the case of penal assessment and penalty, they do not accrue on the lands which are now sought to be proceeded against. Once the amount levied as penal assessment and penalty is to be deemed to be land revenue and is to be recovered as such, it is impossible to come to any other conclusion than that a sale of the defaulter's property for such an amount passes the property free of all encumbrances.

Mr. Raghava Rao then argued that if it is so, the Legislature need not provide that the amount may be recovered as arrears of land revenue. He says that these words will be superfluous if under the expression "shall be deemed to be land revenue," the amount in question became land revenue. I think the Legislature used the expression "and may be recovered as land revenue" only for the purposes of further clarification and that the addition of this expression does not cut down the effect to be given to the expression "shall be deemed to be land revenue." All the decisions referred to by Mr. Raghava Rao proceed upon the wording of the provisions of the particular Acts all of which have this common feature that the arrears due under those Acts were to be recovered as if they were land revenue or in the like manner as land revenue. But here the provision is "that the amount shall be deemed to be land revenue" and "may be recovered as land revenue" and not "in the manner provided for the recovery of land revenue." Therefore the Legislature has expressed in the clearest terms possible that for the purpose of recovery, penal assessment is land revenue and if this so, S. 42 of Madras Act, 2 of 1864 applies.

Before closing the judgment, it is only necessary to say that Madras Act 3 of 1905 was necessitated by the decision of the Full Bench of this Court in 27 Mad. 386,[8] which held that the provisions of Madras Act 2 of 1864 could not be applied to recovery of penalties and other amounts of like nature from persons who were not landholders and who were treated by the Government as trespassers. It was said that the impost was not land revenue, that the trespasser was not a landholder within the meaning of the Revenue Recovery Act, that he was only in improper possession of Government property and that his act was a wrongful act and a trespass. It is because the Full Bench held that the impost in such cases was not land revenue, that Madras Act 3 of 1905 was passed and the acceptance of Mr. Raghava Rao's argument will be to defeat one of the main purposes of the Legislature in enacting Madras Act 3 of 1905. I hold that S. 9 equates the penal assessment to land revenue and also provides that it may be recovered as land revenue. This being so, the view of the lower appellate Court is wrong. I reverse the decision of the lower appellate Court and restore that of the District Munsif with costs here and in the lower appellate Court.

C. R. P. No. 204 of 1941:—In view of my decision in the second appeal, the civil revision petition does not arise. It is dismissed with costs. Leave refused.

C.R.K./G.N. *Order accordingly.*

6. ('11) 34 Mad. 493 : 8 I. C. 414 : 20 M.L.J. 794, Secretary of State v. P. Sankarayya.

7. ('15) 2 A. I. R. 1915 Mad. 481 : 25 I.C. 797 : 27 M. L. J. 295, Dorayya v. Ayyamma Charyulu.

8. ('04) 27 Mad. 386 : 14 M.L.J. 37 (F. B.), Madathapu Ramaya v. Secretary of State.

A. I. R. (29) 1942 Madras 247

HORWILL J.

Syed Dewan Khaja Moideen Saheb — *Petitioner*

v.

D. M. Abdul Gaffoor Sahib—*Respondent.*

Civil Revn. Petn. No. 1699 of 1940, Decided on 13th October 1941, to revise order of Dist. Munsif, Udumalpet, D/- 17th September 1940.

(a) Court-fees Act (1870 as amended in Madras), Sch. 2, Art. 17-B and Sec. 7 (iv) (f) — Administration suit not being suit for account falls under Sch. 2, Art. 17-B— Market value of property determines jurisdiction.

An administration suit cannot be treated as a suit for accounts for any purpose relating to court-fee, above all a suit which is not one by a creditor for the administration of the assets of a deceased person to be divided amongst the creditors, but one by the heirs of the deceased in which a division of moveable and immovable property might have to be made. As an administration suit is not a suit for account, it should be valued under Sch. 2, Art. 17-B : C. M. A. No. 235 of 1938, *Rel. on; Case law discussed.* [P 248*h*; P 249*a*]

The jurisdiction of the Court is determined by the market value of the property : ('27) 14 A. I. R. 1927 Mad. 563 and ('39) 26 A.I.R. 1939 Mad. 776, *Rel. on.* [P 249*a*]

(b) Civil P. C. (1908), S. 115 — Question of jurisdiction arising at preliminary stage of suit —High Court can interfere in revision — Question of inconvenience and delay in trial of suit should be considered.

The High Court can interfere on a question of jurisdiction arising at a preliminary stage in the suit but before doing so it must consider questions of inconvenience and delay in the trial of the suit which may result from its revisional interference : ('26) 13 A.I.R. 1926 Mad. 1047 (F.B.), *Expl.* [P 249*e*, *f*]

K. V. Ramaseshan and C. D. Venkataraman — for Petitioner.

Government Pleader and K. V. Ramachandra Ayyar — for Respondent.

Order. — This petition has been filed against the finding of the District Munsif of Udumalpet in O. S. No. 46 of 1940 that he has jurisdiction to try the suit. The suit was one for the administration of the estate of one Kairunnissa Bibi for accounts and for division of the assets amongst the heirs under the Mahomedan law. The short point that arises in this petition is whether the provisions of Section 7 (iv) (f), Court-fees Act, or Artical 17-B of Sch. 2 apply. At first sight, there is a very formidable array of authority in support of the contention of Mr. Ramachandra Iyer for the respondent that an administration suit should be treated as a suit for accounts and that, therefore, S. 7 (iv) (f) is applicable. He has cited 39 Bom. 545,[1] 44 Cal. 890,[2] 45 Cal. 634,[3] 61 Cal. 711[4] at p. 724, 55 I. C. 258[5] and 12 Rang. 512,[6] in most of which cases it was held that S. 7 (iv) (f) was the proper provision of the Court-fees Act to apply. Of these cases, however only one, viz., 44 Cal. 890[2] discusses this question fully and directly. That was a case where there was a trust for sale created by a debtor for the benefit of his creditors. The history in the English Courts of administrative actions was discussed; but the whole of the reasoning, the discussion, and the conclusions were confined to that particular kind of administration suit in which a creditor seeks to have administered the estate of a deceased debtor for the benefit of the creditors. If this suit had been one for the administration of a debtor's estate, I should have been compelled to regard this well considered decision as a very strong authority for Mr. Ramachandra Ayyar's position that S. 7 (iv)(f) was the proper provision of the Court-fees Act to determine both the question of court-fee and the question of jurisdiction; but can the analogy for purposes of court-fee between an administration suit and a suit for accounts be extended to other kinds of administration suits in which the next of kin, the legatee, or the executor seeks to have the estate of the deceased person administered for the benefit of those entitled to some share of the deceased person's property, and which may involve not merely the taking of accounts but the division of moveable and immovable property ? In 39 Bom. 545[1] the question discussed was whether the suit, which was for accounts and the administration of an estate of a deceased person, was really an administration suit or whether it was not a suit for a definite share of property. The pleadings were discussed and the learned Judges came to the conclusion that it was an administration suit. They did not discuss what provisions of the Court-fees Act do apply to an administration suit. They say :

According to the provisions of the Court-fees Act, if the plaintiff succeeds in showing upon the accounts that she is entitled to a share in the property

1. ('15) 2 A.I.R. 1915 Bom. 59 : 29 I.C. 949 : 39 Bom. 545 : 17 Bom.L.R. 574, Khatija v. Adam Husenally.
2. ('18) 5 A.I.R. 1918 Cal. 883 : 38 I.C. 835 : 44 Cal. 890 : 24 C.L.J. 448 : 21 C.W.N. 310, Shashi Bhushan Bose v. Manindra Chandra Nandy.
3. ('18) 5 A.I.R. 1918 Cal. 895 : 41 I.C. 693 : 45 Cal. 634 : 26 C.L.J. 265 : 22 C.W.N. 115, Suraju Bala Dasi v. Jogemaya Dasi.
4. ('35) 22 A.I.R. 1935 Cal. 39 : 154 I.C. 479 : 61 Cal. 711, Shivaprasad Singh v. Prayagkumari Debee.
5. ('20) 7 A.I.R. 1920 L.B. 55 : 55 I.C. 258, San Paw v. Ma Yin.
6. ('35) 22 A.I.R. 1935 Rang. 13 : 153 I.C. 858 : 12 Rang. 512, Ma Thin On v. Ma Ngwe Hmon.

and assets of Tyeballi Sheikh Adam, she will not be able to obtain execution of any decree that may be passed in her favour by reason of the provisions of S. 11, Court-fees Act, until the difference between Rs. 130 and the fee which would have been payable, had the suit comprised the whole of the amount decreed, has been paid to the proper officer. That being so, there does not appear to be any reason why this should not be treated as a suit for account and for the share which may be found due to the plaintiff upon taking of such account, and if it is a suit for an account falling under S. 7 (iv) (f), Court-fees Act, the plaintiff is at liberty to value it at Rs. 130 or any other sum she pleases.

45 Cal. 634[3] was an administration suit of a somewhat similar kind to that in 39 Bom. 545;[1] but the learned Judges do not discuss whether that particular kind of administration suit would properly be governed for purposes of court-fee by S. 7 (iv) (f), Court-fees Act. They follow 39 Bom. 545[1] and 44 Cal. 890[2] without expressing any reasons. 61 Cal. 711[4] at p. 724 has been quoted by Mr. Ramachandra Iyer because of a sentence found in the judgment in which the learned Judges were discussing whether the suit under consideration was an administration suit or not. They held that it was not; because (quoting 44 Cal. 890[2]) "an administration suit is in essence a suit for accounts." 55 I.C. 258[5] merely follows 39 Bom. 545[1] and 44 Cal. 890[2] without argument. 12 Rang. 512[6] dealt with an administration suit, the nature of which is not clear from the judgment. The learned Judges purported to follow 9 Rang. 165[7] which, however, did not deal with an administration suit at all, but with a suit for accounts. They apparently assumed, as a proposition that needed no argument, that an administration suit is a suit for accounts. 12 Rang. 512[6] also contains a reference to 7 Rang. 164[8] which dealt with a suit for the administration of the estate of a deceased Mahomedan. There, the relief was valued by the plaintiff at Rs. 2000, that being her share in the property. It was held by the learned Judge that that was the correct valuation. Clearly, section 7 (iv) (f) was not applied in that case. The learned Judge went on to say that as the suit was not of the nature described in the Court-fees Act, S. 7, paras. v, vi and ix and para. x, cl. (d), and that as the court-fee was payable ad valorem on the claim, the value of the suit for the computation of court-fees and the value for purposes of jurisdiction were the same. He therefore concluded that the value of the share of the plaintiff in the deceased's estate determined jurisdiction.

In none of the above decisions was it considered whether it would not be more appropriate to apply Article 17B of Sch. 2, Court-fees Act. The question in each case was whether the plaintiff should pay court-fee on a reasonable valuation of his share of the deceased's assets. If not, it was assumed that S. 7 (iv) (f) was the correct provision of the Court-fees Act to apply. The learned District Munsif quoted the decision of Wadsworth J. in C. M. A. No. 235 of 1938. This was a short order on a check slip put up by the office in which the learned Judge pointed out that an administration suit was not merely a suit for account, that S. 7 (iv) (f) could not therefore be applied, and that as there was no provision in the Court-fees Act applicable to an administration suit, it followed that the residuary provision of Art. 17B of Sch. 2 would have to be applied. He did not discuss the case law on this point, beyond saying that 55 Mad 26[9] was an authority for the position that an administration suit was not a suit for accounts. The point that fell for decision in 55 Mad. 26[9] was whether creditors who were impleaded in an administration suit as defendants would have to pay court-fee on the value of their claims. It was argued by the learned Government Pleader, on the analogy of S. 11, Court-fees Act, that as a suit for administration was substantially a suit for accounts, the defendant-creditors would have to pay a court-fee.

The learned Judges, while conceding that in a sense a creditor's suit for administration was a suit for accounts, pointed out that the analogy between an administration suit and an ordinary suit for accounts broke down in many respects. They were not prepared to consider it a suit for accounts for the purpose of applying S. 11, Court-fees Act. They pointed out that it would be improper in a fiscal enactment like the Court-fees Act to argue by analogy and to apply to an administration suit rules that were laid down solely for a suit for accounts. The learned Judges avoided expressing any opinion as to the court-fee payable by the creditor who filed the suit ; but if we exercise the caution thought necessary by the learned Judges in applying the provisions of a fiscal enactment relating to one type of suit to another, it is clear that we ought not to regard an administration suit as a suit for

7. ('31) 18 A. I. R. 1931 Rang. 146 : 133 I. C. 91 : 9 Rang 165 (F. B.), C. K. Umar v. C. K. Ali Ummar.
8. ('29) 16 A. I. R. 1929 Rang 211 : 118 I. C. 122 : 7 Rang. 164, Ma Fatima v. Monin Bibi.
9. ('31) 18 A.I.R. 1931 Mad. 683 : 134 I. C. 1137 : 55 Mad. 26 : 61 M. L. J. 933, Ramaswami Iyer v. Rangaswami Iyer.

accounts for any purpose relating to court-fee, above all a suit which is not one by a creditor for the administration of the assets of a deceased person to be divided amongst the creditors, but one in which a division of moveable and immovable property might have to be made. I, therefore, respectfully agree with Wadsworth J.'s expression of opinion in C. M. A. No. 235 of 1938 that as an administration suit is not a suit for account, it should be valued under Art. 17B of Sch. 2, Court-fees Act.

It is conceded that if Art. 17B of Sch. 2, Court-fees Act, is to govern the court-fee, then the jurisdiction is determined by the market value of the property. If the market value exceeds the pecuniary jurisdiction of the Court, then the plaint will have to be returned for presentation in the Court having jurisdiction. As this is conceded, it is not necessary to discuss the authorities on this point. It is sufficient to refer to 50 M. L. W. 154[10] which follows 50 Mad. 646.[11] The learned Munsif while holding that Art. 17B of Sch. 2 governed the court-fee, came to the conclusion that the court-fee paid was sufficient, because the plaintiff had paid Rs. 22 whereas, under Art. 17B of Sch. 2, all that was necessary was a court-fee of Rs. 15. On the question of jurisdiction, he contented himself with saying

> as regards issue 10, since there is nothing preventing an administration suit being filed in this Court and since this suit is a suit for administration, I find on this issue that this Court has jurisdiction.

He did not consider whether, despite its being an administration suit, the value of the property was such as to preclude him from trying the suit. It seems probable that the market value of the property exceeded the pecuniary jurisdiction of the Court; but as the learned District Munsif has not given any definite finding on this point, he will have to do so. It was argued by Mr. Ramachandra Ayyar that even though the District Munsif erred in holding that he had jurisdiction, this Court ought not to interfere at this stage; for, if the suit is decreed in favour of the plaintiff, the defendant would be entitled to raise this question in appeal; and if he satisfied the Court that he had suffered prejudice by the wrongful exercise of jurisdiction by the District Munsif, he would be able to get the decree set aside. He quoted 51 M. L. J. 500[12] in support of his argument. I do not think that 51 M.L.J. 500[12] can be considered to be an authority for the position that this Court should not interfere in revision on a question of jurisdiction when it arises at a preliminary stage in the suit.

The learned Judges thought that under the peculiar circumstances of the case before them, it was not necessary for them to consider the principal point raised in revision. This Court has frequently interfered before the disposal of a suit where it has been found that a Court has wrongfully assumed jurisdiction. I quite appreciate the argument as to the inconvenience caused by holding up the trial of a suit in order that this Court might consider the correctness of decisions made during the course of trial. If I had considered the question of inconvenience soon after admission, I might have held that it was not advisable to interrupt the trial of the suit; but that inconvenience has already been caused and the disposal of the suit has been delayed for a considerable time owing to the pendency of this civil revision petition. That cannot now be avoided; so there is no longer any reason why, when the suit is still in its early stages, this Court should not interfere to correct an error which affects jurisdiction. The petition is therefore allowed and the suit remanded to the District Munsif for fresh consideration of the question of jurisdiction. If he finds that the market value of the property exceeds Rs. 3000, he should return the plaint to the plaintiff for presentation in a Court having jurisdiction. The costs of the parties to this application will abide the result and will be provided for in the order of the District Munsif. The Government Pleader will be entitled to his costs from the Government.

C.R.K./G.N. *Petition allowed.*

10. ('39) 26 A.I.R. 1939 Mad. 776 : 189 I. C. 289 : (1939) 2 M.L.J. 226: 50 M.L.W. 154, Karuppanna Nadar v. Karuppa Nadar.

11. ('27) 14 A.I.R. 1927 Mad. 563 : 101 I. C. 379 : 50 Mad. 646: 52 M.L.J. 381, Vasireddi Veeramma v. Butchayya.

12. ('26) 13 A.I.R. 1926 Mad. 1047 : 97 I. C. 921 : 51 M. L. J. 500 (F. B.), Zamindar of Kallikote v. Mongolopur.

C. P. C. —

(b) ('40) Chitaley, S. 115, N. 5 Pt. 24.
('41) Mulla, Page 411 Pt. (u).

A. I. R. (29) 1942 Madras 249

HORWILL J.

Indukuri Suryanarayana Raju and others — Petitioners

v.

Indukuri Viswanadharaju and others — Respondents.

Criminal Revn. Case No. 282 and Petn. No. 268 of 1941, Decided on 16th September 1941.

(a) Criminal P. C. (1898), Ss. 435, 561A and 145 (7)—Order under S 145 — After filing revision to High Court petitioner dying — High Court can bring legal representatives on record if ends of justice so require.

Where after filing the revision petition against an order under Sec. 145 (7) before the High Court the petitioner dies, the High Court in view of the provisions of Ss. 561A and 435 has ample power to bring the legal representatives of the deceased on record if the ends of justice require it : ('17) 4 A.I.R. 1917 Mad. 664, *Expl.* [P 250*g*]

(b) Criminal P. C. (1898), S. 145 — Partition between *A* and *B* after harvest — *A* willingly accepting partition and saying that *B*'s share was to be his — That amounts to giving over possession to *B*—*B*'s repairing bunds and cultivation of seed beds held sufficient to constitute possession.

After the partition between *A* and *B* was effected, *B* immediately obtained possession of his share of the land but that was after the harvest was completed. Shortly after, proceedings under Sec. 145 were instituted in which it was contended that there was no evidence that *B* was in possession and the acts of enjoyment performed by *B* were not sufficient to establish possession :

Held that the fact that *A* willingly accepted the partition and said that the share of *B* was to be his, amounted in fact to effectively giving over possession into the hands of *B* even though the nature of the season made it impossible for *B* to perform many acts of enjoyment and such acts of enjoyment as repairing of bunds and cultivation of a seed bed by *B* were in the circumstances sufficient to constitute possession. [P 251*c*]

K. S. Jayarama Iyer and G. Gopalaswami — for Petitioners.

V. V. Srinivasa Ayyangar for K. Venkatarama Raju and S. Vepa, and J. Krishnamurthi — for Respondents.

K. Venkataraghavachariar for Public Prosecutor — for the Crown.

Order. — In a dispute between one Suryanarayana Raju, who originally filed this criminal revision petition, and a large number of counter petitioners, the Sub-Divisional Magistrate of Bhimavaram passed an order that certain items of property should be retained in the possession of the counter petitioners, and the petitioner was prohibited from interfering with their enjoyment. After the filing of this petition, Suryanarayana Raju died; and his wife and sister were brought on record as his legal representatives. Mr. Jayarama Iyer for the petititoners argues that the order of the lower Court is not only a travesty of justice but also a gross abuse of the powers of the Court. In particular, he says that none of the facts stated by the counter petitioners was satisfactorily proved and that in any event the Magistrate did not give a finding as to possession on the date of the preliminary order. A preliminary objection was raised by Mr. V. V. Srinivasa Iyengar that this Court had no jurisdiction to bring on record the legal representatives of the man who filed this petition; and he has quoted 4 M.L.W. 440[1] where it was held that S. 145(7), which permitted Magistrates to continue their inquiry despite the death of any of the parties, applies only to the proceedings of the Magistrates' Court and not to this Court in revision. The learned Judges said that they had been shown no authority for the extension of the purview of S. 145 (7) to other proceedings, such as the proceedings before them under the Charter Act. That revision petition had to be filed under the Charter Act; because at the time that case was decided, S. 435, Criminal P. C., did not apply to proceedings under Chap. 12, Criminal P. C. In 1923, however, S. 435 was extended to proceedings under Chapter 12 and Sec. 561A was enacted. As Sec. 435 was made to apply to Chap. 12 also, it followed that from the date of the amendment, this Court, in dealing with revision applications against orders under Sec. 145, Criminal P. C., had the wide powers of an appellate Court instead of the restricted powers conferred under Sec. 15, Charter Act. Section 561A, too, gave very wide additional powers to the High Court. It says :

Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

If there had been a gross miscarriage of justice in this case, then, to secure the ends of justice, it would have been necessary to have brought the present petitioners on record in order that the wrong order of the lower Court could be corrected. I think therefore that as the law now stands, this Court has ample power to bring legal representatives on record if the ends of justice require it. Mr. Jayarama Ayyar has taken me through certain portions of the depositions of the witnesses and through a great deal of the judgment of the learned Magistrate, and there seems to me to have been abundant material for the finding that was arrived at by the Magistrate. It may or may not be true that a civil Court would have required some better evidence of the adoption and partition; but a large number of witnesses were examined on behalf of the counter petitioners; and if their evidence is to be accepted, as the learned Magistrate did

1. ('17) 4 A.I.R. 1917 Mad. 664 : 35 I.C. 821 : 17 Cr.L.J. 389 : 4 M.L.W. 440, Subbaraju v. Ramabhadra Raju.

accept it, they prove that the second counter petitioner was adopted by Suryanarayana Raju and that when some dispute arose between the adoptive father and the adopted son about the selection of a bride for the latter, a partition was effected by mediators of the family property. In that partition the second counter petitioner (the adopted son) obtained possession of his half share. Counter petitioners 4 and 17 obtained possession, the Magistrate finds, of all of the father's half share with the exception of 20 cents; and he gave a finding that with the exception of that 20 cents, all the other property was in the hands of the counter petitioners.

It is contended by Mr. Jayarama Iyer that the learned Magistrate's order is vitiated by his failure to consider the real question that fell to be decided by him under S. 145, Criminal P. C., i.e., who was in possession on the date of the preliminary order? It does seem true that in the operative part of the learned Magistrate's judgment, he has not specifically referred to that crucial date; but it seems clear from a reading of the judgment that he was of opinion that when the partition was effected, the son immediately obtained possession of his half share of the property. That was on 24th March 1940, after the harvest had been completed; and so there were few acts of enjoyment possible before this complaint was filed. The evidence of the counter petitioners is to the effect that there were certain acts of enjoyment, such as repairing the bunds and the cultivation of a seed bed. I think that is quite sufficient. If, in fact, the petitioners willingly accepted the partition and said that the share of the son was to be his, that was in fact effectively giving over possession into the hands of the son, even though the nature of the season made it impossible for the son to perform many acts of enjoyment.

It has been found that counter petitioners 4 and 17 took the half share of the father—with the exception of 20 cents on lease for a period of one year. That period has long since expired and the learned advocate for the said counter petitioners does not deny that the petitioners are entitled to receive back items 2, 3, 6 and 14. Attachment of all the lands was ordered by this Court to continue, and the Court auctioned the lands for one year and received a certain sum, the exact amount of which we do not now know. It is admitted that the petitioners are entitled to the lease amount agreed on between them and counter petitioners 4 and 17 and that counter petitioners 4 and 17 are entitled to the balance of the money deposited in Court in connexion with the items leased to them. The lower Court will therefore pay from the money in its hands the lease amount to the petitioners and the balance of this sum to counter petitioners 4 and 17. The proceeds of the leasing out of the son's property will of course be given to him. The attachment of those lands will be dissolved and the possession of them given to him. Items 2, 3, 6 and 14 will be given to the petitioners. In the result the petition fails and is dismissed.

C.R.K./G.N. *Petition dismissed.*

Cr. P. C. —

(a) ('41) Chitaley, S. 439, N. 43, Pt. 3; S. 145, N. 22, Pts. 3 and 4.
('41) Mitra, Page 1468, N. 1222 : "Death of the applicant," and Page 417, N. 435.

(b) ('41) Chitaley, S. 145, N. 25.
('41) Mitra, Page 381, N. 404.

A. I. R. (29) 1942 Madras 251

HORWILL J.

Mrs. Raji Bai Ammal guardian and mother of I. Minor Dickson Chandrahasan and another — Petitioners.

v.

Mohamed Nathar Sahib — Respondent.

Criminal Revn. Case No. 393 and Petn. No. 372 of 1941, Decided on 27th August 1941, to revise order of Sub-Divisional Magistrate, Chidambaram, D/- 7th January 1941.

Criminal P. C. (1898), S. 488 — Maintenance petition by married woman against third person as mother of minor child alleged to be born through illegal intimacy with him—Admissions of paternity are irrelevant if woman fails to prove non-access to her husband when child could have been begotten.

In a petition for maintenance by a married woman against a third person as mother and guardian of minor child alleged to have been born out of illegal intimacy with that third person all admissions of paternity by that third person are irrelevant if the woman fails to prove that she and her husband had no access at the time when the child could have been begotten. [P 252b]

K. S. Jayarama Iyer and G. Gopalaswami — for Petitioners.

C. Padmanabha Ayyangar — for Respondent.

Public Prosecutor — for the Crown.

FACTS.—The petitioner as the mother and guardian of two minor children filed an application under S. 488, Criminal P. C., against the respondent alleging that she was a married woman employed as a midwife, that the respondent got acquainted with her and contracted illegal intimacy with the result that two children were born. It was in evidence that she got separated from her

husband in 1934 and became acquainted with the respondent from 1937. It was also found that the husband was visiting the petitioner during the time the respondent was intimate with her and there were ever so many other males with whom the petitioner was intimate. The lower Court held that in those circumstances there was no conclusive proof that the children were born to the respondent and so refused to pass an order under S. 488, Criminal P. C., and against this order the present revision was filed.

Order.—In view of the clear wording of S. 112, Evidence Act, all admissions of paternity are irrelevant if the complainant fails to prove that she and her husband had no access at the time when the child could have been begotten. The Magistrate has held that there may have been access. The petition for maintenance had necessarily therefore to be dismissed, however convincing the evidence adduced by the complainant might have been. This petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

Cr. P. C.—
('41) Chitaley, S. 488, N. 25 Pts. 9 to 11a.
('41) Mitra, Page 1556 N. 1276.

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* A. I. R. (29) 1942 Madras 252

LEACH C. J. AND HAPPELL J.

K. K. A. Ponnuchami Goundar — *Petitioner*

v.

Muthusami Goundar and another — *Respondents.*

Civil Revn. Petn. No. 916 of 1940, Decided on 15th October 1941, to revise decree of Dist. Munsif, Palni, D/- 15th February 1940.

Partnership Act (1932), S. 69 (2)—Registration after suit cannot cure defect: (1937) 2 M.L.J. 273=('37) 24 A.I.R. 1937 Mad. 767=176 I.C. 916, *OVERRULED.

A suit is instituted when the plaint is filed in a Court of competent jurisdiction. The registration of the firm is a condition precedent to the right to institute the suit and the Court has no jurisdiction to proceed with the trial when the condition precedent has not been fulfilled. Registration after the filing of the suit cannot cure defect: (1937) 2 M.L.J. 273=('37) 24 A. I. R. 1937 Mad. 767=176 I.C. 916, *OVERRULED*; ('36) 23 A. I. R. 1936 Mad. 991; ('38) 25 A. I. R. 1938 Mad. 185 and ('38) 25 A.I.R. 1938 Mad 688, *Approved*; ('36) 23 A. I. R. 1936 Mad. 24, *Disting.*; *Case law discussed.* [P 253g]

S. V. Venkatasubramaniam—for Petitioner.

K. S. Ramamurti and A. N. Veeraraghavan — for Respondents.

Leach C. J.—Section 69 (2), Partnership Act, states that no suit to enforce a right arising from a contract shall be instituted in a Court by or on behalf of a firm against a third party unless the firm is registered and the persons suing are or have been shown in the register of firms as partners in the firm. The question which arises in this petition is whether the registration of a firm after it has filed a suit can cure the defect. In this case an unregistered partnership instituted a small cause suit in the Court of the District Munsif of Palni. It had applied for registration before filing the plaint, but the application had not been granted. In fact it was not granted until over a month had elapsed after the filing of the plaint. In these circumstances the District Munsif dismissed the suit with costs. The reported cases disclose a difference of opinion, but the majority of the judgments are to the effect that subsequent registration of the firm does not entitle the Court to proceed with the suit and that the only course open to it is to dismiss it.

The question has been considered on different occasions by four Judges of this Court, namely by Menon J. in 71 M. L. J. 663,[1] Stodart J., in (1937) 2 M.L.J. 717,[2] Horwill J., in (1937) 2 M.L.J. 273[3] and Venkataramana Rao J., in ('1938) 2 M.L.J. 44.[4] Menon, Stodart and Venkataramana Rao JJ. formed the opinion that subsequent registration did not remedy the defect. On the other hand, Horwill J. held that it did. Menon, Stodart and Venkataramana Rao JJ. considered that the wording of the section compelled the Court to dismiss a suit filed by an unregistered firm. Venkataramana Rao J. in addition to relying on the wording of the section drew attention to the fact that the Privy Council in 51 Bom 725[5] had pointed out that S. 80, Civil P. C., is explicit and mandatory. Section 80, Civil P. C., has very much in common with S. 69, Partnership Act. It says that no suit shall be instituted against the Secretary of State for India in Council, or against a public officer for an act purporting to be done by him in his official capacity, until the expiration of two months next after

1. ('36) 23 A. I. R. 1936 Mad. 991 : 165 I.C. 939 : 71 M.L.J. 663, Subramania Mudaliar v. The East Asiatic Co. Ltd.
2. ('38) 25 A. I. R. 1938 Mad. 185 : 175 I. C. 811 : (1937) 2 M.L.J. 717, Ibrahim Sahib & Brother v. Gurulinga Ayyar.
3. ('37) 24 A. I. R. 1937 Mad. 767 : 176 I. C. 916 : (1937) 2 M.L.J. 273, Varadarajulu Naidu v. Rajamanicka Mudaliar.
4. ('38) 25 A. I. R. 1938 Mad. 688 : 179 I. C. 16 : (1938) 2 M. L. J. 44, Girdharilal Son & Co. v. Kappini Gouder.
5. ('27) 14 A.I.R. 1927 P.C. 176 : 104 I.C. 257 : 51 Bom 725 : 54 I.A. 338 (P.C.), Bhagchand Dagadusa v. Secretary of State.

notice in writing has been given. The Privy Council also observed that S. 80 imposes a statutory and unqualified obligation upon the Court, and S. 69 (2), Partnership Act, does the same. Venkataramana Rao J. relied further on the decisions of this Court with regard to S. 28 (2), Provincial Insolvency Act. That section prevents a suit being filed against an insolvent without the leave of the Insolvency Court, and in 51 Mad. 833[6] and I.L.R. (1937) Mad. 841[7] this Court held that a subsequent leave would not cure the initial defect and validate the institution of a suit. In expressing the contrary opinion Horwill J. in (1937) 2 M.L.J. 273[3] observed :

> It is well established principle that the Court can take notice of events that happen subsequent to the filing of the suit and that any irregularities or deficiencies in the cause of action that may exist on the date of the filing of the plaint can be overlooked if on some date subsequent to the filing of the plaint and before the suit comes up for trial those irregularities or deficiencies are rectified by the plaintiff or by process law.

Whatever may be principle which applies to the rectification of irregularities and deficiencies in the cause of action, we are of the opinion that it cannot be applied here. The conclusion of Horwill J., that subsequent registration will put the suit on a proper basis receives support, however, from the judgment of the Calcutta High Court in 41 C. W. N. 534[8] and that of the Nagpur High Court in A.I.R. 1939 Nag. 301.[9] These cases were decided by Judges sitting alone. In the Calcutta case, it was said that when registration had been effected the suit might be treated as though the plaint had been received and the suit instituted on the day following the day of registration. The Patna High Court expressed dissent from this opinion in 18 Pat. 114[10] where Harries C. J. observed that he knew of no provision of law which permits a Court to treat the plaint as having been filed on a date subsequent to the date upon which it was actually filed, and we know of no such provision. It has been pointed out to us that a Bench of this Court expressed the opinion in 69 M.L.J. 791[11] that a defect in a suit filed under the provisions of O. 33, R. 15, Civil P. C., could be remedied after the suit had been instituted and that in such circumstances it should be treated as having been instituted on that date. Order 33, R. 15 states that an order refusing to allow a person to sue as a pauper shall be a bar to a subsequent application of a like nature by him in respect of the same cause of action, but he shall be at liberty to institute a suit in the ordinary manner provided he first pays the costs incurred by Government and by the opposite party opposing his application for leave to sue as a pauper. The wording of O. 33, R. 15 is not the same as the wording of S. 69 (2), Partnership Act. Order 33, R. 15 gives liberty to institute a suit in certain circumstances. Section 69 (2) says that no suit shall be instituted in certain circumstances which is more emphatic, and the circumstances are very different. Therefore we do not regard 69 M.L.J. 791[11] as having application here.

The Allahabad High Court in 58 All. 495,[12] the Patna High Court in 18 Pat. 114,[10] the Lahore High Court in 17 Lah. 275[13] and A.I.R. 1938 Lah. 767,[14] have all held that subsequent registration of the firm will not allow the suit to proceed. All these cases except the second Lahore case were decided by Division Benches. The great weight of authority is in favour of the opinion that registration will not put the suit on a proper basis and that the Court's duty is to dismiss it. We consider that the majority opinion is correct. A suit is instituted when the plaint is filed in a Court of competent jurisdiction. Section 69 says that a suit by a firm shall not be instituted until the firm has been registered. The registration of the firm is a condition precedent to the right to institute the suit and the Court has no jurisdiction to proceed with the trial when the condition precedent has not been fulfilled. For the reasons given, we consider that the District Munsif acted lawfully in dismissing the suit.

6. ('27) 14 A.I.R. 1927 Mad. 925 : 105 I.C. 109 : 51 Mad. 833 : 53 M.L.J. 412, Ghouse Khan v. Balasubba Rowther.

7. ('37) 24 A. I. R. 1937 Mad. 667 : 173 I. C. 285 : (1937) 2 M. L. J. 223 : I.L.R. (1937) Mad. 841, Dawood Mohamed Rowther v. Sahabdeen Sahib.

8. ('37) 41 C. W. N. 534, Radhacharan Saha v. Matilal Saha.

9. ('39) 26 A. I. R. 1939 Nag. 301 : 186 I. C. 670, Jakiuddin Badruddin v. Vithoba Jagannath.

10. ('39) 26 A.I.R. 1939 Pat. 239 : 182 I.C. 796 : 18 Pat. 114 : 20 P.L.R. 33, Firm Laduram Sagarmal v. Jumuna Prasad.

11. ('36) 23 A.I.R. 1936 Mad. 24 : 159 I. C. 1029 : 69 M.L.J. 791, Ramakrishna Nadar v. Tirumalai Vandya Thevar.

12. ('36) A.I.R. 1936 All. 3 : 160 I.C. 277 : 58 All. 495 : 1935 A L.J. 1245, Parshothamdass v. Baluram Chotelal.

13. ('35) 22 A.I.R. 1935 Lah. 893 : 160 I.C. 513 : 17 Lah. 275 : 38 P.L.R. 633, Krishenlal Ramlal v. Abdul Ghafur Khan.

14. ('38) 25 A.I.R. 1938 Lah. 767 : 179 I.C. 363 : 40 P.L.R. 667, Chhaganlal v. Firm Mangal Sain Raj Narain.

It follows that the petition must be dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

C. P. C. —
('40) Chitaley, S.26, N. 2, Pt.(1a); S.27, N. 1, Pt.(2).
('41) Mulla, Page 140, Pt. (v).

A. I. R. (29) 1942 Madras 254

WADSWORTH J.

Manyam Krishna Rao — Petitioner

v.

Official Receiver, East Godavari and another — Respondents.

Civil Revn. Petn. No. 2258 of 1939, Decided on 8th September 1941, to revise order of Dist. Court, East Godavari at Rajahmundry, D/- 5th August 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 20—S. 20 does not apply to sales by Official Receiver.

Section 20 has no application to sales by Official Receiver and cannot be invoked in favour of a person who is not a judgment-debtor seeking to stay the execution of a decree. [P 255*e*]

(b) Madras Agriculturists Relief Act (4 of 1938), Ss. 21 and 20—Debts due by insolvent—Scaling down - Procedure analogous to that for reduction of other debts should be followed—Debts not covered by decree or suits in other Courts—Insolvency Court can entertain application under S. 21 to scale down debts and direct receiver to revise schedule according to result or stay realisation of assets — Insolvent and Official Receiver both should be made parties to application under S 21 — But Court is not bound to stay administration of estate or sale of property subject to mortgage until debts are scaled down.

Though S. 21 lays down no procedure for scaling down debts due by the insolvent, the procedure should, as far as may be, be analogous to that prescribed for the reduction of other debts. Therefore, in the case of a debt embodied in a decree, the Court which passed the decree would have to be moved under S. 19 to reduce the decree and the Court which executes the decree must be moved under S. 20 to stay execution of the decree. The Insolvency Court is competent to entertain an application under S. 21 for the scaling down of the debts not covered by the decrees or suits in other Courts and to apply the principles of the Act and direct the Official Receiver to revise or frame the schedule in accordance with the result, and to give directions to the Official Receiver regarding the staying of realisation of assets where such realisation is legally to be effected by the scaling down process. But it certainly does not follow from the mere fact that an insolvent's estate may claim the benefit of S. 21, that all administration of the estate must stop until there has been an adjudication on the claims nor does it necessarily follow because there is a sale being held subject to mortgages and the insolvent estate may have a right to get those mortgage-debts scaled down, that the sale must necessarily await the scaling down process. Both the Official Receiver and the insolvent should be made parties to any application under S. 21.

[P 255*f*, *g*, *h*; P 256*e*, *f*]

(c) Madras Agriculturists Relief Act (4 of 1938), Sections 21 and 20—Sale of insolvent's property subject to mortgage advertised by Official Receiver — Application by insolvent under S. 21 to Insolvency Court without impleading Official Receiver to declare him agriculturist, scale down his debts and stay sale—Insolvent also applying to Official Receiver to stay sale under S. 20 and mentioning his application filed before Insolvency Court—Receiver refusing stay and holding sale on 27th September 1938—Application by insolvent under S. 68, Provincial Insolvency Act, to set aside sale—Application to Insolvency Court without impleading receiver and for scaling down all debts including mortgage debts held not maintainable — Application to receiver under S. 20 for stay of sale held incompetent — Sale by Receiver held valid.

In the course of the administration of the assets of the insolvent the Official Receiver advertised for sale the equity of redemption on certain properties belonging to the insolvent. The sale was fixed for 27th September 1938. On 14th September 1938, the insolvent applied to the Insolvency Court under S. 21 without impleading the Official Receiver for declaring him to be an agriculturist, for scaling down his debts and staying the sale. He also applied to the Official Receiver under S. 20 to stay the sale mentioning the application which he had filed before the Insolvency Court. The Official Receiver refused to stay the sale which was held on 27th September 1938. The insolvent thereupon applied to the Insolvency Court under S. 68, Provincial Insolvency Act, to set aside the sale:

Held that the application to the Insolvency Court to scale down all the debts including the mortgage debts and without impleading the Official Receiver was not maintainable and the application to the Official Receiver under S. 20 of Act 4 of 1938 for stay of sale was incompetent, and though the sale was held by the Official Receiver with the knowledge that the insolvent had made a move in the matter of an application under S. 21 of Act 4 of 1938, it could not be said that the Official Receiver acted illegally or irregularly in going on with the sale notwithstanding that knowledge.

[P 256*d*, *g*]

(d) Madras Agriculturists Relief Act (4 of 1938), Ss. 20 and 21—Official Receiver about to sell insolvent's property subject to mortgages—Mortgages liable to be scaled down under Act—Application to Insolvency Court to direct Receiver to suspend sale till completion of scaling down process can be made — Sale by receiver in disobedience of direction can be set aside under S. 68, Provincial Insolvency Act.

Where the Official Receiver is about to sell the insolvent's properties subject to mortgages which mortgages were liable to be scaled down under the Act an application can be made to the Insolvency Court to give directions to the Official Receiver to suspend the sale until the scaling down process is completed; and if the Official Receiver holds the sale in disobedience to such directions, then it would be a ground under S. 68, Provincial Insolvency Act, for setting aside the sale. It would not be a case of the insolvent being aggrieved by the mere sale of the properties, but the insolvent being aggrieved by the act of the Official Receiver disregarding the directions of the Court obtained at

the instance of the insolvent who is seeking the benefit of a special statutory procedure : ('26) 13 A.I.R. 1926 Mad. 556 (F.B.), *Expl.* [P 256*a*, *b*]

A. Lakshmayya — for Petitioner.

V. Viyanna — for Respondents.

Order. — This civil revision petition is preferred under S. 75, Provincial Insolvency Act, against the order of the District Judge reversing the decision of the Insolvency Court which declined to interfere under S. 68, Provincial Insolvency Act, with a sale held by the Official Receiver. The petitioner here was the purchaser from the Official Receiver of the equity of redemption of certain properties of the insolvent which were bound by three mortgages, one of which had been the subject of a decree for sale. The other two had not been sued on. The insolvency sale was held on 27th September 1938 and was subject to these mortgages. On 14th September 1938, the insolvent filed the petition in the Insolvency Court. According to an unofficial copy of the petition which has been placed before me, the insolvent impleaded therein a large number of creditors, but did not implead the Official Receiver and he asked under Ss. 21 and 7 of Act 4 of 1938 that he should be declared an agriculturist, that the debts due to the creditors should be scaled down or that the Official Receiver should be asked to prepare schedules according to the Act after scaling down the debts; and the petition recites that the Official Receiver has advertised the properties for sale on 27th September 1938, and that loss will be suffered by the insolvent if the properties were sold before the debts are scaled down. On 27th September, the actual date of the sale, the insolvent filed an application before the Official Receiver in which he alleged that he was an agriculturist entitled to relief, no dividend having yet been declared, and also recited the fact of the petition already filed in the Insolvency Court; and under S. 20 of Act 4 of 1938 he prayed the Official Receiver to stay the sale. The Official Receiver did not stay the sale. The properties were knocked down to the present petitioner. Thereupon the insolvent filed the petition under S. 68, Provincial Insolvency Act, to set aside the sale.

This petition was rejected by the Insolvency Court on the ground that the insolvent was not a person aggrieved by the sale in the light of the decisions and that he was not therefore entitled under S. 68 to question the act of the Official Receiver whereby the sale was completed. There was an appeal to the District Judge against this order and the District Judge reversed the decision of the trial Court holding that, although in an ordinary case the insolvent was according to the authorities not aggrieved by the sale held in the course of administration of his estate, the enactment of Act 4 of 1938 has made a substantial difference, seeing that it confers the right upon the insolvent to apply for the scaling down of his debt, and the learned Judge goes further and says that the insolvent is entitled under S. 20 of the Act to get the proceedings stayed. It seems to me quite clear that S. 20 of Act 4 of 1938 has no application to sales by Official Receivers and cannot be invoked in favour of a person who is not a judgment-debtor seeking to stay the execution of a decree. It seems to me also clear that though S. 21 of Act 4 of 1938 lays down no procedure for scaling down debts due by the insolvent, the procedure should, as far as may be, be analogous to that prescribed for the reduction of other debts. It is apparent, therefore, that, if there was a debt embodied in a decree, the Court which passed the decree would have to be moved under S. 19 to reduce the decree and the Court which executes the decree must be moved under S. 20 to stay execution of the decree in so far as the debts of the insolvent are covered by the decrees of a Court.

There was at the time of this sale no procedure prescribed by the rules. Subsequently, rules have been enacted giving to the Court having jurisdiction a power to entertain applications for declaration of the amount due on any debt as scaled down under the Act, even though no suit has been filed therein. But as things stood when this sale was held, I have little doubt that it would be within the power of the Insolvency Court to entertain an application under S. 21 for the scaling down of those debts not covered by the decrees or suits in other Courts, and that with reference to those debts the Insolvency Court would be empowered to apply the principles of the Act and direct the Official Receiver to revise or frame the schedule in accordance with the result. One thing seems to be abundantly clear and that is that any proceedings under S. 21 of Act 4 of 1938 should not be taken behind the back of the Official Receiver by the insolvent himself. As the status of the insolvent has necessarily to be established before any relief can be obtained, it seems to me desirable that both the Official Receiver and the insolvent should be made parties to any application under this section. If an application is properly presented to the Insolvency

Court it would no doubt be within the competence of the Insolvency Court to give directions to the Official Receiver regarding the staying of realisation of assets where such realisation is legally to be effected by the scaling down process. Thus, if the Official Receiver was about to sell properties subject to mortgages which mortgages were liable to be scaled down, an application might be made to the Insolvency Court to give directions to the Official Receiver to suspend the sale until the scaling down process is completed; and, if the Official Receiver held the sale in disobedience to such directions, then, presumably, it would be a ground under S. 68 for setting aside the sale. I doubt whether the decision of the Full Bench in 49 Mad. 461[1] would necessarily stand in the way of a petition by the insolvent in such special circumstances. It would not be a case of the insolvent being aggrieved by the mere sale of the properties, but the insolvent being aggrieved by the act of the Official Receiver disregarding the directions of the Court obtained at the instance of the insolvent who is seeking the benefit of a special statutory procedure.

In the present case the procedure of the insolvent seems to have been wrong throughout. The mortgages to which the properties were subject were not all in the same position. The first mortgage was decreed. The Court which passed that decree might properly be moved under S. 19 to scale down the debt on proof that the insolvent, had he not been an insolvent, would have been entitled to the benefits of the Act. The other two mortgages had not been decreed. It is doubtful whether the Insolvency Court would have jurisdiction to scale down those secured debts and it might be argued that R. 2 of the rules framed under the Act cannot override the general law of mortgages, a matter on which I express no opinion. As to the rest of the debts, the question whether the Insolvency Court could or could not deal with them depends upon the nature of each debt, whether it was decreed or was the subject of a pending suit and if so, in what Court. It seems to me clear that the petition filed by the insolvent before the Insolvency Court to scale down all the debts, apparently including these mortgage debts, could not be maintained.

Moreover, the application to the Official Receiver under S. 20 praying for the stay of sale was clearly incompetent. An application might possibly have been made to the Official Receiver to move on behalf of the insolvent in the proper Court for the scaling down of those debts which could not be scaled down in the Insolvency Court and to move the Insolvency Court for the reduction of those debts which were within the competence of the Insolvency Court and in that application the Official Receiver might have been asked to obtain the directions of the Insolvency Court to suspend the sale pending the decision of the amount due. But it certainly does not follow from the mere fact that an insolvent's estate may claim the benefit of S. 21, that all administration of the estate must stop until there has been an adjudication on the claims nor does it necessarily follow because there is a sale being held subject to mortgages and the insolvent estate may have a right to get those mortgage debts scaled down, that the sale must necessarily await the scaling down process. It might be desirable to sell the properties subject to the mortgages, the purchaser taking a chance of the burden being reduced as a result of the scaling down process. However that may be, it seems to me clear that on the procedure adopted by the insolvent in this case there was nothing to prevent the Official Receiver from going on with the sale and that, though the sale was held by the Official Receiver with the knowledge that the insolvent had made a move in the matter of an application under S. 21 of Act 4 of 1938 it cannot be said that the Official Receiver acted illegally or irregularly in going on with the sale notwithstanding that knowledge. In this view I allow the civil revision petition with costs throughout and restore the order of the Insolvency Court.

C.R.K./G.N. *Petition allowed.*

1. ('26) 13 A.I.R. 1926 Mad. 556 : 94 I.C. 642 : 49 Mad. 461 : 50 M. L. J. 359 (F. B.), Hari Rao v. Official Assignee of Madras.

A. I. R. (29) 1942 Madras 256

SOMAYYA J.

Tirumalai Tirupati Devasthanams Committee represented by Commissioner — Appellant

v.

Tirupati Municipal Council represented by Commissioner — Respondent.

Second Appeal No. 53 of 1939, Decided on 9th September 1941, against decree of Dist. Court, Chittoor, in A. S. No. 163 of 1937.

(a) Madras District Municipalities Act (5 of 1920), S. 3 (3) — Compound-wall more than eight feet high is building by itself within S. 3 (3) — But compound-wall less than eight feet high is not — Detached wall (not compound-wall less than eight feet high) is building within S. 3 (3).

Under S. 3 (3) "building" includes a wall other than a boundary wall which is less than eight feet in height. So, a compound wall which is more than eight feet in height is a building by itself within S. 3 (3) though there may be no building inside but a compound wall less than eight feet in height is not a building by itself under S. 3 (3). A detached wall (which is not a compound wall less than eight feet high) would be a building under S. 3 (3). [P 257*g* ; P 258*e*]

(b) Madras District Municipalities Act (5 of 1920), S. 82 (2) Proviso—Compound wall is part of building — Cost of constructing compound wall must be considered in valuing building under S. 82 (2) Proviso.

Compound walls are part of the building and the cost of constructing the compound walls therefore should also be taken into consideration in valuing a building under S. 82 (2) Proviso : 12 C.L.J. 476 and 8 C.W.N. 487, *Expl.*; 12 C.L.J. 525, *Ref.* [P 258*e*]

V. Govindarajachari — for Appellant.

N. Gopala Menon and C. S. Govindaswami — for Respondent.

Judgment.—The respondent, the Municipal Council of Tirupati, assessed the electric power house owned by the appellant. This building is not ordinarily let, and hence the respondent proceeded to fix the annual value under the proviso to S. 82, cl. (2), District Municipalities Act. Under this proviso, the annual value of the premises shall be deemed to be 6 per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building less a deduction for depreciation. In fixing the "estimated present costs of erecting the building" the respondent took the costs of constructing the compound walls as well. This is objected by the appellant on the ground that the compound walls are not included in the word "building" in S. 82 of the Act and that "A compound wall" is not a building by itself as defined in S. 3, cl. (3) of the Act. Section 82 runs thus:

> Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto unless the owner of the building is a different person from the owner of such site or premises.
>
> (2) The annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year less a deduction, (in the case of buildings only) of ten percentum of such annual rent and the said deduction shall be in lieu of all allowance for repairs or on any other account whatsoever: Provided that (a) in the case of (i) any Government or railway building or (ii) any building of a class not ordinarily let the gross annual rent of which cannot, in the opinion of the Chairman be estimated, the annual value of the premises shall be deemed to be 6 per cent. of the total of the estimated value of the land and the estimated present cost of erecting the building after deducting for depreciation a reasonable amount which shall in no case be less than 10 percentum of such cost; (b) machinery (and furniture) shall be excluded from valuations under this section.

It is urged that in cl. (1) of S. 82 the word "building" is used so as to exclude even the site on which it stands and also the adjacent premises occupied as appurtenances thereto. The argument is that unless the expression "compound wall" comes within the words "other adjacent premises occupied as an appurtenance thereto;" its value cannot be taken into consideration and that compound walls cannot be called adjacent premises. But in S. 82, cl. (1) the Legislature is laying down a rule of single assessment for the building, site, and the adjacent premises, unless the latter are owned by a different owner. Where for instance the superstructure is owned by one and the land by another, the building proper alone should be valued and the owner of the building assessed. The site and the adjacent premises will be valued under other provisions and the owner thereof assessed in respect of them. In all other cases, the building, the site and the adjacent premises form a single unit of taxation. The word "building" is defined by S. 3, cl. (3) as including

> a house, outhouse, stable, latrine, shed, hut, wall (other than a boundary wall not exceeding eight feet in height) and any other such structure . . .

Under this definition, "building" includes a wall other than a boundary wall which is less than eight feet in height. So, a compound wall which is more than eight feet in height is a building by itself though there may be no building inside. The present compound wall is less than eight feet in height. Therefore, it is not a building by itself under S. 3, cl. (3). But the question for decision is whether in valuing a building under S. 82, cl. (2) proviso, the respondent can include the money spent on the compound walls which are less than eight feet in height and not whether the compound walls constitute a building by themselves even though there is no structure inside. I do not see why the compound walls should not be considered part of the building. A parapet wall is certainly included in the word "building". Why the money spent on compound walls should be excluded from the valuation of "building" it is difficult to see. Existence of compound walls certainly enhances the letting value of the building in cases of buildings which are ordinarily let. The decision of the Calcutta High Court in 12 C.L.J. 476[1] which is relied on by the appellant deals with a case of compound walls with no building inside;

1. ('10) 12 C.L.J. 476 : 7 I.C. 890 : 15 C.W.N. 84, Corporation of Calcutta v. Benoy Krishna Bose.

and these walls were sought to be assessed. That decision does not throw any light on the present question. Another decision of the Calcutta High Court relied upon is that in 8 C.W.N. 487.[2] The question was whether a detached wall built of masonry is not a "masonry building" as defined by S. 3, cl. (25) of Bengal Act, 3 of 1899. The term "building" was not defined in the then Calcutta Act but the term "masonry building" was defined as "any building other than a hut". The Judges held that the term "building" does not include a wall, i.e., that a detached wall is not a building. They took care to say this on page 488:

> We think the latter view is correct and that 'building' in the Act does not include 'wall'. The wall in question is a detached wall *and cannot be said to form part of any building* and it must be understood that the opinion we express in this judgment is confined to a detached wall such as we understand that to be to which this case refers.

I have underlined (here italicized) the above wording. It must be noticed that there was no building at all inside the wall or walls. This decision appears to be against the appellant. Compound walls cannot be said not to form part of the building. A compound wall is part of the building and is not a detached wall. If the building is one which is ordinarily let, the gross annual rent at which the building may reasonably be expected to let less a deduction of 10 per cent. for repairs is the annual value. If such a building has compound walls, the letting value is certainly higher than that of a building with no compound walls. There is no reason why if in the case of buildings ordinarily let, the compound walls are taken into consideration, they ought to be left out in the case of buildings which are not ordinarily let. Both the advocates rely on the way in which the word "building" or "house" is explained in different decisions. I do not consider that any useful purpose is served by adverting to these cases. Each case depends on the particular statute in which the word occurred. Thus, in 7 I.C. 436[3] the question was what all are comprised in the term "house" in the Partition Act. Compound walls would according to this decision be part of the "house". The compound walls of a house or building would certainly pass to the purchaser when the building is sold unless they are reserved.

No doubt whatever is built should not be taken to be a building by itself—a detached wall for instance. But even there, the particular statute may define a building so as to include a mere wall. Under the Madras District Municipalities Act, S. 3, cl. (3), it is conceded that a detached wall (which is not a compound wall less than eight feet high) would be a building. Having regard to the purpose and intendment of the Act and of the proviso to cl. (2) of S. 82, I hold that the compound walls are part of the building and the cost of constructing the compound walls should also be taken into consideration. The second appeal fails and is dismissed with costs. No leave.

C.R.K./G.N. *Appeal dismissed.*

2. ('04) 8 C.W.N. 487, In the matter of Corporation of Calcutta v. Jojeshwar Laha.
3. ('10) 12 C.L.J. 525 : 7 I.C. 436, Khirode Chandra v. Saroda Prosad.

A. I. R. (29) 1942 Madras 258

LEACH C. J. AND HAPPELL J.

T. K. Nallamuthu Pillai and others — *Appellants*

v.

R. K. Thirumalai Ayyangar and others — *Respondents.*

Letters Patent Appeal No. 45 of 1940, Decided on 24th October 1941, against judgment and decree of Wadsworth J., in S. A. No. 542 of 1937, D/- 23rd July 1940.

Custom—Irrigation rights — Lands irrigated by water from tank—Defendant's lands remaining submerged for weeks during rains under water spread from tank — Defendant constructing bunds to prevent submersion—Erection of bunds interfering with customary supply of water to lands of plaintiff and other ryots in ayacut — Plaintiff held entitled to injunction — Principles of English common law held inapplicable.

The parties to the dispute were ryots cultivating lands in the neighbourhood of a tank. From time immemorial the lands cultivated by the defendants had been submerged for several weeks in the year after the tank had filled as the result of the rains. The withdrawal of water from the tank for the purpose of the cultivation of the lands falling within the ayacut and cultivated by the plaintiffs caused the water to recede gradually from the defendants' lands and when this had happened they were fit for cultivation. The defendants and their predecessors had accepted tenancies of these lands knowing that they would be completely submerged for part of the year. The defendants erected bunds to prevent the submersion. This caused some of the water in the tank to escape over the weir and lessened the supply which the plaintiffs in the ayacut were accustomed to receive. The plaintiffs claimed that they were entitled by prescription and custom to prevent the defendants interfering with the spread of the water in the tank:

Held that (1) the principles of English common law could not be applied in India to questions affecting the rights of ryots to their customary supply of water for the purpose of cultivation the conditions in England being entirely different, the law on such matters being determined in India by custom and

customary right: ('32) 19 A. I. R. 1932 Mad. 532, *Approved.* [P 259*g*,*h*; P 260*a*]

(2) the action of the defendants in reality amounted to interference with the bed of the tank because their lands for several weeks in the year formed part of the bed of the tank and since as the result of the construction of the tank generations ago the plaintiffs and other ryots of the ayacut had become entitled to have their lands irrigated from it anyone who interfered with their customary supply was interfering with rights recognized by law and therefore was subject to the injunction of the Court and the plea that the defendants were merely protecting their own property could not be accepted: 7 M. H. C. R. 37, *Disting.* [P 260*b*,*c*]

K. V. Sesha Ayyangar and J. S. Vedamanikkam — for Appellants.

Advocate General and K. R. Rama Ayyar — for Respondents.

Government Pleader — for the Government.

Leach C. J. — The parties to this appeal are ryots cultivating lands in the neighbourhood of Kadamba tank in the Tinnevelly District. The tank which is a large one is fed from a river through a channel flowing into the tank at its northern extremity. A bund running from north to south causes the water to spread during the monsoon season to a line beyond the boundaries of the lands cultivated by the appellants. It is admitted that from time immemorial these lands have been submerged for several weeks in the year after the tank has filled as the result of the rains. The withdrawal of water from the tank for the purpose of the cultivation of the lands falling within the ayacut causes the water to recede gradually from the appellants' lands and when this has happened they are fit for cultivation. The appellants and their predecessors have accepted tenancies of these lands knowing that they would be completely submerged for part of the year. In 1898 the appellants' predecessors erected bunds to prevent the submersion. This caused some of the water in the tank to escape over the weir and lessened the supply which the ryots in the ayacut were accustomed to receive. They naturally objected to the erection of these bunds and as the result of their objection the revenue authorities caused them to be demolished. Notwithstanding the action of the revenue authorities similar bunds were erected in 1899, 1904, 1907 and 1924. Except in the year 1924 the revenue authorities stepped in immediately and caused the protective earthworks to be demolished. In 1924 however, the revenue authorities refused to interfere as they considered that the bunds erected by the appellants were merely field ridges and the loss of water was inconsiderable. The question was not finally decided until 29th March 1927 when the Board of Revenue agreed with the Subordinate Revenue Officers that no substantial loss had been suffered by the ryots in the ayacut as the result of the erection of the bunds. The Board's order caused respondents 1 to 4 who are ryots cultivating lands within the ayacut to file the suit out of which this appeal arises. There are concurrent findings of the Courts below that the bunds are more than field ridges and that the respondents have in consequence suffered material diminution in their customary supply of water. It is now clear that the Board was misinformed.

The suit was filed in the Court of the District Munsif of Srivaikuntam. The plaintiffs claimed that they were entitled by prescription and custom to prevent the appellants interfering with the spread of the water in the tank. The District Munsif found against the plaintiffs and dismissed the suit. On appeal the Subordinate Judge held that the District Munsif was wrong and issued a mandatory injunction requiring the appellants to remove the bunds which they had erected. The appellants then appealed to this Court. The appeal was heard by Wadsworth J. who agreed with the Subordinate Judge, but gave a certificate which has permitted the present appeal to be filed under Cl. 15 of the Letters Patent. Much has been said in the course of the litigation with regard to rights which are recognized by the English Common Law, and in this Court the learned advocate for the appellants has contended that an owner of land has always the right under the common law of England to prevent his land being submerged. Assuming this to be so, it is, however, manifest that principles which can be applied in England are not always applicable here. The conditions in England are very different from the conditions in this country and the Court must have regard to the principles which have been applied in India when questions have arisen affecting the rights of ryots to their customary supply of water for the purpose of cultivation. In many parts of the Madras Presidency the storage of water in tanks is essential if crops are to be raised, and agriculture provides the means of livelihood for the vast majority of the population. The application of English rules of law was fully discussed by Wallace J. in 36 M. L. W. 408,[1] where he stated that the whole system of tank irrigation and the rights of ryots to

1. ('32) 19 A.I.R. 1932 Mad. 532 : 140 I.C. 28 : 36 M. L. W. 408, Seshadri Iyengar v. Narasimhachari.

water for irrigation has no counterpart in a England and had no place in the English Common Law, the law on such matters being determined in India by custom and customary right. He pointed out that it would generally be found that the system is so self-contained that any attempt to alter it on behalf of an individual who may have a private grievance is almost certain to react to the detriment of the ryots as a body. He also drew attention to the fact that submersion of lands on the foreshore of a tank when it is full is no uncommon occurrence and is a feature of the recognized irrigation system. With these remarks we find ourb selves in full agreement.

It cannot be denied that if the appellants are allowed to prevent the Kadamba tank reaching its full capacity during the rains the plaintiffs and other ryots in the ayacut will suffer because the water which would otherwise spread over the appellants' lands will be forced over the weir and lost so far as the ayacut is concerned. The action of the appellants in reality amounts to interference with the bed of the tank because their lands for several weeks in the year form part of the bed of the tank. As the result of the construction of this tank generations ago the c ryots of the ayacut have become entitled to have their lands irrigated from it and anyone who interferes with their customary supply is interfering with rights recognized by law and therefore is subject to the injunction of the Court. The action of the appellants in erecting these bunds has resulted in a material loss of water to which the ryot respondents are entitled. That is the overriding factor and the plea that the appellants are merely protecting their own property cannot be accepted. The appellants agreed to become tenants of these lands possessing full knowledge that for part of the year they would be submerged and they d have no real grievance quite apart from the principles which govern the case. In the course of the arguments, the learned advocate for the appellants laid great stress on 7 M. H. C. R. 37,[2] but when the judgment in that case is fully understood it will be seen that it does not help the appellants in any way. There a tank used for the irrigation of the lands of the plaintiffs obtained part of its water from rain falling on the lands of certain of the defendants. The bund of the tank threw back the waters flowing into it on to the lands of these defendants and remained there until the water in the tank e fell sufficiently to allow it to drain off. These defendants, through the agency of the Government, constructed a channel which prevented the water over-flowing their lands, but conducted it back to the tank without loss to the plaintiffs, who, however, claimed to have the former state of affairs restored on the ground that they had a prescriptive right to throw back the water on to the defendants' lands and to keep it there until required for use. This contention was rejected. In the course of the judgment it was said that water not running in a defined stream is the absolute property of the owner of the land of which it forms part, and before it f has reached a defined stream he may drain it off or put it to what purpose he pleases, the decisions in (1856) 25 L. J. Ex. 33[3] and (1856) 25 L. J. Ex. 115,[4] being referred to. That may perhaps have been the right principle to apply in that case as the construction of the channel did not cause interference with the rights of others, but here there is interference with the rights of others and the principle there relied on is inapplicable.

Inasmuch as the appellants by their action have interfered with the rights of the plaintiff-respondents we hold that the plaintiff-respondents are entitled to reliefs granted, g which means that the appeal fails. Consequently, it will be dismissed with two sets of costs, one set to be paid to the plaintiff-respondents and one set to the Secretary of State who has been made a party to the suit and has opposed the appeal.

C.R.K./G.N. *Appeal dismissed.*

2. ('74) 7 M.H.C.R. 37, Robinson v. Ayya Krishnamachariar.

3. (1856) 11 Ex. 369 : 25 L. J. Ex. 33, Rawstron v. Taylor.

4. (1856) 11 Ex. 602 : 25 L.J. Ex. 115, Broadbent v. Ramsbotham.

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* A. I. R. (29) 1942 Madras 260

VENKATARAMANA RAO J.

Thangathammal — Appellant h

v.

Veerama Reddiar — Respondent.

Appeal No. 157 of 1939, Decided on 26th September 1941, against appellate order of Sub-Judge, Trichinopoly, D/- 14th November 1938.

*** (a) Hindu law—Debts—Creditor succeeding as heir to debtor—Effect — Principle of retainer applies whether heir is limited owner or absolute owner.**

Under the Hindu law, when a person dies, his property vests in his heir subject to the obligation of paying the debts of the deceased. Where the heir happens to be a creditor of the deceased, there is nothing in Hindu law which says that the moment the heir succeeds to his debtor, he forgoes his debt. The principle of retainer applies and the heir may

retain out of the assets which he has got in his possession, the amount of the claim for which he cannot sue. So much of the property as is available in his hands must be deemed to have been appropriated by him and only the net balance of the estate must be deemed to have vested in him. So that if any other creditor brings a claim for his debt he will be entitled to assert the right of retainer and plead that the creditor can only claim payment from and out of the balance of the assets in his hands after deduction of his debt. The fact that the heir is a limited owner would not make any difference in the application of this principle : *English and Indian case law referred.* [P 262*b*; P 264*b*,*g*,*h*; P 265*a*]

* (b) Civil P. C. (1908), Ss. 73, 47 — Creditor who had attachment before judgment obtaining decree and succeeding debtor as heir — Decree obtained by another creditor against such heir as representative of debtor and property in his hands sold in execution — Whether heir is entitled to claim rateable distribution in sale proceeds explained.

A who had obtained an attachment before judgment got a decree against *B* and subsequently on death of *B* succeeded to him as his heir. *C*, another creditor of *B*, obtained a decree against *A* as heir and legal representative of *B* and in execution sold a property belonging to *B*. *A* who had also put in an application for execution applied for rateable distribution in the sale proceeds :

Held that though *A*'s execution application was still pending, no order could issue thereon because he could not have execution against himself. The ground on which execution is denied is that *A* being the same hand to receive and to pay, the debt due to him must be deemed to have been paid from and out of the assets in his hands and therefore it must be deemed to have been satisfied. The question whether the decree has been satisfied is one which should be gone into. If *B* had left assets other than the property which was sold sufficient to satisfy *A*'s decree debt, *A*'s claim must be disallowed. But if the only asset that he left was the property which was sold, so much of the property that would be necessary to satisfy *A*'s debt must be deemed to have been appropriated for his debt and only the balance will be available for payment to *C*. And though S. 73 might not apply because the decree must be held to have been satisfied and therefore execution could not issue, still *A* was entitled to urge his claim under S. 47, being a party to the decree and prevent *C* from appropriating the whole of the sale proceeds for satisfaction of his debt. Since *A* had chosen only to ask for a rateable distribution, his claim to that limited extent was perfectly justified. But before a rateable distribution could be ordered, an enquiry must be held as to whether *B* left any other estate besides the property that had been sold, so that if it be found that there were other assets of the judgment-debtor which would cover the value of *A*'s debt, to the extent it must be deemed to be satisfied and only for the balance he could claim rateable distribution; if there were no other assets of the judgment-debtor, he *(A)* must be allowed to participate in the sale proceeds along with *C*. [P 264*b*; P 265*a*,*d*,*e*,*f*; P 266*a*,*b*]

T. V. Ramanatha Iyer and T. S. Venkatarama Iyer — for Appellant.

K. V. Sesha Ayyangar — for Respondent.

Judgment. — This appeal raises a question of some difficulty. The question is whether the appellant is entitled to a rateable distribution by virtue of her being the holder of a decree in O. S. No. 334 of 1934 on the file of the District Munsif of Thuraiyur against one Ramaswami Pillai from and out of the sale proceeds of property realised in execution of a decree in S. C. S. No. 340 of 1936 on the file of the said Court. The said Ramaswami Pillai was the brother of the appellant. The decree in O. S. No. 334 of 1934 was obtained by the appellant against the said Ramaswami Pillai who died subsequent to the decree, and the appellant became his heir and representative. The decree in S. C. S. No. 340 of 1936 was obtained by the respondent against the appellant as the heir and representative of the said Ramaswami Pillai in respect of a debt due by him. The respondent in execution of his decree attached the immovable property belonging to Ramaswami Pillai. The property was sold and the sale proceeds were deposited into Court. The appellant as the decree-holder in O. S. No. 334 of 1934 applied for rateable distribution. From the affidavit filed by her, it appears that she obtained an attachment before judgment of the said property in her suit and the said attachment was subsisting on the date of sale. The attachment must, therefore, have been obtained during the lifetime of Ramaswami and after the decree it would enure to her benefit under O. 38, R. 11, Civil P. C. She has stated in her affidavit that she filed an execution petition and the same was pending on the date of her application for rateable distribution. The learned District Munsif allowed rateable distribution to her; but his order was reversed by the learned Subordinate Judge of Trichinopoly. In the course of the order the learned Subordinate Judge observes thus :

As soon as Ramaswami Pillai died, the petitioner respondent (the appellant) became his heir and legal representative. In other words, in the decree which the petitioner respondent obtained against Ramaswami Pillai she became both the judgment-creditor and the judgment-debtor. The result is, I think, a total merger. . . . . That merger, I think, has taken place as soon as Ramaswami Pillai died and he died long before the petitioner respondent filed the petition E. A. No. 404 of 1937 from which this appeal arose. So on the date that petition was filed petitioner's decree was not in existence as it has become merged long before that date and thereby ceased to exist. . . . . So it follows that she was not entitled to apply for rateable share.

This appeal is against the said decision and the question is whether the view of the learned Subordinate Judge is tenable. Mr. Ramanatha Iyer on behalf of the appellant contends that the doctrine of merger on which the lower appellate Court relied is

not applicable because the appellant, when she succeeded to the estate of Ramaswami Pillai as his heir, took only a limited interest analogous to that of a widow's interest under the Hindu law and further, the doctrine of merger should not be allowed to operate when there are also other creditors of the deceased besides the appellant. Mr. K. V. Sesha Ayyangar on behalf of the respondent contends that where a debtor and creditor happen to be the same person, the doctrine of merger will operate and the only remedy of the creditor who succeeds as heir to the debtor, if at all, is to file a suit for administration and get her rateable share of the debt and the remedy by way of rateable distribution is not open to her because the decree by reason of the merger was no longer executable. In order to test the soundness of these contentions it is necessary to examine the legal effect of a creditor succeeding as heir to his debtor under the Hindu law by which the parties are governed. Under the Hindu law when a person dies, his property vests in his heir, irrespective of his will. But the heir takes the property subject to the obligation of paying the debts of the deceased. Dealing with the right of an heir under the Mahomedan law their Lordships of the Privy Council in A.I.R. 1938 P.C. 169[1] at p. 173 remarked thus :

> That the right of an heir under the Mahomedan law is a share in the estate after debts and valid legacies have been provided for is undeniable . . . . But in providing that the heir takes a share in the *nett estate* after deduction of the debts of the deceased, the Mahomedan law is in line with other laws including the Hindu law.

(The italics are mine). Therefore the debt due to an heir is also one of the debts which will have to be deducted in finding out the net residue taken by an heir. Can it therefore be said that when a Hindu heir to whom the deceased was indebted succeeds to his property only the net balance after deduction of such a debt is taken by the heir ? Spencer J. seems to think that only the net balance would vest in him : *vide* the observations in 44 M.L.J. 171[2] at p. 174. In English law where the creditor of the deceased happens to be his executor, what is known as the principle of retainer is applied. What is 'retainer' is thus explained by Cotton L. J. in (1886) 30 Ch. D. 15[3] at p. 19 :

> What is retainer ? It is this, that an executor having a claim against the testator's estate is not to be put in a worse position than any other creditor, who by suing and obtaining a judgement against the executor could obtain priority, while the executor not being able to sue himself could not obtain priority. The right of retainer applies to that which the executor has in his hands, or which has been paid into Court while he was executor, and which but for that payment would have come into his hands. The word 'retainer' speaks for itself. When the personal representative is also a creditor of the estate he may retain out of the assets which he has got in his possession, the amount of the claim for which he cannot sue, and when money has been paid into Court during the life of the executor, the Court does not withdraw from the executor his right in respect of that money. The Court treats that payment into Court as in effect a payment into the executor's own hands.

In (1890) 44 Ch.D. 262[4] at p. 272 Lindley L. J. stated the origin of the principle thus :

> A man cannot sue himself, and out of that the law developed the right of an executor to retain a debt due to him from the testator.

He further explained it in (1899) 2 Q.B. 347[5] at p. 352 thus :

> The older common law authorities go far to shew that if an executor was a creditor of his deceased testator and had assets in his hands sufficient to pay his debt such debt was treated as extinguished. Sufficient assets to pay his own debt and properly applicable thereto being in the executor's hands, such assets were treated without more as applied by him to such payment. Blackstone says so distinctly. His words are 'so much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose.' Plowden goes further, and says that the property in the assets is changed.

On this principle it has been held that if the assets in his hands were insufficient to pay his debt he is entitled to retain the whole of it in satisfaction of his debt. In English law it is also well settled that an executor can assert the right of retainer until distribution of the estate; it is not lost even by a decree for the administration of assets (1 Sm. and Giff. 415) and Lindley L. J. in (1899) 2 Q.B. 347[5] at p. 353 points out when a right can be asserted by the executor and when it is lost :

> It is quite plain from these authorities that the executor's right to retain assets in his hands was, as against him, treated as enforced as soon as he could properly enforce it. It would be very strange if it were held that he had lost his right because he had done nothing to assert it before there was any occasion to do so. It is only when some one seeks to take assets out of the executor's possession that it becomes necessary for him to assert his right of retainer; and, if he asserts it then his right must be protected, unless, of course, he has released it or done something to deprive himself of it.

1. ('38) 25 A.I.R. 1938 P.C. 169 : 174 I.C. 977 : 13 Luck. 494 : 32 S.L.R. 772 : 65 I.A. 219 (P.C.), Kazim Ali Khan v. Sadiq Ali Khan.
2. ('23) 10 A.I.R. 1923 Mad. 340 : 72 I.C. 194 : 44 M.L.J. 171, Sami Iyer v. Ramaswami Chettiar.
3. (1886) 30 Ch.D. 15 : 54 L.J.Ch. 904 : 53 L.T. 410, In re Crompton; Norton v. Crompton.
4. (1890) 44 Ch.D. 262 : 59 L.J.Ch. 661 : 62 L.T. 817 : 38 W.R. 417, In re Baker; Nichols v. Baker.
5. (1899) 2 Q.B. 347 : 68 L.J.Q.B. 801 : 80 L.T. 742 : 15 T.L.R. 407 : 47 W.R. 561 : 6 Manson 277, In re Rhoades; Ex parte Rhoades.

What happened in that case was, the executrix after collecting a sum of £1100 paid the amount to the trustee in bankruptcy. The testator was indebted to her in the sum of £600. It was held that only the balance of £1100 less the sum of £600 vested in the trustee in bankruptcy and she was entitled to be paid the £600. The same principle was applied before the Land Transfer Act to the case of an heir to whom the testator owed a specialty debt, the foundation of the rule being that he cannot sue himself: *vide* the observations of Cotton L. J. in (1885) 27 Ch. D. 478[6] at p. 481. The question is how far these principles can be applied to Hindu law and whether there is anything in that law which precludes the application of those principles. In a very early case in 5 ALL. 27[7] a question arose as to the legal effect of one of several joint judgment-debtors acquiring only a partial interest in the decree by right of inheritance. It was there held that the effect was not to extinguish the judgment debt in its entirety which could only happen if he acquired the whole debt but so much only as the judgment-debtor had acquired. Mahmood J. in the course of the judgment remarked thus :

> We are prepared to hold that, when on account of death a creditor becomes heir to a debtor or a debtor becomes heir to a creditor, and thus the two opposite characters of debtor and creditor become united in the same person, the obligation to pay money may be regarded as extinguished. But this rule, even though applied in its full scope to judgment-creditors and judgment-debtors, falls short of showing that when the debtor inherits the rights of only one of his judgment-creditors the effect is to extinguish the entire judgment-debt. The rule, no doubt, owes its origin to the confusion of the Roman law.

In 10 ALL. 570[8] the same learned Judge affirmed this principle. The principle of these decisions was followed in our High Court : *vide* 44 M. L. J. 171[2] and I. L. R. (1939) Mad. 73.[9] In 44 M. L. J. 171[2] the question arose thus. There was a decree for mesne profits in favour of the plaintiffs against defendant 1 in the suit out of which the appeal, with which the learned Judges were dealing, arose. Defendant 1 died subsequent to the decree and his mother defendant 2 succeeded to his property as his heir. Subsequently, defendant 2 surrendered the property to the plaintiffs. During the course of the litigation a person stood surety for the payment of the mesne profits and executed a surety bond. The question was whether the plaintiffs could recover the amount of the mesne profits from the surety. The learned Judges held that he could not on the ground that the plaintiffs having become the heirs of defendant 1 the debt must be deemed to have been paid out and extinguished and as the principal obligation became extinguished, the surety's obligation also became extinguished. Venkatasubba Rao J. in the course of the judgment made the following observations :

> The plaintiffs became the legal representatives of their debtor and they were, therefore, entitled to execute the decree against themselves to the extent of his property which had come to their hands and the plaintiffs must accordingly be deemed to have obtained satisfaction of their decree. The circumstance that the plaintiffs did not actually take out execution against themselves and recover the sum in execution is immaterial and I am, therefore, satisfied that the principal obligation was in this case extinguished.

Spencer J. observed thus :

> What they must be deemed to have got in succession by defendant 1's untimely death and his mother's release deed was the balance of his estate after wiping out his debt to them.

In I. L. R. (1939) Mad. 73,[9] Venkatasubba Rao J. had to deal with a case where a decree-holder became an heir of one of the judgment-debtors. After observing that O. 21, R. 16, Civil P. C., would not in terms apply, he remarked that the principle which that section would embody was that,

> where the decree-holder's right and the judgment-debtor's liability became united in one and the same individual, it stands to reason that the decree should be treated as satisfied,

but a distinction should be made between a partial and complete satisfaction and the decree must only be treated as satisfied pro tanto, that is, to the extent of his share. This was the view taken in the early Allahabad cases and also in the recent decision of that Court reported in 54 ALL. 448.[10] But in a case in 16 M. L. W. 678[11] Spencer J. took the view that where a creditor was a limited owner like a Hindu widow there would be no extinguishment. In that case one N died leaving a widow and a daughter. The widow succeeded to the estate of N and she was also a creditor of her husband. The widow died subsequently leaving a will by which

6. (1885) 27 Ch. D. 478 : 53 L. J. Ch. 991 : 51 L. T. 523 : 33 W. R. 18, In re Illidge ; Davison v. Illidge.
7. ('82) 5 All. 27 : 1882 A. W. N. 140, Banarsi Das v. Maharani Kuar.
8. ('88) 10 All. 570 : 1888 A. W. N. 231, Kudhai v. Sheo Dayal.
9. ('38) 25 A. I. R. 1938 Mad. 814 : 177 I. C. 331 : (1938) 2 M. L. J. 156 : I. L. R. (1939) Mad. 73, Sankaralingam v. Arumugham Pillai.
10. ('32) 19 A. I. R. 1932 All. 704 : 137 I. C. 50 : 54 All. 448 : 1932 A. L. J. 230, Asia Bibi v. Aziz Ahmed.
11. ('18) 16 M. L. W. 678 : 52 I. C. 842, Chidambaram Pillai v. Meenakshi Ammal.

a she assigned that debt to the plaintiff. The plaintiff brought a suit to recover the amount from the daughter who succeeded to the estate of her father after the widow's death. Held he was entitled. The ground on which the learned Judge put it was that the principle of English law of retainer which applies to executors would not apply to Hindu widows as such, that the question of merger was one of intention and that it was not for the advantage of a widow to pay off her stridhanam debt out of the income of her husband's estate as she was entitled to enjoy the whole of the income of the estate.

This principle of retainer could not be b considered to be a peculiarity of English law. It is founded on a general principle of jurisprudence, namely, where it is the same hand that has to receive and pay, he cannot sue himself and the law must infer satisfaction of the debt on the ground that the debt must be deemed to have been paid from and out of the assets in the hands of the representative whether he be the executor or heir. The fact that the heir is a limited owner would not make any difference in the application of the principle. The principle is founded on common justice. In (1932) A.C. 365[12] at p. 370 Lord Atkin refers to the case of *Woodward* c v. *Darcy*[13] for the reason underlying this principle and states thus :

> The reason for it is to be found in the report in Plowden of the opinions of the Judges of both the King's Bench and the Common pleas in *Woodward* v. *Darcy*[13] given in 1547 after discussion in several previous terms. The explanation is that without the right the executor would be bound to pay the other debts of the testator and to leave the testator's debt to himself unpaid.

In (1547) 75 E. R. at p. 284[13] the scope of the principle is thus explained in a passage which in spite of its length I shall quote as it is informing and instructive :

> If the execution of the administration should extinguish the debt, this would be derogatory to testaments, and to the souls of testators. To testa- d ments for that executors would refuse rather than lose their debts and without an executor a will is null and void; and to the souls of testators, for that if the executor takes upon him the administration which is an act of charity, then thereby the just debt due from the testator to the executor, would remain for ever unpaid, which would be dangerous for the soul of the testator. So that such a law would induce a man to omit charity and friendship, or if he did execute it, he would be ungratefully required with the loss of a just debt due to him, and would be forced to pay all the other debts of the testator, and to leave the testator's debt due to himself unpaid. But our law is not so unreasonable or uncharitable for the executor may retain assets e to pay himself, notwithstanding he may not bring an action to recover it for true it is that the action is gone by the act of administration. . . . . But the reason why the action is lost for ever is, because in judgment of law he is satisfied before, for, if the executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered and vested in himself, that is, he has them as his own proper goods in satisfaction of his debt, and not as executor. So that there is a transmutation of property, by the operation of law, without suit and execution, for, inasmuch as Windham here could not have an action against himself as executor, nor have execution against himself as executor, the operation of the law is equivalent to a recovery and execution for him, and the property is as strongly altered as it could be by recovery and execution. So that the reason why the action is f gone is, because, he has full satisfaction by the alteration of the property. And although the debt was a chose in action, yet it is not so in him as executor, for his action is totally gone for the reason aforesaid, in which respect the chose in action has become converted into a chose in possession and a satisfaction executed. Wherefore Windham might well retain goods to satisfy his own debt.

No doubt, Wright J. in (1898) 1 Q.B. 282[14] doubted whether it was the law that the property in the assets was absolutely altered without something showing assent or appropriation by the executor. Lindley L. J. seemed to approve of it and Lord Atkin in referring to *Woodward* v. *Darcy*[13] did not express any doubt about it. Whether in the g case of a creditor executor the principle of alteration of property should be held to be applicable or not, I do not see why it should not be applied to the case of a property vesting in an heir. However, the basis on which the debt is said to be extinguished is clear, that is, so much of the property as is available in his hands must be deemed to have been appropriated and only the net balance of the estate must be deemed to have vested in him. So that if any other creditor brings a claim for his debt he will be entitled to assert the right of retainer and plead the creditor can only claim payment from and h out of the balance of the assets in his hands after deduction of his debt. I do not see there is anything in the Hindu law which precludes the application of this principle. In fact this principle was applied in the Indian decisions referred to above.

In 49 ALL. 645[15] dealing with a case of a dower debt Ashworth J. expressed the view in which Mukerji J. concurred, that this

12. (1932) 1932 A.C. 365: 101 L. J. Ch. 186: 1931 B. & C. R. 167 : 146 L.T. 450 : 16 Tax. Cas. 681: 76 S. J. 146: 48 T. L. R. 261, Attorney-General v. Jackson.

13. (1547) 75 E. R. at p. 284.

14. (1898) 1 Q. B. 282 : 67 L.J.Q.B. 229 : 77 L. T. 775: 14 T.L.R. 125: 46 W.R. 351: 4 Manson 337, Gilbert In re; Gilbert Ex parte.

15. ('27) 14 A.I.R. 1927 All. 459: 101 I.C. 507 : 49 All. 645 : 25 A. L. J. 359, Tamiz Bano v. Nand Kishore.

principle would apply to India: *vide* the observations of Ashworth J. at pp. 650 and 651. As remarked in *Woodward* v. *Darcy*[13] it would be unreasonable and uncharitable that an heir should forego his debt and that the other creditors should be paid. So far as I am able to see, there is nothing in the Hindu law which says that the moment an heir succeeds to his debtor, he foregoes his debt. The appellant in this case is entitled to say that it is only the net balance of the sale proceeds of the house that will be available for the payment of the debt of the respondent if the suit property was the only property left by the deceased Ramaswami. But she claims rateable distribution. The question is can she claim it? In order that a decree-holder may claim rateable distribution the following requisites are necessary; (1) he must have made an application to the Court which holds the assets before their receipt for the execution of his decree; (2) it must be a decree for the payment of money; (3) it must be against the same judgment-debtor; and (4) he has not obtained satisfaction of it. In this case, she has applied for the execution of the decree before the receipt of the assets and it is pending. It is a decree for payment of money. Though her decree was obtained against Ramaswami and the decree of the respondent was obtained against her as the legal representative of Ramaswami, it must be held to be against the same judgment-debtor. In regard to the question of satisfaction, her case is that no satisfaction of the decree has been entered up and the decree must be deemed to be subsisting. The contention of Mr. Sesha Ayyangar is, though the execution application is still pending, no order can issue thereon because the appellant cannot have execution against herself. This again brings in the theory of satisfaction because the ground on which execution is denied is that she being the same hand to receive and to pay the debt due to her must be deemed to have been paid from and out of the assets in her hands and therefore it must be deemed to have been satisfied. As pointed out in William on Executors, this remedy arises from the mere operation of law (Vol. 1, Edn. 11, page 797).

In the language of the learned Judges in *Woodward* v. *Darcy*,[13] "the operation of the law is equivalent to a recovery and execution." The question whether the decree has been satisfied is one which has to be gone into. If Ramaswami had left assets other than the property which was sold sufficient to satisfy the decree debt of the appellant, her claim must be disallowed. But if the only asset that he left was the property which was sold, so much of the property that would be necessary to satisfy her debt must be deemed to have been appropriated for her debt and only the balance will be available for payment to the respondent. Though the contention of Mr. Sesha Ayyangar may be right in so far as S. 73 may not apply because the decree must be held to have been satisfied and therefore execution cannot issue, still she is entitled to urge her claim under S. 47, Civil P. C., and prevent the respondent from appropriating the whole of the sale proceeds for satisfaction of his debt. The fact that she has chosen to claim rateable distribution should not stand in the way of her getting this limited relief which she has claimed.

In this connexion I would like to refer to 26 Mad. 792[16] which appears to me to be a case in point. The facts in that case were as follows: A succeeded to the property of his mother B. C, a creditor of B, obtained a decree against A for the amount payable from and out of the assets of the mother in his hands. C then attached in execution of his decree certain jewels in the possession of A. A admitted liability of the jewels to attachment but claimed a lien on the sale proceeds of the jewels to the extent of Rs. 1562; Rs. 361 paid by him to redeem two of the jewels which had been pledged by the mother; Rs. 110 lent to the mother for remaking jewel No. 11; Rs. 1091 paid by him in discharge of debts contracted by the mother. The District Judge took the view that A's contention that the assets in his hands must be taken to be what was left after he had satisfied his own claims against the mother's estate was unsound, and he therefore disallowed the claim. On appeal Subramania Ayyar and Divis JJ. held that A was entitled to be paid out of the sale proceeds the sums which he proves he is entitled to. In regard to the debt owing to him they remarked thus:

> In regard to the Rs. 110 said to have been advanced to the mother in her lifetime, the appellant A has a right to pay himself out of the assets *as he cannot sue himself*.

(The italics are mine.) It will thus be seen that the learned Judges in that case applied the principle of retainer. They set aside the order of the District Judge and remanded the case for enquiry as to whether A in fact discharged the debt of the mother and if so, to

16. ('03) 26 Mad 792 : 13 M.L.J. 258, Veerasokkaraju v. Papiah.

what extent. Therefore, if the ratio decidendi of this case were to be applied to the present case, it follows that the appellant could have justly claimed that the amount payable to her under the decree should be paid first out of the sale proceeds and the balance only should be available for the respondent's decree. It was open to her to prefer this claim under S. 47, Civil P. C., being a party to the decree. Since she has chosen only to ask for a rateable distribution, her claim to this limited extent is perfectly justified. But before a rateable distribution can be ordered, an enquiry must be held as to whether Ramaswami left any other estate besides the property that has been sold, so that if it is found that there were other assets of the judgment-debtor which would cover the value of the appellant's debt to the extent it must be deemed to be satisfied and only for the balance she could claim rateable distribution, if there were no other assets of the judgment-debtor, she must be allowed to participate in the sale proceeds along with the respondent. I therefore set aside the decision of the learned Subordinate Judge and remand the petition of the appellant to the learned District Munsif of Thuraiyur for disposal in the light of the observations contained in this judgment. I direct each party to bear his or her costs throughout. Leave to appeal refused.

C.R.K./K.S. *Case remanded.*

C. P. C. —
(a) ('40) Chitaley, S. 52 N. 9.
(b) ('40) Chitaley, S. 73 N. 11a.

A. I. R. (29) 1942 Madras 266

SPECIAL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

M. K. Mahomed Ibrahim and another — *Petitioners*

v.

Commissioner of Income-tax, Madras — *Respondent.*

O. P. No. 8 of 1941, Decided on 25th Nov. 1941.

Income-tax Act (1922), Ss. 26 (2) and 23— Profits earned before year of account cannot be included in assessment.

The Income-tax Officer cannot include in the assessment profits, secret or otherwise, which have been earned before the year of account especially when no action has been taken under S. 34 of the Act with a view to collect tax on income which had escaped taxation. [P 267c,d]

K. Bhashyam Ayyangar and T. R. Srinivasan — for Petitioners.

K. V. Sesha Ayyangar — for Respondent.

Leach C. J. — The case for the Income-tax authorities set out in the reference by the Commissioner of Income-tax cannot be accepted. The facts are very simple. In the year 1936-37 one Muhammad Ibrahim was the agent of the Standard Oil Company in Trichinopoly. There were two agencies for the Burmah Shell Company in that district, one being conducted by Ramakrishna Chettiar and the other by G. Srinivasalu Naidu respectively. They had agencies in other places in South India and there was an agreement between them that Ramakrishna was to have the profits of the business done in the town of Trichinopoly. There was a further arrangement between Ibrahim and Ramakrishna. This was to the effect that they were to carry on business jointly without competition between themselves and to divide the profits made by them in the ratio of 48 : 52. The Income-tax Officer attempted to assess these three persons as a firm, but they objected and their objection prevailed. The consequence was that for that year they were assessed separately. Ramakrishna and Srinivasalu quarrelled in the course of that year and Ramakrishna filed a suit for the dissolution of his partnership with Srinivasalu. On 1st May 1938, Ibrahim and Srinivasalu commenced to trade jointly as a firm and on 7th February 1939 a formal deed of partnership was drawn up with effect from 1st May 1938. The firm was then registered under S. 26-A, Income-tax Act.

For the year 1938-39 the firm returned a loss of Rs. 7014 in respect of the year 1937-38. The firm was not, however, liable to assessment in respect of that year because it had not carried on business in the year of account. The Income-tax Officer appears to have treated the firm as being the successor to the businesses carried on by the two partners and Ramakrishna. The firm did not object to the course adopted by the Income-tax Officer, presumably because of the alleged loss in the year of account. The Income-tax Officer, however, refused to accept the figure of Rs. 7014. He added back certain sums which appeared in the books and had been carried forward from the books kept by Ibrahim. There were large sums entered in the suspense account in Ibrahim's books and the Income-tax Officer considered that these represented secret profits made when Ibrahim, Ramakrishna and Srinivasalu were carrying on business, not in partnership, but in conjunction with one another. These sums had received the attention of the Income-tax Officer when he was assessing Ibrahim in 1937-38. He considered the whole question then and came to the conclusion that Rupees

20,000 of the sums entered in the suspense account represented secret profits. He assessed Ibrahim accordingly.

When it came to assessing the firm of Ibrahim and Srinivasalu in 1938-39, the Income-tax Officer was not satisfied that the secret profits amounted only to Rs. 20,000 and he formed the opinion that Rs. 26,699 of the monies then appearing in the suspense account also represented secret profits. It was on this basis that he made his assessment. Objection was taken on the ground that the question of secret profits had been considered and decided in the previous year when Ibrahim was assessed and that the Income-tax Officer was not entitled to reopen the matter. This reference concerns the sum of Rs. 26,699. The Appellate Assistant Commissioner accepted the decision of the Income-tax Officer, as did the Commissioner who refused to state a case to this Court under S. 66 (2). Ibrahim and Srinivasalu then applied to this Court for an order directing the Commissioner to state a case under S. 66 (3). The Court directed that this should be done and framed the question as follows :

In including the sum of Rs. 26,699 in the amount of the taxable income for the year of assessment 1938-39 were the Income-tax authorities acting in accordance with law ?

It is obvious that the Income-tax authorities were not acting in accordance with law. Even assuming that there was justification for assessing the firm under S. 26 (2) the Income-tax Officer could not include in the assessment profits, secret or otherwise, which had been earned before the year of account and the sum of Rs. 26,699 had been earned before the year of account. This sum appeared in Ibrahim's books for the year 1936-37 and was included in the balance of the year 1937-38. It is true that the objection now stated was not taken by the assessees and that they were content to base their case on the fact that the secret profits question had been investigated and decided in the previous year. At the same time, the Income-tax authorities are not entitled to include in the assessment a sum of money which the law does not allow to be included. There was no action taken under S. 34 with a view to collect tax on income which had escaped taxation. The decision was merely to treat the Rs. 26,699 as profits earned by the firm in the year of account, which was certainly not the case. The question will be answered in the negative and the Commissioner will pay the assessees' costs, Rs. 250.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 267
SPECIAL BENCH

LEACH C. J., MOCKETT AND KUPPUSWAMI AYYAR JJ.

In re V, An Advocate, Madras.

Referred Case No. 41 of 1941, Decided on 15th December 1941.

Bar Councils Act (1926), S. 12 (1) — Rules under, framed by Madras High Court, R. 7— Direction that members of tribunal shall sign their finding is mandatory—Member of tribunal dying before completion of report — Tribunal ceases to be properly constituted—New tribunal should investigate de novo.

The direction in R. 7 that all the members of the tribunal shall sign their findings is mandatory. If a member of the tribunal dies before the report has been completed, that is, drawn up and signed, the tribunal ceases to be properly constituted and therefore its report cannot be considered. In such circumstances another tribunal must be constituted to investigate the charges de novo. [P 268*a*]

Advocate General — In support of Notice.

V. C. Gopalaratnam — for the Advocate.

Leach C. J.—The respondent is an advocate of this Court. Two charges of professional misconduct have been framed against him. These have been investigated by a tribunal constituted under the Bar Councils Act. The tribunal having considered the evidence drew up its report, but unfortunately one of the members, Mr. T. S. Venkatesa Iyer, died before the document was ready for signature. In these circumstances, the learned counsel for the respondent has taken a preliminary objection that the report is not one which this Court can consider, having been signed only by two members of the tribunal. He says that a new tribunal will have to be constituted and the case investigated de novo. Rule 7 of the rules relating to the procedure to be followed by tribunals or District Courts in cases referred to them for inquiry under the Bar Councils Act reads as follows :

(1) The tribunal or Court, having heard the evidence for the complainant and the respondent, shall report to the High Court its finding on each charge that has been framed, giving reasons for its finding.

(2) The findings of the tribunal, if unanimous, shall be signed by all the members of the tribunal. If the members of the tribunal differ in their findings or any of them, all the findings shall be reported to the High Court, being signed respectively by the members whose findings they are. The reasons for the findings shall be reported to the High Court in one report if the members of the tribunal are unanimous and in separate reports if their findings differ, provided that, whether their findings are unanimous or not, any member may record the reasons for his findings separately and the record so made shall be forwarded to the High Court with the other report or reports of the tribunal in the case.

The direction that all the members of the tribunal shall sign their findings is mandatory. Moreover, if a member of the tribunal dies before the report has been completed, that is, drawn up and signed, the tribunal ceases to be properly constituted. In these circumstances we cannot take into consideration the report before us and another tribunal will have to be constituted to investigate the charges.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 268
SPECIAL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

RM. N. S. Sinnaswami Pillai — *Petitioner*

v.

Commissioner of Income-tax, Madras — *Respondent.*

O. P. No. 4 of 1941, Decided on 24th November 1941: reference by Commissioner of Income-tax, Madras.

Income-tax Act (1922), S. 16 (3) (a) (iii) — Assets of married Hindu lady — There is no presumption that they are transferred to her by her husband out of love—Under S. 16 (3) (a) (iii) assessee husband must prove source of those assets—Assessee admitting that some of monies in his wife's account came from him—No proof that some of them came from other sources—Income-tax authorities held justified in including interest on monies in his income.

In the case of the assets of a married Hindu lady, there is no presumption in law that those assets are transferred to her by her husband out of love or affection. Under S. 16 (3) (a) (iii), it is incumbent upon the assessee to show the source of the monies standing in the name of his wife. Where the assessee has admitted that some of the monies appearing in the account of his wife came from him and has made no efforts to prove that some of the sums have come from other sources, it is impossible for the assessee to contend that there is no material on the record from which the Income-tax Officer could lawfully treat the interest on the monies appearing in the name of the wife as representing interest on assets transferred by the assessee to his wife otherwise than for adequate consideration. [P 269*d*,*e*,*f*]

V. Ramaswami Ayyar—for Petitioner.

K. V. Sesha Ayyangar—for Respondent.

Leach C. J. — For the year 1939-40, the assessee returned an income of Rs. 1,604-0-6 which had been arrived at after taking into account an alleged loss of Rupees 176-10-6 in respect of his moneylending business. In arriving at the figure of Rs. 176-10-6 the assessee deducted two sums, Rs. 511-12-6 and Rs. 808-4-6, said to have been paid to his two wives, Srirangammal and Kaveri Ammal, respectively. The Income-tax Officer allowed a deduction in respect of the amount paid to Srirangammal, but refused to allow a deduction in respect of Rs. 808-4-6 paid to Kaveri Ammal, the senior wife. The assessee married Kaveri Ammal some years before 1922 when an account in her name was opened in the assessee's books. From time to time moneys were paid into this account and interest was allowed on the balance in her favour. Section 16 (3) (a) (iii) provides that in computing the total income of an individual for the purpose of assessment there shall be included so much of the income of a wife as arises directly or indirectly from assets transferred directly or indirectly to her by the husband, otherwise than for adequate consideration or in connexion with an agreement to live apart. This provision was inserted in S. 16, by the Income-tax Amendment Act, 1937. Up to the time the amendment was made the Income-tax authorities were content to treat the monies standing in Kaveri Ammal's account in the assessee's books as her own monies, but the amendment of the Act altered the position very materially. If these monies had been received by the wife from her husband otherwise than for adequate consideration, the interest earned thereon became for the purposes of the Income-tax Act part of the husband's income.

The Income-tax authorities gave the assessee an opportunity of proving that the monies were her own and had not come from him in a manner which would attract S. 16 (3) (a) (iii), but beyond stating that the monies represented his wife's stridhanam the assessee took no steps. Two of the sums appearing in the account admittedly represent gifts from him. When the case was before the Appellate Assistant Commissioner of Income-tax, the assessee stated that he had no evidence to prove that the monies in the account represented sums received from her parents and not monies set apart by the assessee in her name. As the Assistant Commissioner refused to interfere with the order of the Income-tax Officer, the assessee applied to the Commissioner to state a case to this Court on certain questions which he regarded as being questions of law.

On 10th May 1940 the Commissioner wrote to the assessee pointing out that neither the Income-tax Officer, nor the Appellate Assistant Commissioner, questioned the statement that he had given monies to his wife or that she had become the absolute owner of the monies so given but the reason for including interest thereon in the assessment made on him was that under the law as it

stood the interest was to be treated as his income for the purpose of income-tax and reference was made to the amendment of S. 16 by the amending Act of 1937. The letter concluded :

> Your application for a reference to the High Court is presumably based on a misapprehension of the law on the subject. Will you please let me know whether in the light of the explanation now given you wish to press the application for a reference to the High Court.

In reply to this letter, the assessee wrote to the Commissioner on 24th May through his advocate taking up the position that gifts by a husband to his wife constitute the wife's stridhanam property and the income from such monies was not taxable. In the course of this letter, the assessee's advocate observed :

> According to my client's case, the amounts consisted of various gifts by the husband to the wife on the occasion of the marriage and on other auspicious occasions and also those given by the parents and other relations which were all invested with several inums and they were collected and realised and constituted into a single fund in the year 1922. Under the circumstances it is wholly ultra vires and illegal to disallow the deduction of interest this year contrary to what has been going on consistently and uniformly from 1922 onwards.

On 25th June the Commissioner wrote to the assessee's advocate with reference to his letter of 24th May. The Commissioner asked the assessee to produce such evidence as he could to prove that the amount not admitted to have been received by the assessee's wife from himself had actually been received from her parents or other relations as alleged. On 3rd July the assessee's advocate replied stating that the Commissioner would appreciate that on the construction placed by him on the section and its operation "the question now sought to be clarified by you by production of evidence does not arise." The assessee took no steps to adduce evidence in support of his contention that his wife had received some of the monies standing in her account in his books from her parents or other relations. Therefore the question which the Court is now called upon to decide is whether there are materials on the record on which the Income-tax Officer could lawfully treat the Rs. 808 as representing interest on assets transferred by the assessee to his wife otherwise than for adequate consideration.

The position is this. The assessee has admitted that some of the monies appearing in that account came from him and he has made no efforts to prove that some of the sums have come from other sources. In these circumstances it is impossible for the assessee to contend that there is no material on the record from which the Income-tax Officer could draw his conclusion. In fact, until the case came into this Court the assessee's contentions were based on a misconception of the law and it was only at the last moment that he raised the question which is now under reference. It follows that we are of the opinion that the question referred should be answered in the affirmative, but before concluding we consider it necessary to deal with a statement made by the Commissioner to the effect that the natural presumption in the case of the assets of a married Hindu lady is that they are transferred to her by her husband out of love or affection. We do not agree that there is any such presumption. It is not an uncommon thing for a husband to put money in the name of his wife without ever intending to give it to her. We do not suggest that any monies were put in the name of the assessee's wife with ulterior motive, but it was incumbent upon him to show their source and this he has not done apart from his admission that some of them represented gifts from him. As the assessee has failed he must pay the Commissioner's costs, Rs. 250.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 269

HORWILL J.

In re Syed Murthuza Sahib —

Petitioner.

Criminal Revn. Case No. 323 and Petn. No. 307 of 1941, Decided on 3rd October 1941, to revise judgment of Joint Magistrate, Tindivanam, D/- 24th December 1940.

(a) Madras Local Board's Act (14 of 1920), Ss. 164 (1) and (2), 159 (1) and 160 (3) — Applicability of S. 164 (2) and S. 159 (1) — Word "occupies" in S. 164 — Meaning of—Lessee of small road-side site under S. 160 (3) constructing small shed — Lessee continuing in possession inspite of notice under S. 159 (1) to remove shed—Proper notice held should have been under S. 164 (2) and not S. 159 (1) — Lessee held liable under S. 164 (1) — Defect of notice held immaterial.

Section 159 (1) governs the extension or projection of a premises over or into a public road and not the erection of some structure independently of any existing premises. The very foundation for S. 159 (1) is the existence of premises which have been extended into a public road. Occupying a land within S. 164 means "being on the land" and therefore includes continuing in possession as well as entering into possession. [P 270*c*]

The lessee was granted a lease under S. 160 (3) for a period of one year to use a small road-side site to sell his wares, and in it he constructed a small shed. He did not quit the land at the end of the period of the lease and so a notice was sent to

him, purporting to be one under S. 159 (1), requiring him to remove the shed and threatening that unless he removed the encroachment within a fortnight from the date of service of that notice further proceedings under the Act would be taken against him. He ignored the notice and therefore was charged with having committed an offence punishable under S. 159 (1) read with S. 207 (1) (a) and (c) and sentenced to pay a fine of Rs. 25 :

Held that notice should have gone to the lessee under S. 164 (2) and not under S. 159 (1), and that the lessee was liable under S. 164 (1) for having continued in possession after the expiry of his lease without the previous sanction of the Local Board:

[P 270*e*,*f*]

Held further that the defect in notice did not make any material difference, because the notice made it very clear what was required of the lessee. By disobeying the lawful notice of the president, even though it was labelled S. 159 (1) and not S. 164 (2), the lessee did commit an offence.

[P 271*a*]

(b) Madras Local Boards Act (14 of 1920), S. 160 (6)—S. 160 (6) does not deal with leases —Licence and lease—Distinction — S. 160 (6) does not create punishable offence.

Section 160 (6) deals with only licences and not leases. There is a great difference between a licence and a lease, a licence being merely a permission, whereas a lease conveys certain legal rights over the land to the lessee. While, however, S. 160 (6) gives the President of the Local Board the power to remove buildings and recover the costs for doing so from the owners, it does not create a punishable offence. [P 270*g*,*h*]

M. S. Venkatarama Iyer — for Petitioner.

Public Prosecutor — for the Crown.

Order. — The petitioner was granted a lease under S. 160 (3), Local Boards Act, for a period of one year to use a road-side site of 1 or 2 cents to sell his wares, and in it he constructed a small shed. He did not quit the land at the end of the period of the lease and so a notice was sent to him, purporting to be one under S. 159 (1), requiring him to remove the shed which was on the 1 or 2 cents in Survey No. 85/1 of the local fund road and threatening that unless he removed the encroachment within a fortnight from the date of service of that notice further proceedings under the Act would be taken against him. He ignored this notice; and so the present case was instituted against him. He has been charged with having committed an offence punishable under S. 159 (1), read with Ss. 207 (1) (a) and (c), Madras Local Boards Act. He was sentenced to pay a fine of Rs. 25 and his conviction and sentence were upheld on appeal by the joint Magistrate of Tindivanam. It is fairly clear that the petitioner did not contravene the provisions of S. 159 (1). Section 159 (1) permits the President of a Local Board to issue a notice to the owner or occupier of any premises to remove or alter any projection, encroachment, or obstruction situated against or in front of such premises . . . . This sub-section governs the extension or projection of a premises over or into a public road and not the erection of some structure independently of any existing premises. The very foundation for this sub-section is the existence of premises which have been extended into a public road. Notice should have gone to the petitioner under S. 164 (2) and not under S. 159 (1). Section 164 (1) makes liable for payment of a penalty any person who occupies any land set apart for any public purpose without the previous sanction of the Local Board. The petitioner entered into possession of this land with the sanction of the Local Board; but he however continued in possession without the sanction of the Local Board. It is argued that continuing in possession is not occupying. Occupying a land means "being on the land" and therefore includes continuing in possession as well as entering into possession. As the petitioner did not obtain the previous sanction of the Local Board to occupy that land during the period in question, he is liable to a penalty under S. 164 (1).

Section 164 (2) empowers the President to issue notice to such a person as is referred to in Sec. 164 (1). If a person occupying the land disregards the notice under S. 164 (2), then he becomes liable under Sec. 207 (1) (a) for contravening the provisions of one of the sections specified in the first column of Sch. 8. Schedule 8 makes express mention of Sec. 164 (2). It was argued by the learned Public Prosecutor that S. 160 (6) would also apply. I do not think it would. Sections 160 (1) and 160 (2) refer to licences and S. 160 (3) to a lease. Section 160 (6) mentions only licences and not leases. There is a great difference between a licence and a lease, a licence being merely a permission, whereas a lease conveys certain legal rights over the land to the lessee. While, however, S. 160 (6) gives the President of the Local Board the power to remove buildings and recover the costs for doing so from the owners, it does not create a punishable offence.

It is next argued for the petitioner that even though the petitioner was wrong in continuing in possession after the expiry of the lease, he did not commit a punishable offence by doing so, because the notice issued to him was a faulty one. What is punished, it is argued, is not the continuing in possession but the disobedience of a notice, and that if a notice is not a proper one then the disobedience of it cannot be an offence. It is true that the notice that was sent to the

petitioner did not purport to be a notice under S. 164 (2), but one under S. 159 (1), but I do not think that this makes any material difference, because the notice made it very clear what was required of the petitioner. He was ordered to remove the shed which he had been permitted to put up under the licence that was previously granted to him and he knew that the president had power to order the removal of such shed and he knew that he was wrongfully in possession of that plot of land. By disobeying the lawful notice of the president, even though it was labelled S. 159 (1) and not S. 164 (2), the petitioner committed an offence. I therefore find no sufficient reason for interfering in revision. The petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

T. P. Act—
(b) ('36) Mulla, Page 581 Pt. (o).
('34) Mitra, Page 566 N. 544.

A. I. R. (29) 1942 Madras 271

WADSWORTH AND PATANJALI SASTRI JJ.

Vallur China Kondayya and others — *Appellants*

v.

Sidavarapu Ramalinga Reddi and others — *Respondents.*

Appeal No. 240 of 1939, Decided on 14th August 1941, against order of Dist. Court, Nellore, D/- 10th March 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 23—Sale in execution of decree set aside under S. 23 —Purchaser is entitled to profits of land between date of his obtaining possession and re-delivery of land on cancellation of sale.

Where a sale held in execution of a decree is set aside at the instance of an agriculturist under S. 23 the purchaser whether he is a stranger or the decree-holder himself is entitled to the profits of the land between the date of his obtaining possession and the date of re-delivery of possession on the cancellation of the sale under S. 23. This view finds support from the fact that S. 24 of that Act which provides for the consequences of the setting aside of a sale under S. 23 is silent on the subject of interest and profits, the natural inference being that the purchaser gets back his money without interest and that he does not incur any liability for profits. There is no express provision in the Act that the judgment-debtor should be entitled to the profits on the land the sale of which is set aside nor can any such provision be read into the Act by necessary implication from its terms. When the sale which is set aside under S. 23 was perfectly legal and the possession of the purchaser was rightful there can be no question of restitution under the Civil Procedure Code, either by the express provisions of S. 144 or on the general principle that the Court will not permit injustice and will not permit a decree-holder to retain profits to which he was not lawfully entitled. [P 272*b*,*f*,*g*]

(b) Madras Agriculturists Relief Act (4 of 1938), Ss. 8, 19 and 23—Mode of construing Act, stated.

The Act is an expropriatory measure and the process of expropriation should not proceed beyond that which is laid down either by the express language of the Act or by necessary implication therefrom. [P 272*g*]

(c) Madras Agriculturists Relief Act (4 of 1938), S. 23 — Decree-holder purchasing property at sale in execution of his decree—Sale set aside under S. 23 — Decree amended— Decree-holder seeking execution by resale of property —Claim by judgment-debtor that he was entitled to profits earned by decree-holder between date of his obtaining possession as purchaser and date of cancellation of sale is not claim arising out of execution— Claim held could be agitated only in separate proceeding.

The decree-holder at a sale in execution of his decree purchased the property himself and obtained possession. Subsequently, the sale was set aside under S. 23 and the decree amended under the provisions of the Act. The decree-holder applied for execution of the amended decree by resale of the same property. The judgment-debtor as an objection to execution, put forward a claim based under S. 23 that he was entitled to the profits earned by the decree-holder between the date of his obtaining possession of the property as purchaser and the date of the re-delivery of the property to the judgment-debtor on the cancellation of the sale :

Held that the claim for profits not being a claim arising in execution of the decree, but a claim based on the statutory assumption under S. 23 that the sale in execution had not taken place at all could not be put forward as an objection to execution and could be agitated only in a separate proceeding. [P 272*h* ; P 273*a*]

P. Satyanarayana Rao — for Appellants.

K. Umamaheswaran — for Respondents.

Wadsworth J.—The only question arising in this appeal is one under S. 23 of the Madras Act, 4 of 1938. Respondent 1 obtained a decree against the appellants in March 1936 and in execution of that decree a sale of the appellants' property was held on 22nd November 1937. The property was purchased by the decree-holder who on 18th February 1938 got possession of one item with which we are now concerned. Act 4 of 1938 came into force on 22nd March 1938 and thereafter the judgment-debtors filed an application under the Act to set aside the sale and to scale down the decree. The sale was set aside on 7th November 1938 and the decree was scaled down. The judgment-debtors then applied for re-delivery of the property and claimed that the profits on the land should be adjusted towards the decree as scaled down. On objection they gave up this claim to profits, stating that they would prosecute it in separate proceedings. The decree-holder then sought to execute the amended decree by the sale of the same property once more. By way of objection to this execution petition the judgment-debtors asked the Court to give credit to the amount of the profits enjoyed

by the decree-holder during the interval between the delivery in February 1938 and the re-delivery and asked that these profits be treated as realisations towards the revised decree. This application has been rejected and hence this appeal.

It will be quite clear that the claim to an adjustment of the profits towards the decree cannot be entertained unless it is provided by the terms of Act 4 of 1938 or by necessary implication therefrom. The sale held in execution of the unamended decree was a perfectly legal sale and the possession of the decree-holder as purchaser in execution of that decree was rightful possession. There can be no question therefore of restitution under the Civil Procedure Code, either by the express provisions of S. 144 or on the general principle that the Court will not permit injustice and will not permit a decree-holder to retain profits to which he was not lawfully entitled. The argument is however that the last words of cl. (1) of S. 23 of Act 4 necessarily imply that a judgment-debtor shall have a right to the profits on the land during the interval between the delivery under the sale and the re-delivery after its cancellation. The words are "and thereupon the sale shall be deemed not to have taken place at all." It is argued that, if the sale is deemed not to have taken place at all, then the purchaser was in possession of properties to which he must be deemed not to have been entitled and was enjoying profits which must be deemed to have been properties belonging to the judgment-debtor.

The argument is reinforced by the further contention that, when the sale is set aside, the decree though amended, is revived and interest thereon will run up to the date on which further execution takes place and the decree is satisfied, and it is contended that it is not fair that the decree-holder should get both interest on his decree and the profits on the land of which he should be deemed not to have been the purchaser. This argument has a certain plausibility when the decree-holder is the purchaser but it cannot apply when the purchaser is a stranger. If a stranger buys lands in execution of a decree which is subsequently set aside under S. 23 at the instance of an agriculturist, the purchaser gets no interest on the money which he has paid. All he gets is a refund of the actual sum and there is no equitable reason for requiring the purchaser to forego the profits of the land which has been taken from him and in lieu of which he gets the bare sum which he has paid without interest thereon. Although the words "thereupon the sale shall be deemed not to have taken place at all" might be read as having the consequence that the person who purchases the land would be deemed to have had no right thereto, that is not the only meaning which those words could have had. It is no doubt true that, if these last words had been omitted, any third party purchaser from the Court auction purchaser would lose his title when the latter's sale was set aside. But the Legislature may well have thought it desirable to make this matter clear and this may well have been the reason for putting in the words "thereupon the sale shall be deemed not to have taken place at all." It is pointed out that in the analogous section relating to sales of moveable properties, S. 22, though there is no cancellation of the sale, that which the decree-holder is required to refund is merely the excess over his decree as scaled down and not any interest thereon. It would therefore not appear to have been the intention of the Legislature to deprive the decree-holder-purchaser of the profits which his purchase has earned in the interval between the original execution of the decree and the cancellation of the sale.

A more formidable argument against the appellants is derived from S. 24 which provides for the consequences of the setting aside of a sale under S. 23. This section provides that a purchaser shall be entitled to an order for repayment of any purchase money paid by him against the person to whom it has been paid. It is silent on the subject of interest and it is silent on the subject of profits. The natural inference is that the purchaser gets back his money without interest and that he does not incur any liability for profits. As we have often had occasion to point out, Act 4 of 1938 is an expropriatory measure and the process of expropriation should not proceed beyond that which is laid down either by the express language of the Act or by necessary implication therefrom. There is no express provision that the judgment-debtor should be entitled to the profits on the land the sale of which is set aside and it does not seem to me that any such provision can be read into the Act by necessary implication from its terms. A further objection has been raised that even if the appellants were entitled to claim profits as against the decree-holder, that claim would have to be agitated in a separate proceeding and could not be put forward as an objection to execution, the profits not being ascertained as yet and, by the very nature of the claim, the

profits not being a claim arising in execution of the decree, but a claim based on the statutory assumption that the sale in execution has not taken place at all, it would appear that this objection is also valid. In the result, therefore, the appeal is dismissed with costs.

Patanjali Sastri J. — I own to some doubt on the question whether a purchaser of immovable property whose sale is set aside under Sec. 23 of Madras Act, 4 of 1938 is accountable for the profits received by him before the sale is set aside. The last words of para. 1 of S. 23, namely, "thereupon the sale shall be deemed not to have taken place at all," would prima facie seem to import that the purchaser obtained no title at any time to the property and that his possession of it from the start was without any right. The consequence of this, it is arguable, must be that he is accountable for the profits received by him from the property of which he was in possession without any right or title. On the other hand, there is force in the argument for the respondents, that, when the Legislature made express provisions in S. 24 for the consequence to follow upon a sale being set aside under S. 23, it has omitted to provide expressly for the payment by the purchaser of the net profits received by him. The question is by no means free from difficulty but having regard to the considerations adverted to in the judgment of my learned brother I agree, on the whole, though not without some hesitation, with the view expressed by him.

C.R.K./G.N. *Appeal dismissed.*

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* A. I. R. (29) 1942 Madras 273

LEACH C. J. AND HAPPELL J.

Chokkalinga Mudali — Appellant

v.

Manickka Mudali — Respondent.

Second Appeal No. 1119 of 1938, Decided on 24th October 1941, against decree of Sub-Judge, Chingleput, in A. S. No. 113 of 1937.

*** Provincial Insolvency Act (1920), Ss. 47, 44, 34 and 28 (2) and (6) — Secured creditor not realising, abandoning or valuing his security before insolvent's discharge—There is no provable debt — Creditor is entitled to personal decree against insolvent even after his unconditional discharge : (1941) 2 M.L.J. 690=('42) 29 A.I.R. 1942 Mad. 151, *OVERRULED*.**

By reason of the provisions of S. 47, the debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened there is no debt provable in the insolvency proceedings. Thus, the real position is that a secured creditor may prove in the insolvency proceedings, but his right is a contingent one and until the contingency happens he is outside the Act. If the secured creditor has not during the insolvency proceedings realised his security, or surrendered or valued it, S. 44 (2) cannot affect him, because no portion of the debt due to him has become provable and the section only applies to debts which are provable in the insolvency. Therefore he is entitled to a personal decree against the insolvent under O. 34, R. 6, Civil P. C., after the insolvent's unconditional discharge if the security has not been realised before the discharge of the insolvent. If it has and there is a deficiency the balance of the debt constitutes a debt provable in insolvency and S. 44 (2) will operate to cancel it : ('38) 25 A.I.R. 1938 Lah. 217, *Approved*; ('40) 27 A.I.R. 1940 Nag. 252, *Dissent.*; ('32) 19 A.I.R. 1932 All. 336 and ('39) 26 A.I.R. 1939 All. 401, *Not approved*; (1941) 2 M.L.J. 690=('42) 29 A.I.R. 1942 Mad. 151, *OVERRULED*. [P 274*d*,*e*]

V. Rajagopalachari and K. Rajah Ayyar — for Appellant.

K. Bhashyam Ayyangar and T. R. Srinivasan — for Respondent.

LEACH C. J. — The question for decision in this appeal is whether a mortgagee is entitled in law to a personal decree for the balance of the mortgage debt when the mortgagor has been adjudicated an insolvent and has obtained as unconditional order of discharge. The reported decisions disclose a divergence of opinion. The adjudication in this case was under the Provincial Insolvency Act, but admittedly there is no distinction to be drawn between that Act and the Presidency Towns Insolvency Act in this connexion. On 4th November 1910 the respondent mortgaged immovable property to the appellant, who on 10th October 1916 filed a suit in the Court of the District Munsif of Poonamallee to enforce his security. On 8th January 1917 he obtained a preliminary mortgage decree and on 29th January 1920 a final decree for the sale of the mortgaged property. In the meantime, to be exact, on 13th November 1919, the respondent filed a petition asking that he be adjudicated an insolvent. This application was granted on 18th September 1920. On 23rd February 1926 the respondent was given his discharge unconditionally. The appellant took no steps to enforce his security until the year following the respondent's discharge. He then instituted proceedings in execution and the property was brought to sale on 23rd March 1927. The sale proceeds fell short of the amount required to discharge the appellant's debt by the sum of Rupees 383-13-4. On 9th July 1927 the appellant applied under the provisions of O. 34, R. 6, Civil P. C., for a personal decree for the balance. His application was granted on 27th September 1927.

The respondent appealed to the District Judge of Chingleput against the order passed on the application under O. 34, R. 6, but not against the personal decree itself The District Judge held that in these circumstances the appeal did not lie and refused to allow the respondent to convert the appeal into one against the personal decree. The respondent then appealed to this Court, which allowed the appeal to the District Judge to be converted into an appeal against the personal decree and remanded the case to the District Judge for disposal on the merits. The District Judge in turn remanded the case to the District Munsif, who held that the appellant was entitled to a personal decree. The respondent challenged this decision in an appeal to the Sub-

ordinate Judge, who reversed the District Munsif's a decision. This resulted in the filing of the present appeal. In the first instance the appeal came before King J. who considered that it should be decided by a Bench in view of the conflict of authority.

The sections of the Act which call for consideration here are Ss. 28 (2) and (6), 34 (2), 44 and 47 and their provisions will be mentioned in the order most convenient to the question raised. Section 28 (2), Provincial Insolvency Act, states that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver and shall become divisible among the creditors, but sub-s. (6) says that nothing in the section shall affect the power of a secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if the section had not been passed. Section 47 states that where a secured creditor rea- b lises his security he may prove for the balance due to him after deducting the net amount realised, or if he relinquishes his security for the general benefit of the creditors he may prove for his whole debt, or where he does not either realise or relinquish his security he may value it and prove for the balance. Section 34 (2) says that save as provided by sub-s. (1) (which has no bearing in this case) all debts and liabilities, present or future, certain or contingent, to which a debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of an obligation incurred before the date of the adjudication, shall be deemed to be debts provable under the Act. Sub-section (1) of S. 44 states that an order of discharge shall not release the insolvent from certain specified debts, but sub-s. (2) says that subject to sub-s. (1) an order of discharge shall release the in- c solvent from all debts provable under the Act. A debt due to a mortgagee is not one of the specified debts.

By reason of the provisions of S. 47 the debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened there is no debt provable in the insolvency proceedings. In the course of the arguments it has been suggested by the learned advocate for the respondent that a secured debt is at all times a provable debt within the meaning of S. 44 (2) and in support of this argument he has pointed to S. 34 (2). The argument overlooks, however, the provisions of S. 28 (6) and S. 47 which are the governing provisions so far as the secured creditor is concerned. If the argument were to be accepted, it would mean that once an d insolvent had obtained his discharge unconditionally the secured creditor would be deprived of the benefit of his security. He could not retain the security if the mortgagor were released from all liability under the mortgage. This could never have been the intention of the Legislature in inserting sub-s. (2) in S. 44. The real position is that a secured creditor may prove in the insolvency proceedings, but his right is a contingent one and until the contingency happens he is outside the Act. If the secured creditor has not during the insolvency proceedings realised his security, or surrendered or valued it, S. 44 (2) cannot affect him, because no portion of the debt due to him has become provable and the section only applies to debts which are provable in the insolvency. This means that he is entitled to a personal decree if the security has not been realised before the discharge of the insolvent. If it has and there is a deficiency the balance of the debt constitutes a debt provable in the insolvency and S. 44 (2) will operate to cancel it. Turning now e to the reported cases, the Allahabad High Court in 54 All. 428[1] held that an order of discharge has no more effect upon the rights of a secured creditor than an order of adjudication and consequently he is entitled to a personal decree whenever he has realised his security. The basis of this decision was the opinion that the debt due to a secured creditor is not a debt provable in insolvency and the order of adjudication and the subsequent order of discharge cannot affect the rights of the secured creditor which flow from the mortgage contract. The report does not, however, show at what stage the order of discharge was obtained. The question was again raised in the Allahabad High Court in I.L.R. (1939) All. 492.[2] The report here mentions the date of the order of discharge, but the date of the realisation of the property is not given. The judg- f ment in 54 All. 428[1] was however followed. It would appear that the opinion of the Allahabad High Court is that the secured creditor is at all times outside the Act and may obtain a personal decree even if the property has been realised before the passing of the order of discharge. In our opinion this is going too far.

The Lahore High Court in A.I.R. 1938 Lah. 217[3] held that where a creditor of an insolvent holding a mortgage decree realizes the security before the mortgagor obtains his discharge the order of discharge prevents the mortgagee obtaining a personal decree. It follows from what we have said that we regard this case as having been rightly decided. In I. L. R. (1940) Nag. 512,[4] the Nagpur High Court, however, held that a secured creditor is debarred from obtaining a personal decree when the mortgaged property has been realized after the discharge g of the insolvent. In this case part of the property was realized on 23rd February 1929, but the remainder was not sold until 21st March 1930 and until all the properties had been sold the mortgagee creditor could not ask for a personal decree. Before 21st March 1930, the insolvent had obtained his discharge. It also follows from what we have said that we are unable to agree with this decision. At no stage of the insolvency proceedings was there a provable debt. After the present case had been referred to a Bench by King J. the question was considered by Venkataramana Rao J. in the unreported case in S. A. No. 257 of 1939.[5] Venkataramana Rao J. accepted the opinion of the Nagpur High Court, but as already indicated we do not share this opinion. In the present case there was no surrender or valuation of the security and it was not realised during the pendency of the insolvency proceedings. h Therefore, during the pendency of those proceedings there was no provable debt and S. 44 (2) could have no application. Consequently, we hold that the Subordinate Judge was wrong in reversing the decision

1. ('32) 19 A.I.R. 1932 All. 336 : 138 I.C. 361 : 54 All. 428 : 1932 A. L. J. 237, Niaz Ahmed v. Phul Kunwar.
2. ('39) 26 A. I. R. 1939 All. 401 : 184 I. C. 868 : I.L.R. (1939) All. 492 : 1939 A. L. J. 238, Sunder Lal v. Benarsi Das.
3. ('38) 25 A. I. R. 1938 Lah. 217 : 178 I. C. 272 : 40 P.L.R. 514, Haveli Shah v. Mt. Hussaina Jan.
4. ('40) 27 A. I. R. 1940 Nag. 252 : 192 I. C. 572 : I. L. R. (1940) Nag. 512, Khupchand Nathmal v. Rajeshwar Shanker.
5. *Reported in* ('42) 29 A. I. R. 1942 Mad. 151 : (1941) 2 M.L.J. 690, Athiappa Chettiar v. Ibramsa Pulavar.

of the District Munsif. The appeal will be allowed with costs throughout.

C.R.K./G.N. *Appeal allowed.*

C. P. C. —
('40) Chitaley, O. 34 R. 6, N. 16.

A. I. R. (29) 1942 Madras 275 (1)

LAKSHMANA RAO J.

In re Thandra Narasimhappadu Petitioner.

Criminal Revn. Case No. 329 of 1940 (Criminal Revn. Petn. No. 318 of 1940), Decided on 18th October 1940, to revise judgment of Court of joint Magistrate, Chicacole, D/- 15th April 1940.

Penal Code (1860), S. 188 (2) — Crop raised and removed prior to order for possession under S. 145, Criminal P. C. — Person removing crop is not guilty under S. 188, Penal Code.

Where the crop has been raised and harvested by a party to S. 145, Criminal P. C., proceedings before possession has been restored to the opposite party, there is no disobedience of the order prohibiting the party from interfering with the possession of the opposite party and hence the conviction of the party under S. 188 (2), Penal Code, is unsustainable. [P 275*d*,*e*]

K. S. Jayarama Iyer and C. V. Dikshitalu — for Petitioner.

Public Prosecutor — for the Crown.

FACTS. — The petitioners in this criminal revision petition were the counter-petitioners in proceedings under S. 145, Criminal P. C., on the file of the First Class Magistrate, Chicacole. By a preliminary order, dated 17th August 1938, both the parties were restrained from interfering with the lands. After a contest a final order under S. 145 (6) was passed on 23rd November 1938 and in and by the said order possession of the lands in dispute with the crops, if any, standing thereon was restored to the petitioner in the proceedings under S. 145 and the counter petitioners were forbidden from disturbing their possession except by proceedings through a competent Court.

It was in evidence that the counter petitioners had sown paddy in a portion of the land in June and that the said crop were ripe for harvest at the time the order dated 27th November 1938 was made. The final order was served on the counter petitioners only after the crop was cut and removed by them. The petitioners complained against the counter petitioners alleging that by cutting and removing the crop they had committed an offence under Ss. 188 and 379, Penal Code, and the First Class Magistrate sanctioned the prosecution of the counter petitioners. The Sub-Magistrate found the counter petitioners guilty of an offence under S. 188 (2), Penal Code, and sentenced them and the said finding and sentence of the Sub-Magistrate was confirmed by the appellate Magistrate. Against this conviction and sentence, the present revision petition has been filed by the counter petitioners who were the accused in the case under Ss. 188 and 379, Penal Code.

ORDER.—The crop was raised by the petitioner and it was harvested by him before possession was restored to the opposite party. There was therefore no disobedience of the order prohibiting the petitioner from interfering with the possession of the opposite party and the conviction under S. 188 (2), Penal Code, is unsustainable. The conviction and sentence of the petitioner are, therefore, set aside, and his bail bonds will be cancelled.

C.R.K./R.K. *Conviction set aside.*

Penal Code —
('36) Gour, Page 641 Para. 1920 "Persons not in possession."

A. I. R. (29) 1942 Madras 275 (2)

BURN AND MOCKETT JJ.

In re Rama Goundan — Accused.

Referred Trial No. 23 of 1941 (Criminal Appeal No. 108 of 1941), Decided on 19th March 1941, referred by Addl. Sess. Judge, Coimbatore Division, for confirmation of sentence, D/- 17th January 1941.

(a) Penal Code (1860), Ss. 302 and 201—Question for decision whether accused was guilty of murder — While convicting accused of murder it is not desirable to convict him for concealing evidence though such course is legal.

Where the whole question is whether the accused person was guilty of murder without there being any suggestion that anybody else committed it, it is highly unusual and undesirable to convict the accused for concealing the evidence whilst convicting him of murder though as a strict question of law it may not be wrong to do so. [P 275*h*; P 276*a*]

(b) Penal Code (1860), S. 302 — Deliberate murder with attempt at concealment — Death sentence is justified.

In the case of a deliberate murder with a deliberate attempt at concealment sentence of death is appropriate. [P 275*h*]

K. S. Jayaram — for Accused.

Public Prosecutor — for the Crown.

MOCKETT J. — The appellant has been convicted of the murder of his cousin and has been sentenced to death by the learned Additional Sessions Judge of Coimbatore. There is no question that on 24th September last Parama Goundan was murdered. His body was exhumed on 2nd October from the garden of the accused. (After discussing the evidence, his Lordship proceeded.) In these circumstances we think that the learned Sessions Judge quite rightly drew the inference from these facts that the accused deliberately murdered his cousin and quite rightly rejected the story told at a somewhat late stage and only when the body was revealed that it was done in a manner which might have reduced this offence to some lesser offence.

The whole of the circumstances in this case point to the fact that for some reasons which may not ever be ascertained this was a deliberate murder and a deliberate attempt at concealment. We therefore confirm the conviction and dismiss the appeal. Similarly, in a case of this sort the sentence passed was the appropriate sentence and that also is confirmed.

We notice that the learned Judge whilst convicting of murder has also convicted the appellant and sentenced him to seven years rigorous imprisonment for concealing the evidence. Whilst as a strict question of law this may not be wrong; it is in our view highly unusual and undesirable. This is a case where the whole question was whether this man was guilty of murder. It was not suggested, the murder was committed by anybody else and we think that the

procedure in the lower Court should not be treated as a precedent in that Court.

C.R.K./G.N. *Appeal dismissed.*

Penal Code —
(a) ('36) Gour, Page 701 Pt. (1); Page 702 Pts. (1, 2).
('36) Ratanlal, Page 501 Pt. (2).
(b) ('36) Gour, Page 1030 Pt. (12).
('36) Ratanlal, Page 752 Pts. (7) and (11).

* A. I. R. (29) 1942 Madras 276 (1)

GENTLE J.

M. Rangaswami Naicker and others — Plaintiffs—Applicants

v.

M. Raju Naicker and others — Defendants—Respondents.

Application No. 1728 of 1941 (in C. S. No. 121 of 1938), Decided on 29th August 1941.

*** Income-tax Act (1922), S. 54—Account book of firm produced before Income-tax Officer in course of income-tax proceedings—Even partners are not entitled as of right to production or inspection of it from Income-tax Officer.**

Where an account book in possession of an Income-tax Officer has been produced in the course of proceedings under the Income-tax Act, even partners in the firm with persons who deposited the books are not entitled to production or even to an examination as of right of the book which the Income-tax Officer has : ('40) 27 A.I.R. 1940 Mad. 768 (F.B.), *Ref.* [P 276*f*]

T. M. Kasturi for K. Subramaniam — for Applicants.

K. Varadachari for V. Radhakrishnayya — for Respondents.

K. V. Sesha Iyengar — for Income-tax Officer.

ORDER.—The applicants are the plaintiffs in the suit which was referred to the learned Official Referee for inquiry. They served upon the Income-tax Officer a subpœna requiring him to produce some account books in his possession which are said to have belonged to the firm of Cunniappa Nayagar for the year 1930 and 1934-35. The Income-tax Officer does not produce them. The present application is made by the plaintiffs against the Income-tax Officer calling upon him to show cause why he should not be directed to produce the account books mentioned in the subpœna. In his affidavit, the Income-tax Officer says that of the account books mentioned in the subpœna he has only one book containing the monthly trial balance for the year 1930 and further he says this book was produced in the course of proceedings under the Income-tax Act for the year 1938-39. Learned counsel on his behalf claims that the Income-tax Officer is entitled to refuse to produce the books either in pursuance of the subpœna served upon him or under any order of Court. This claim is made under the provisions of S. 54 (1), Income tax Act, which are as follows :

" All . . . accounts . . produced . . in the course of any proceedings under this Act . . . shall be treated as confidential, and notwithstanding anything contained in the Evidence Act, 1872, no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such . . . . . accounts."

Sub-section (2) gives a number of exceptions to sub-s. (1) ; but learned counsel for the applicants conceded that he cannot bring himself within any of these exceptions. The seriousness with which the Legislature considers the provisions in sub-s. (1) is reflected by sub-s. (2) of the section which renders any public servant liable to punishment with imprisonment for six months in the event of his disclosing any particulars contained in any accounts which are produced as contemplated in sub-s. (1). It is argued on behalf of the applicants that, inasmuch as they are partners in the firm with the persons who deposited these books as such, they are entitled to inspect and to obtain an order requiring their production in Court. The wording of S. 54 (1) is perfectly clear. It is emphatic in its language and mandatory in its provisions. It may be that, as a matter of practice, the income-tax authorities may allow a partner to inspect the books of his firm which have been deposited with them as would appear to be the case from the observations in the course of the opinion expressed in (1940) 2 M. L. J. 257[1] at p. 267 in which the learned Chief Justice referred to para. 5 of the Notes of Instructions compiled for the guidance of Income-tax Officers. In no way is this any departure or exception to the provisions of S. 54, Income-tax Act. There is no dispute regarding the statement of the Income-tax Officer in his affidavit that the account book in his possession was produced in the course of proceedings under the Income-tax Act. That being so, in my view, the applicants are not entitled to production or even to an examination as of right of the book which the Income-tax Officer has. The protection which is given by S. 54 covers the present case and in consequence this application must be dismissed with costs of the Income-tax Officer.

C.R.K./R.K. *Application dismissed.*

1. ('40) 27 A.I.R. 1940 Mad. 768 : 192 I. C. 548 : I.L.R. (1940) Mad. 969 : (1940) 2 M. L. J. 257 (F.B.), Venkata Gopala Narasimha Rama Rao v. Venkataramayya.

A. I. R. (29) 1942 Madras 276 (2)

LAKSHMANA RAO J.

In re Ramachandran — Petitioner.

Criminal Revn. Case No. 211 of 1940 (Criminal Revn. Petn. No. 203 of 1940), Decided on 20th September 1940, to revise order of Chief Presidency Magistrate, Egmore, Madras, D/- 11th December 1939.

Motor Vehicles Act (1914), S. 16 — Madras Motor Vehicles Rules (1938), R. 4, cl. (iii) — Car held used as "contract carriage."

The car was used for carrying passengers for reward under a contract for the use of the vehicle for an agreed sum, and possession of the car was not transferred within the meaning of the explanation to R. 4, cl. (iii) :

Held that the car was a "contract carriage" as defined in R. 4, cl. (iii). [P 277*a*]

M. Ranganatha Sastri and M. V. Ganapathi — for Petitioner.

Crown Prosecutor — for the Crown.

FACTS. — The petitioner was charged with an offence under S. 16, Motor Vehicles Act, for a breach of R. 138 under the Act by permitting his car to be used as a contract carriage without a permit. It was admitted by the accused that he had allowed a third person to use the car on payment of Rs. 50 per month for the expenses, that it was not intended for public use and that it was not let out to any-

body else. The Magistrate convicted the accused. a Against this order the present revision is filed.

ORDER. — The car of the petitioner was used for carrying passengers for reward under a contract for the use of the vehicle for an agreed sum, and possession of the car was not transferred within the meaning of the explanation to R. 4, cl. (iii), Madras Motor Vehicles Rules, 1938. The car would therefore be a 'contract carriage' as defined in R. 4, cl. (iii) and the petitioner had no permit to use it. as a contract carriage. The conviction is therefore correct but the fine is excessive and it is reduced to Rs. 20; otherwise this petition is dismissed.

C.R.K./R.K. *Fine reduced.*

A. I. R. (29) 1942 Madras 277

VENKATARAMANA RAO J.

b *K. Stanumurthiayya and others* — *Appellants*

v.

K. Ramappa and others — *Respondents.*

Second Appeal No. 784 of 1939, Decided on 10th October 1941, against decree of Sub-Judge, South Kanara, D/- 13th February 1939.

Hindu law — Succession — Murderer cannot succeed as heir of person whom he murdered — No title can be claimed through murderer — Inheritance vests in those entitled to it if murderer was out of way — Test of disqualification is not relationship but whether title is traced through murderer.

Under the Hindu law a murderer cannot succeed as heir of the person whom he murdered nor can c title be claimed through the murderer. The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent. The inheritance vests in those who would be entitled to it were the guilty heir out of the way. The test of disqualification is not relationship but whether the title is traced through the murderer : ('24) 11 A. I. R. 1924 P. C. 209 and ('21) 8 A. I. R. 1921 Bom. 270, *Rel. on* ; ('22) 9 A. I. R. 1922 Lah. 293 and ('22) 9 A. I. R. 1922 Lah. 243, *Dissent.*

[P 277*e,f,g,h*]

Consequently, where the daughter of the last male-holder murders his widow, the daughter's sons would be entitled to inherit to their grandfather's estate. Though they are related to the murderess they do not trace their title through her. Their mother should be treated as non-existent and further she could never become a fresh d stock of descent. [P 278*b*]

K. Y. Adiga and S. Ramayya Naick — for Appellants.

K. Srinivasa Rao — for Respondents.

JUDGMENT. — The question for decision in this second appeal lies in a narrow compass. One K. Narayanayya was the last male owner of the property involved in the suit out of which this appeal arises. He died leaving him surviving his widow Nagamma and a daughter Lakshmi. Nagamma was murdered on 27th September 1928 by her daughter Lakshmi and her son-in-law. Defendants 1 to 5 are the sons of Lakshmi and defendants 6 to 13 are the lessees under Nagamma in respect of the suit property. The plaintiffs are the sons of K. Ramakrishnayya, the deceased divided brother of K. Narayanayya. The question in controversy is whether the plaintiffs are entitled to succeed to the suit property in preference to defendants 1 to 5. The case for the plaintiffs is that as the defendants are the sons of the murderess e Lakshmi, they are disentitled to succeed to the suit property and that they as next heirs are entitled to it. The learned District Munsif gave a decree in favour of the plaintiff, but the learned Subordinate Judge reversed this decision. The question is which view is tenable. It is now settled by the Privy Council that a murderer cannot succeed as heir of the person whom he murdered. This proposition was laid down in 48 Bom. 569[1] affirming the decision in 45 Bom. 768.[2] After stating that the murderer was disqualified, Lord Phillimore, who delivered the judgment of the Board proceeded to state the legal consequence of this doctrine in regard to the devolution of the estate of the murdered man as follows :

"The second question to be decided is whether title can be claimed through the murderer. If this f were so, the defendants as the murderer's sisters, would take precedence of the plaintiff, his cousin. In this matter also, their Lordships are of opinion that the Courts below are right. The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent. It may be pointed out that this view was also taken in the Madras case just cited."

The Madras case referred to is 27 Mad. 591.[3] The view that the learned Lord was referring to was, I believe, the view expressed at page 601, namely, "the beneficial interest in the inheritance vests in those who would be entitled to it were the guilty heir out of the way." In an earlier passage their Lordships pronounced the view expressed by the High Court in 27 Mad. 591[3] that the legal estate might vest in the heir though the beneficial interest would not, as unsound on the ground that g the theory of legal and equitable estates is no part of Hindu law. What their Lordships must be deemed to have approved is the view, in so far as it states that the inheritance vests in those who would be entitled to it were the guilty heir out of the way without the qualification of the "beneficial interests." In the case before the Privy Council, there was a dispute as to who should succeed as heir of the last male owner—the sisters of the murderer, who were also the father's brother's daughters of the last male owner or the father's sister's son. Their Lordships said that if the murdered man was regarded as the stock for a line of descent, then the sisters would certainly take the estate in preference to the father's sister's son but as he could not be considered to be a fresh stock of descent and title cannot be traced through him, the sisters could not succeed on that ground. Their h Lordships considered, however, the question that though they were related to him, whether they could not still succeed in their own right, as the father's brother's daughters of the last owner ; and they were held not entitled to succeed on the application of another rule of law, namely, that a male bhandu succeeds in preference to a female bhandu. The principle that is clearly deducible from this decision is that the test of disqualification is not relationship but whether the title is traced through

1. ('24) 11 A. I. R. 1924 P. C. 209 : 82 I. C. 966 : 48 Bom. 569 : 51 I. A. 368 (P. C.), Kenchava v. Girimallappa.
2. ('21) 8 A. I. R. 1921 Bom. 270 : 61 I. C. 294 : 45 Bom. 768 : 23 Bom L. R. 213, Girimallappa Chennappa v. Kenchava.
3. (1900) 27 Mad. 591 : 14 M. L. J. 297, Vedanayaga Mudaliar v. Vedammbal.

the murderer. This is also made clear by their observations with reference to the decision in 32 Bom. 275.[4] This is how their Lordships explained that decision :

"In that case, the wife of a murderer was held entitled to succeed to the estate of the murdered man ; but that was not because the wife deduced title through her husband, but because of the principle of Hindu family law that a wife becomes a member of her husband's gotra, an actual relation of her husband's relations in her own right, as it is called in Hindu law a gotraja sapinda."

If this observation is read with the observation made by Chandavarkar J. in the same case, 32 Bom. 275,[4] with reference to the title based on the wife being gotraja sapinda, the matter is placed beyond doubt. This is how Chandavarkar J. observed at page 294 :

"It is no doubt because she is the husband's wife that she becomes a gotraja sapinda of the deceased. In other words, her status as wife is the cause of her status as gotraja sapinda. This former is the cause; the latter is the effect . . . . . But the sapindaship is an entity by itself, distinct from, though arising out of, the cause. And it is the sapindaship which is the immediate cause of her heirship."

If the principle of the Privy Council decision is applied to the present case, defendants 1 to 5 would be entitled to inherit to their grandfather's estate in spite of the fact that their mother murdered Nagamma. Though they are related to her, they do not trace title through her. The mother should be treated as non-existent and further she could never become a fresh stock of descent. Considerable reliance was placed by Mr. Adiga on two decisions of the Lahore High Court reported in 3 Lah. 103[5] and 3 Lah. 242,[6] which took a contrary view. But those decisions cannot be held to be correct in view of the decision of the Privy Council in 48 Bom. 569.[1] (*Vide* the criticism of the learned editor of Mayne's Hindu Law, page 729, Foot-Note 3.) It seems to me that the view taken by the learned Subordinate Judge is sound. In the result the second appeal fails and is dismissed with costs. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

4. ('08) 32 Bom. 275 : 10 Bom. L. R. 149, Gangu v. Chandrabhagabai.

5. ('22) 9 A. I. R. 1922 Lah. 293 : 67 I. C. 526 : 3 Lah. 103, Mt. Jind Kuar v. Inder Singh.

6. ('22) 9 A. I. R. 1922 Lah. 243 : 68 I. C. 769 : 3 Lah. 242, Har Bhagwan v. Hukum Singh.

Hindu Law —

('40) Mulla, Page 101 Pt. (w).

('38) Gour, Page 908 Pt. (5); Page 909 Pts. 6, 8 and 9.

A. I. R. (29) 1942 Madras 278

WADSWORTH AND PATANJALI SASTRI JJ.

Turlapati Seshayya — Petitioner

v.

Bollapalli Venkataramayya — Respondent.

Civil Revn. Petn. No. 684 of 1941, Decided on 2nd May 1941, to revise order of Sub-Judge, Bapatla, D/- 2nd July 1938.

Madras Agriculturists Relief Act (4 of 1938), S. 23—S. 23 applies to sales held between 1st October 1937 and 22nd March 1938—It does not apply to sales held after Act.

Section 23 was drafted with reference to the point of time at which the Act came into force and therefore the section only relates to sales held between 1st October 1937 and 22nd March 1938, and has no application to sales held after the Act came into force. [P 278*g*; P 279*a*]

K. Kotayya — for Petitioner.

K. Raghuramiah — for Respondent.

WADSWORTH J. — This civil revision petition raises a question regarding the effect of S. 23 of Madras Act, 4 of 1938 on which there appears to be no decided case. The sale which the petitioner sought to set aside was held on 29th March 1938, that is to say, just one week after Act 4 of 1938 came into force. Section 23 applies in terms to sales held on or after 1st October 1937 and the only future limit which is expressly laid down relates to the date within which an application is to be made, which is within 90 days of the commencement of the Act. It is argued that within these 90 days any judgment-debtor entitled to the benefits of the Act may apply for a sale to be set aside even though that sale has been held after the Act came into force. The only materials for deciding whether this view of the section is correct or not are the use of the tenses in the terms of the section and the alternative provisions found in the Act to relieve agriculturists whose property is brought to sale after the commencement of the Act. The essential words of S. 23 are :

"Where in execution of any decree any immovable property, in which an agriculturist *had* an interest, *has been* sold or foreclosed on or after 1st October 1937. . . . . any judgment-debtor, claiming to be an agriculturist entitled to the benefits of this Act, *may* apply to the Court within 90 days of the commencement of this Act to set aside the sale or foreclosure."

Looking at the three verbs used in this passage we find that it contemplates an interest vesting in an agriculturist at some past time, a sale held after 1st October 1937 but before the point of time with reference to which the section is drafted and a future application to the Court to be made within 90 days of the commencement of the Act. What is the point of time which the Legislature had in mind in drafting this section ? It cannot be the time of the application for that is expressly in future, as is shown by the words 'may apply.' The logical inference from the wording of the section is that the section was drafted with reference to the point of time at which the Act came into force and, if this be so, it would follow that the section only relates to sales held between 1st October 1937, and 22nd March 1938. That this is the correct view is indicated by the other provisions of the Act. The Act contemplates that when there is a decree for the repayment of a debt due from an agriculturist, the judgment-debtor shall apply to the Court under S. 19 to have that debt scaled down in accordance with the provisions of the Act. If that decree is actually in process of execution a remedy is provided by S. 20 whereby the judgment-debtor can get execution stayed for such time as is necessary to prefer an application under S. 19. If therefore a decree has been passed and is being executed after the Act comes into force, the judgment-debtor has ample opportunity for preventing the sale of his property in execution of that decree for such a time as is necessary to get the decree modified in accordance with the Act. It is most unlikely in view of this provision that the Legislature would also have contemplated a power in the judgment-debtor to

stand by while execution is going on after the Act has come into force and while third parties are acquiring interests in property sold, and thereafter to claim to have such a sale set aside. It seems to us clear that the view of the learned Subordinate Judge that S. 23 has no application to sales held after the Act came into force, is correct. In this view we dismiss this civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 279 (1)

HORWILL J.

President, Panchayat Board, Mangalagiri — Petitioner

v.

Bommala Kotayya and others — Respondents.

Criminal Revn. Cases Nos. 317, 318 and 335 of 1941 and Petns. Nos. 301, 302 and 318 of 1941, Decided on 19th August 1941, to revise judgments of Sub-Magistrate, Mangalagiri, D/- 30th November 1940.

(a) Madras Local Boards Act (14 of 1920), S. 159 — Applicability — Person disobeying panchayat President's order is liable to fine— Fact that president and person making encroachment are of opposite faction in panchayat is irrelevant.

The application of S. 159 does not depend upon the extent to which an encroachment is objectionable. The president has a right to have the encroachment removed; and if the person who encroaches upon the land of the panchayat refuses to obey the President's order, he makes himself liable to a fine by a criminal Court. The fact that the President of the panchayat board and the person making the encroachment are of opposite factions in the panchayat is irrelevant. The powers of the president are none the less because he dislikes the person making the encroachment. [P 279*d*,*e*]

(b) Criminal P. C. (1898), S. 439 — Acquittal —High Court will interfere only in very exceptional circumstances—Proper course is Crown appeal.

The High Court, except under very special circumstances, does not interfere in revision with an order of acquittal. The proper course in such a case is to move the proper authorities to prefer a Crown appeal. [P 279*e*]

S. Vepa and J. Krishnamurthi — for Petitioner.

Public Prosecutor — for the Crown.

ORDER.—Three revision petitions have been filed by the President of the Panchayat Board, Mangalagiri, against the order of acquittal of the Sub-Magistrate of Mangalagiri of three persons alleged to have encroached upon the lands of the Panchayat Board. In two out of the three cases, the accused admitted the encroachment, and yet the Magistrate refused to fine them. The reasons he gave for his order were that the Panchayat Board had not proved that the encroachment was objectionable and that it was "an instance of local influences and factions playing a large part with the Local Boards." The learned Magistrate has entirely misconceived the scope of the sections of the Madras Local Boards Act relating to encroachments. The application of S. 159, which empowers the president of the Local Board to require the owner or occupier of any premises to remove an encroachment, does not depend upon the extent to which such encroachment is objectionable. The president has a right to have the encroachment removed; and if the person who encroaches upon the land of the panchayat refuses to obey the president's order, he makes himself liable to a fine by a criminal Court. The learned Magistrate should therefore have taken action under S. 207 (1) and punished the offenders. The fact that the president of the Board and the person making the encroachment are of opposite factions in the panchayat, even if true, is irrelevant. The powers of the president are none the less because he dislikes the person making the encroachment. The proper course for the Panchayat Board to have adopted was to have moved the District Magistrate to prefer a Crown appeal. This Court, except under very special circumstances, does not interfere in revision with an order of acquittal. I understand that the Panchayat Board will be satisfied if the order of this Court makes it clear that a person making an encroachment is liable to punishment whether he belongs to the faction opposed to the president or not and whether the Court thinks the encroachment objectionable or otherwise. The revision petitions are dismissed.

C.R.K./G.N. *Petitions dismissed.*

Cr. P. C.—

(b) ('41) Chitaley, S. 439, N. 12 Pts. 1, 4, 9.
('41) Mitra, Page 1427 N. 1204 : "Interference with acquittal"; Page 1458, N. 1219: "Converting acquittal into conviction."

A. I. R. (29) 1942 Madras 279 (2)

LAKSHMANA RAO J.

Commissioner, Dindigul Municipality — Petitioner

v.

V. Rajamani Iyer—Respondent.

Criminal Revn. Case No. 192 of 1940 (Criminal Revn. Petn. No. 184 of 1940), Decided on 26th September 1940, to revise judgment of Bench Magistrate, Dindigul, in S. T. No. 1697 of 1939.

Madras District Municipalities Act (5 of 1920), Ss. 249, 313—Acquittal on ground of refusal not valid is not sustainable.

Where the executive authority has declined to renew the license, the acquittal of the accused on the ground that the order of refusal was not valid cannot be sustained. [P 280*a*]

V. Seshadri, K. Rajah Iyer and K. S. Rajagopalachari — for Petitioner.

V. T. Rangaswami Ayyangar and A. S. Srinivasa Iyer — for Respondent.

Public Prosecutor — for the Crown.

FACTS.—The petitioner Municipality prosecuted the respondent for an offence under Ss. 249 and 313, Madras District Municipalities Act, 1920, for running a coffee hotel and preparing and selling sweets in unlicensed premises in East Car Street, Dindigul, after his application for renewal of the license for 1939-40 was rejected. The Stationary Sub-Magistrate who tried the case held that no valid order was passed within thirty days of the receipt of application which was on 1st March 1939 and the order rejecting the renewal was passed only on 1st June 1939 and hence under S. 321 (11) the application should be deemed to have been allowed for the

year subject to the conditions ordinarily imposed. a He therefore found the respondent not guilty and acquitted him. Against this order the Municipality filed the revision petition.

ORDER. — The executive authority declined to renew the license and the acquittal of the accused on the ground that the order of refusal is not valid is unsustainable. The order of acquittal is therefore set aside and there will be a retrial in accordance with law by the District Magistrate or such other Magistrate as he may direct.

C.R.K./R.K. *Retrial ordered.*

A. I. R. (29) 1942 Madras 280

WADSWORTH J.

Reddi Mallayya — Petitioner

b

v.

Pedda Mallayya and others —

Respondents.

Civil Revn. Petn. No. 253 of 1940, Decided on 7th November 1941, to revise decree of Dist. Court, Anantapur, in A. S. No. 25 of 1939.

Madras Agriculturists Relief Act (4 of 1938), Ss. 9 and 8—*S* in 1931 executing note in favour of *P* undivided brother of *F*—Partition between *P* and *F* in 1932 — In 1933 *S* executing fresh note in favour of *F* in discharge of note of 1931 — *F* assigning note of 1933 to *P* in 1937 — Suit by *P* on note of 1933 — Debt under suit note held could be scaled down under S. 9—Note of 1933 held not renewal of note of 1931, creditor not being same — Dismissal of suit on account c **of *P's* failure to produce note of 1931 held erroneous — Error held justified interference in revision.**

The plaintiff sued on a note executed by defendant 2 in favour of his undivided brother, defendant 1, on 14th April 1933 which was assigned to the plaintiff on 2nd August 1937. The suit note of 1933 actually discharged an earlier note of 1931 executed in favour of the plaintiff himself at a time when the family was undivided, the partition being in 1932. The trial Court found that defendant 2 was an agriculturist and scaled down the debt on the basis of the suit note under S. 9. The District Judge in appeal found that the creditor had not fulfilled his duty of putting before the Court the materials necessary for scaling down the debt because of the non-production of the prior document of 1931 and in the absence of proof of the docu- d ments necessary in order to ascertain the original principal, no decree could be given against defendant 2. The appeal was therefore allowed and the suit dismissed with costs :

Held that (1) as the suit note was executed in favour of defendant 1 in discharge of an earlier note executed in favour of the plaintiff, the fact that the suit note was subsequently assigned to the plaintiff would not make the note a renewal of an earlier debt in favour of the same creditor ; [P 281*a*,*b*]

(2) as the first note was executed in favour of the plaintiff as representing the joint family and the second note was executed in favour of defendant 1 as a member of that family to whom the debt had been assigned on partition, it could not be said that the creditors were the same in the two transactions : ('40) 27 A. I. R. 1940 Mad. 356, *Rel. on* ; [P 281*b*]

(3) it was open to defendant 2 to plead and prove that the note of 1931 was assigned by the plaintiff e to defendant 1 before it was discharged by the note of 1933, in which case there would clearly be a renewal in favour of the same creditor; but no such case was pleaded ; [P 281*b*]

(4) in a case in which it could be shown that the creditor had wilfully failed to produce earlier documents which ought to be looked into for the purpose of scaling down the debt, the Court would be entitled to draw an inference adverse to the creditor from the non-production of those documents. No attempt was made by defendant 2 to require the plaintiff to produce the earlier note and the earlier note being irrelevant for the purpose of scaling down the debt the District Judge was grievously in error in dismissing the suit solely for the reason that the plaintiff had not produced the materials necessary to scale down the debt : (1940) 2 M. L. J. (N. R. C.) 27, *Expl.*; [P 281*a*,*c*]

(5) the error of the District Judge was one which justified interference in revision. [P 281*c*]

P. Chandra Reddy — for Petitioner.

E. Venkataramana Rao — for Respondents.

ORDER. — The plaintiff, who is the petitioner here, sued on a note executed by defendant 2 in favour of the plaintiff's undivided brother, defendant 1, on 14th April 1933 which was assigned to the plaintiff on 2nd August 1937. The trial Court found that defendant 2 was an agriculturist and scaled down the debt on the basis of the suit note under S. 9 of the Act, 4 of 1938. It was in evidence that the suit note of 1933 actually discharged an earlier note of about the year 1931 executed in favour of the plaintiff himself at a time when the family was undivided, the partition being in 1932. On these facts, the learned District Judge in appeal g found that the creditor had not fulfilled his duty of putting before the Court the materials necessary for scaling down the debt because of the non-production of the prior document of 1931 and in the absence of proof of the documents necessary in order to ascertain the original principal, no decree could be given against defendant 2. The appeal was therefore allowed and the suit dismissed with costs. An attempt has been made to support this judgment by reference to a short note of the case of *Suryanarayana* v. *Viswanadham* (C. R. P. No. 331 of 1939) found at p. 27 of the Notes of Recent Cases in (1940) 2 M.L.J. The short note states:

"Where a creditor becomes entitled to a promissory note belonging to a joint Hindu family at a partition with his other coparceners and fresh promissory notes are executed in his favour by the debtor, he cannot content himself with producing h the promissory notes executed in his favour alone and is bound to produce, if available, the promissory notes anterior to the date of partition as also the account books of the joint family, to enable the debtor to establish a claim to relief under Madras Agriculturists' Relief Act."

As I was a party to the decision in question which, if correctly reported, would be very difficult to reconcile with other decisions of the same Bench, I have sent for the original judgment in the case and find that the brief report bears little or no relation to the actual judgment. What we decided in the judgment was that the lower Court ought not to have refused permission to summon from the plaintiff's custody earlier promissory notes or accounts which tend to prove that the suit can be traced back to the earlier notes in favour of the same creditor or one of whom this creditor is the legal

representative. We expressly stated that nothing was said about the effect of the partition in the creditor's family but we confined ourselves to holding that the lower Court was wrong in shutting out evidence regarding documents executed before this partition.

It will be clear that the actual judgment in this case gives no support whatever to the position taken up by the learned District Judge. No doubt, in a case in which it can be shown that the creditor has wilfully failed to produce earlier documents which ought to be looked into for the purpose of scaling down the debt, the Court would be entitled to draw an inference adverse to the creditor from the non-production of those documents. But, in the present case, we have the suit note executed in favour of defendant 1 in discharge of an earlier note executed in favour of the plaintiff. The fact that the suit note was subsequently assigned to the plaintiff would not make the note a renewal of an earlier debt in favour of the same creditor. And if the first note was executed in favour of the plaintiff as representing the joint family and the second note was executed in favour of defendant 1 as a member of that family to whom the debt had been assigned on partition, it could not be said in view of the decision in (1941) 1 M.L.J. 39,[1] and other similar cases that the creditors were the same in the two transactions. No doubt it might be possible for defendant 2 to plead and prove that the note of 1931 was assigned by the plaintiff to defendant 1 before it was discharged by the note of 1933, in which case there would clearly be a renewal in favour of the same creditor; but no such case was pleaded and no attempt seems to have been made by defendant 2 to require the plaintiff to produce the earlier note and the earlier note was, so far as our information goes, irrelevant for the purpose of scaling down the debt. That being so, it seems to me that the learned District Judge was grievously in error in dismissing the suit solely for the reason that the plaintiff had not produced the materials necessary to scale down the debt. I am also of opinion that the error of the learned District Judge is one which justifies interference in revision. In the result, therefore, I allow the revision petition with costs throughout and restore the decree of the trial Court.

C.R.K./G.N. *Petition allowed.*

1. ('40) 27 A.I.R. 1940 Mad. 356 : (1941) 1 M.L.J. 39, Ramasubbier v. Rama Iyer.

C. P. C.—
('40) Chitaley, S. 115, N. 12.
('41) Mulla, Page 423 Note—"What is Illegality or material irregularity?"

A. I. R. (29) 1942 Madras 281 (1)

LAKSHMANA RAO J.

In re Pichumani Ayyar — Petitioner.

Criminal Revn. Case No. 673 of 1940 (Criminal Revn. Petn. No. 633 of 1940), Decided on 21st November 1940, to revise judgment of First Class Bench Magistrate, Madura Town, D/- 28th June 1940.

Madras District Municipalities Act (5 of 1920), Ss. 249, 313 — Plea held misunderstood.

A person was tried for an offence under Ss. 249 and 313 for running a hotel without licence. The accused stated that he had deposited the licence fee and made an application for renewal and he must be deemed to have licence :

Held that the plea could not be said to have admitted that he was running a hotel without a licence. [P 281*e*]

N. S. Srinivasan — for Petitioner.

Public Prosecutor — for the Crown.

FACTS — The revision is against the conviction of the petitioner for an offence under Ss. 249 and 313, District Municipalities Act, for running a hotel without the licence. In the lower Court the petitioner appeared and stated that he has deposited the licence fee and made an application for renewal and he must be deemed to have licence. The Bench Magistrates thought that the petitioner admitted that he is running a hotel without a licence, found him guilty and sentenced him to pay a fine.

ORDER.—The plea of the petitioner was misunderstood and the conviction cannot be sustained. It is therefore set aside and there will be a retrial in accordance with law. The fine if levied will be refunded.

C.R.K./R.K. *Retrial ordered.*

Cr. P. C.—
('41) Chitaley, S. 243 N. 2.
('41) Mitra, Page 871 N. 790 "Admission of accused."

A. I. R. (29) 1942 Madras 281 (2)

HORWILL J.

In re Sudalamada Kudumban —Accused.

Criminal Revn. Case No. 367 of 1941, (case referred No. 18 of 1941), Decided on 30th July 1941, referred by District Magistrate, Tinnevelly, in his letter dated 1st April 1941.

Criminal P. C. (1898), S. 349 (2)—Magistrate under S. 349 (2) must dispose of case himself—He has no power to remand it.

Under S. 349 (2) the Magistrate to whom proceedings are submitted under S. 349 (1) is bound to dispose of the case himself and has no power to remand the same for disposal to the Magistrate by whom the proceedings were submitted. The Magistrate acting under S. 349 (2) is not obliged to pass an order of the nature considered appropriate by the Magistrate who submitted the proceedings. [P 281*h* ; P 282*a*]

Public Prosecutor — for the Crown.

ORDER. — The Stationary Sub-Magistrate of Srivaikuntum found the accused before him guilty of an offence under S. 324, Penal Code; but as he thought that an order under S. 106, Criminal P.C., had to be passed against the accused and he had no power to do so himself, he acted under S. 349 (1), Criminal P. C., and he submitted his proceedings and forwarded the accused to the Sub-Divisional Magistrate to whom he was immediately subordinate. The joint Magistrate, instead of acting under S. 349 (2), Criminal P. C., and disposing of the matter himself, considered the proposal of the Sub-Magistrate that proceedings should be taken under S. 106, Criminal P. C., and came to the conclusion that it was not necessary. He thereupon sent the case back to the Sub-Magistrate for disposal. That he had no power to do. Section 349 (2) says :

"The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties . . . shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law."

It is thus seen that the Magistrate was bound to a dispose of the case himself; although he was not, of course, obliged to pass an order of the nature considered appropriate by the Stationary Sub-Magistrate. The order passed by the Joint Magistrate dated 12th February 1941 remanding the case to the Sub-Magistrate for disposal is therefore set aside and the Joint Magistrate ordered to dispose of the case according to law under Section 349 (2), Criminal P. C.

C.R.K./G.N. *Order accordingly.*

Cr. P. C. —
('41) Chitaley, S. 349, N. 13, Pts. 1, 2; N. 16 Pt. 1.
('41) Mitra, Page 1166, N. 1010.

A. I. R. (29) 1942 Madras 282

VENKATARAMANA RAO J.

b *C. Ethiraja Mudaliar — Appellant*

v.

N. Murugesa Mudaliar and others — Respondents.

Second Appeals Nos. 346 to 356 of 1939, Decided on 4th September 1941, against decrees of District Court, Chingleput, in A. S. Nos. 36 to 46 of 1937.

(a) Madras Estates Land Act (1 of 1908), Ss. 111 and 112 — More than one landholder — One cannot initiate proceedings under Ss. 111 and 112 without joining others.

In the case of more than one land-holder, the expression "land-holder" in Ss. 77 (a) and 111 should be read as "land-holders." If there is more than one land-holder, particularly, where the land-holder's interest is vested in several sharers, it c would not be competent for one land-holder to exercise the power of sale or initiate proceedings in regard thereto without the other land-holder or land-holders being made parties to such proceedings. The English Common Law rule whereby one cosharer can distrain the tenants on behalf of the other cosharer for arrears of rent cannot be applied in the face of the provisions of the Estates Land Act by which the case must be decided. [P 283*d*,*e*]

(b) Hindu law—Minor— Guardian — Father or mother is natural guardian—Brother cannot act for his minor divided brother unless he gets himself appointed as guardian under Guardians and Wards Act.

Under the Hindu law a father or mother is the natural guardian of his or her minor child and, therefore, unless a person gets himself appointed as d guardian of his minor divided brother under the Guardians and Wards Act he cannot act for his minor brother :('40) 27 A.I.R. 1940 Mad. 33 (F.B.), *Rel. on.* [P 283*e*]

(c) Madras Estates Land Act (1 of 1908), S. 3 (5)—Several land-holders — Collector can recognise one as land-holder only in case of dispute between them and not where dispute is raised by ryot.

The plain language of S. 3 (5) indicates that the Collector can recognise one person as a land-holder if there is more than one land-holder, only if there is a dispute between the land-holders and not where the dispute is raised only by a ryot. [P 283*f*]

K. Rajah Ayyar and V. Seshadri — for Appellant.

S. Jagadisa Iyer and G. R. Jagadisan — for Respondents.

JUDGMENT. — This is a batch of appeals arising out of suits filed by the tenants of Zamin e Devaranjeri village, Ponneri Taluk under S. 112, Madras Estates Land Act, for raising the attachment of the holdings effected by the appellant. Several grounds were alleged in the plaint of which three require notice. (1) There was no proper exchange of patta and muchilika between the plaintiff and the defendant for the fasli 1343 and there was no proper tender of patta. Therefore, the attachment proceedings were not proper and valid. (2) It is not competent for the appellant to initiate the proceedings for sale under the Estates Land Act on the ground that he was not the sole proprietor of the village and that there were other cosharers who ought to have joined in the proceedings. (3) The merais claimed in the demand notice were not legally enforceable. The defendant in the written statement urged that there were valid pattas and f muchilikas in force, that he was competent to take proceedings under the Estates Land Act and bring the holdings of the tenants to sale and that the merais were legally enforceable.

The Deputy Collector who tried these suits held that pattas and muchilikas were exchanged in some cases and tendered in other cases and, therefore, he would hold that there was exchange of pattas and muchilikas continuing in force and that though the defendant had a brother, Kesava Mudaliar, he was only a minor and that the defendant was competent to take proceedings without joining his brother. With regard to the merais he held some of them enforceable and some not. Appeals were preferred against these decisions in the various suits. The learned District Judge of Chingleput reversed the decisions and disposed of the suits on two grounds, viz., (1) that the managing member of a g joint undivided Hindu family was not competent to tender a patta without his undivided brother being also a party to the tender and (2) that he would not be competent to exercise the right of sale under the Estates Land Act without his brother joining in the proceedings.

When these appeals were argued before me, I wanted to find out what were the various pattas which must be deemed to be in force in the several suits, on the strength of which the learned District Judge came to the conclusion which he arrived at. In the course of the hearing, the deposition of D. W. 3 was brought to my notice in which reference was made to a suit for partition in the family of the defendant and the appointments of receiver or receivers in that suit. As the suit was one on the file of this Court (C. S. No. 307 of 1928), I caused the papers to be produced, as without reference to them it would not be satisfactory to dis- h pose of these appeals. On a reference to them I found that the suit was one for partition of the joint family properties instituted by the defendant against his father Venugopala Mudaliar and his undivided brother Kesava Mudaliar. There was a preliminary decree for partition in and by which all the properties of the joint family including the suit village were directed to be partitioned and each of the parties was held entitled to share therein. There was a final decree subsequently in the same suit in which the properties including the suit village were partitioned in two equal shares because at that time the father was dead. So far as the suit village is concerned, the appellant herein and Kesava Mudaliar were each given one-half share in it. One Kumariah was appointed a receiver in that suit and thereafter one Panchakshara Mudaliar was appointed. These facts establish that the assumption on

which the learned District Judge decided, viz., that the parties were members of a joint Hindu family, was wrong. Therefore the question arises as to whether one co-sharer can tender a patta without the consent of the other. On a reference to evidence in the suits, I find that some pattas were tendered by the receiver and muchilikas in his favour executed by the tenants, and that subsequent to the partition suit, pattas were tendered in some faslis by the appellant and refused by the tenants. On these facts the question which naturally arises is whether the patta tendered by the receiver could not be said to be continuing in force if no patta was subsequently exchanged between the parties. Mr. K. Rajah Ayyar's contention is that the pattas issued by the receiver must be deemed to be in force if no subsequent pattas were issued or if the pattas were issued such pattas are held to be invalid. But specific attention was not directed to this aspect of the matter in the lower Courts and the learned Deputy Collector simply stated that there were valid pattas issued in force without specifically adverting to the evidence in the case. If the matter had rested there, I should have set aside the finding of the learned District Judge and remanded the suits for rehearing. There was another question in the case, namely, whether the proceedings initiated by the defendant in bringing the holdings of the tenants to sale were valid, and if they were not valid whether the tenants had not the right to set aside the attachment under S. 112, Estates Land Act. The learned District Judge gave a decision against the appellant and decreed the suits. Therefore this question arises pointedly for consideration.

Mr. Rajah Ayyar contends that Kesava Mudaliar being a minor it would be competent on the part of the appellant alone to take proceedings and at any rate he must be deemed to have done so as the guardian of Kesava Mudaliar. It cannot be said that the appellant can be the legal guardian of Kesava Mudaliar in view of the Full Bench decision in I. L. R. (1940) Mad. 358.[1] But however I find in 1936 that so far as Kesava Mudaliar is concerned, his name was registered as represented by the appellant herein as his legal guardian. In that case it might be that apart from the Full Bench decision, for the purpose of the Estates Land Act, it would be competent for the appellant to tender a patta or initiate proceedings for sale on behalf of his brother as his guardian. That question however does not fall to be decided in these suits because proceedings were taken before 1936. Mr. Rajah Iyer relied on the Common Law rule in England whereby one cosharer can distrain the tenants on behalf of the other cosharer for arrears of rent. The said rule cannot be relied on in the face of the provisions of the Estates Land Act by which the question has to be decided. Under Ss. 77 and 111 of the Act it will be competent for the landholder to proceed against the ryot for the recovery of arrears of rent by the sale of his holding. Both the sections use the expression "landholder" but the singular would include the plural. If there is more than one landholder we must read in the section for the expression "landholder," "landholders." If there is more than one landholder, particularly in this case where the landholder's interest is vested in several sharers, it would not be competent for one landholder to exercise the power of sale or initiate proceedings in regard thereto without the other landholder or landholders being made parties to such proceedings.

Mr. Rajah Iyer pointed out several inconveniences and anomalies which might result by adopting this view. I have to construe the provisions of the statute as they are. Such anomalies have to be met by an amending legislation. I must point out in this connexion that in such cases as the present there apparently appears to be no provision by which one of the cosharers can get himself recognized as a landholder within the meaning of S. 3 (5) of the Act. Taking this specific case the Full Bench of the Madras High Court has held in I. L. R. (1940) Mad. 358[1] that none but a father or mother can be the natural guardian of his or her minor child and therefore unless the appellant gets himself appointed as guardian of his brother under the Guardians and Wards Act he cannot act for his brother. The plain language of S. 3 (5) indicates that the Collector can recognize one person as a landholder if there is more than one landholder only if there is a dispute. Mr. Jagadisa Iyer contends that it is open to the Collector to register a person as a landholder even if there is no dispute between the landholders, but the dispute raised was only by a ryot and he relied upon a decision in 29 I C 31[2] in support of this contention. The case does not lay down any such proposition. The facts are entirely different. To hold in favour of the contention urged by Mr. Jagadisa Iyer would be against the plain language of the section which says that the dispute must be between the landholders. At any rate the section needs an amendment in the interests of the landholders and ryots. In the result on the view I have taken, viz., it is not competent for the appellant to initiate the proceedings to exercise the power of sale under Ss. 111 and 112, Estates Land Act, I dismiss these appeals. But in the circumstances of the case I direct each party to bear his own costs.

C.R.K./G.N. *Appeals dismissed.*

1. ('40) 27 A.I.R. 1940 Mad. 33 : 186 I.C. 749 : I.L.R. (1940) Mad. 358: (1939) 2 M.L.J. 884 (F.B.), Chennappa v. Onkarappa.

2. ('16) 3 A.I.R. 1916 Mad. 765 : 29 I.C. 31, Sona Alaga Kudumban v. Sivarama Aiyar.

Hindu Law —
(b) ('40) Mulla, Page 566 Pt. (e).
('38) Gour, Page 283 Pts. (14, 15).

A. I. R. (29) 1942 Madras 283

HORWILL J.

Ma. Si. Muthuveeran Chettiar and others — Petitioners

v.

Mottayan Chettiar — Respondent.

Criminal Revn. Case No. 694 and Petn. No. 652 of 1941, Decided on 17th September 1941, to revise order of Sub-Divisional Magistrate, Musiri, in C. C. No. 19 of 1941.

(a) Companies Act (1913), S. 4 (5) — Magistrate finding that he ought not to have taken cognizance of offence under S. 4 (5) — He can drop proceedings.

There is no legal objection to the proceedings being dropped by the Magistrate if he finds that he ought not to have taken cognizance of the offence under S. 4 (5). [P 284c]

(b) Companies Act (1913), S. 4 (5)—S. 4 (5) relates to S. 4 (1) and (2)—Company formed in contravention of S. 4 (2) before S. 4 (5) came

into force — Members can be punished for continuing to be members after S. 4 (5) came into force.

Sections 4 (1) and 4 (2) are the only sub-sections to which the wording of S. 4 (5) can be applied. Section 4 (5) does not punish a person for having been a member, prior to its enactment, of an illegal association, company or partnership formed in contravention of S. 4 (2). But S. 4 (5) is applicable to persons who continue to be members of such illegal association, company or partnership after the enactment of S. 4 (5) even though the illegal association, company or partnership was formed before the enactment of S. 4 (5). [P 284*e*, *f*, *g*]

(c) Companies Act (1913), Ss. 137, 138, 141 and 141A—Construction—Offences under Act—Cognizance of, is governed by S. 190, Criminal P. C.—Private person can complain.

As there are no provisions to the contrary in the Companies Act, the taking cognizance of an offence under that Act must be governed as in the case of an offence under the Penal Code, by S. 190, Criminal P. C. One of the methods of taking cognizance of an offence is by receiving a complaint of the facts which constitute such an offence. There is no restriction in the terms of S. 190, Criminal P. C., with regard to the person who may lay a complaint. Consequently, a private person can complain where an offence punishable under the Companies Act has been committed. Sections 137, 138, 141 and 141A refer to offences by registered companies and to offences discovered by a particular procedure. They impose no restriction on the manner in which offences may be taken cognizance of : 13 Bom. 600 and ('40) 27 A.I.R. 1940 Cal. 232, *Rel. on.* [P 284*g*, *h*; P 285*a*]

The Madras Government Notifications No. 518 dated 6th June 1916, and G. O. Misc. No. 3070 dated 23rd August 1932 merely permit the Registrar to do what before was not a part of his duty, viz., to lay complaints. They do not purport to restrict a Magistrate in the exercise of his powers under S. 190, Criminal P. C. [P 285*b*]

V. T. Rangaswami Ayyangar and S. Amudachari — for Petitioners.

T. V. Ramanatha Ayyar — for Respondent.

K. Veakataraghavachariar and A. S. Sivakaminathan — for the Crown.

ORDER.—This is an application by the accused in C. C. No. 19 of 1941 on the file of the Sub-Divisional Magistrate of Musiri to quash the proceedings against them. The offence with which they have been charged is under S. 4 (5), Companies Act, with being members of an association formed in contravention of S. 4 (2), which requires that no company of more than 20 persons shall be formed unless it is registered. It is admitted that the company was formed in 1922-1923, at a time when sub-ss. (1) and (2) to S. 4 had been enacted, but not sub-ss. (3) to (5), which were enacted only in 1936. Mr. V. T. Ramaswami Ayyangar for the petitioners has raised three contentions: The first is that the Sub-Divisional Magistrate was wrong in holding that he could not drop proceedings when once he had initiated them. The second is that S. 4 (5), which was enacted in 1936, has no retrospective effect and cannot affect the petitioners who formed their association in 1922 or 1923. The third is that the complainant in this case has no locus standi to file a complaint and that the Sub-Divisional Magistrate was therefore wrong in taking cognizance of this case on such a complaint. I have not been able to find any legal objection to the proceedings being dropped by the Sub-Divisional Magistrate if he finds that he ought not to have taken cognizance of this offence. The second question is whether the accused are legally punishable for having formed themselves into an illegal body in 1922-1923 when the punitive section did not exist. Section 4 (2), Companies Act, says that:

"No company, association or partnership consisting of more than 20 persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership . . . . . unless it is registered as a company under this Act . . . . ."

It cannot be denied that the original members of this association, whether we call it a company or partnership, did an illegal act in forming themselves into this association; and they continued to be members of an illegal body throughout the whole of the period from 1923 to 1936, when sub-ss. (3), (4) and (5) were enacted. They had contravened the provisions of the Act, but they could not be punished for doing so. Sub-section (5) says:

"Any person who is a member of a company, association or partnership, formed in contravention of this section, shall be punishable with fine not exceeding Rs. 1000."

The members of this association cannot therefore be punished under this sub-section for having formed themselves into a company, association, or partnership in contravention of S. 4 (2); but they can be punished for continuing to be members of it. Mr. V. T. Rangaswami Ayyangar's argument that S. 4 (5) has no retrospective effect would have some force if the forming of a company in contravention of S. 4 (2) had been made punishable, for the petitioners had formed the company before it became a crime to do so. There was however nothing to prevent them from resigning from the association as soon as S. 4 (5) was enacted. If they had done so, they could not have been punished for having been members prior to the amendment. Mr. V. T. Rangaswami Ayyangar contends that S. 4 (5) does not relate to S. 4 (2) at all; but Ss. 4 (1) and 4 (2) are the only sub-sections to which the wording of S. 4 (5) could be applied. I therefore cannot agree that, on the facts of the complaint, no offence has been made out.

The remaining question is with regard to the locus standi of the complainant. It is argued that the proper person to institute a complaint is the Registrar of Companies. As there are no provisions to the contrary in the Companies Act, the taking cognizance of an offence under this Act must be governed, as in the case of an offence under the Penal Code, by S. 190, Criminal P. C.; and one of the methods of taking cognizance of an offence is by receiving a complaint of the facts which constitute such an offence. There is no restriction in the terms of S. 190 with regard to the person who may lay a complaint. I respectfully agree with 13 Bom. 600,[1] that the wording of S. 190 leaves no room for doubt on this matter. The Companies Act deals with the question of initiating proceedings only in S. 137 *et seq.* Section 137 gives power to the Registrar to call for documents from a company and, if he finds on a perusal of them that there is any contravention of the Act, he may report the matter to the Local Government. Under S. 138, Inspectors can be appointed for certain purposes under the Act, and S. 141 makes provision for the reporting to the Local Government of any irregularities discovered

1. ('89) 13 Bom. 600, In re Ganesh Narayan Sathe.

by the Inspectors. Then, under S. 141-A, if the Local Government is of opinion upon the report of the Inspector that an offence has been committed, they shall refer the matter to the Advocate-General or the Public Prosecutor, who are empowered under this section to take such steps for the prosecution of the offenders as may be necessary. These sections refer to offences by registered companies and to offences discovered by a particular procedure. They impose no restriction on the manner in which offences may be taken cognizance of. In I. L. R. (1940) 1 Cal. 575,[2] it was held that a private person can complain where an offence punishable under the Companies Act has been committed. My attention has however been drawn to two Notifications of Government—No. 518 dated 6th June 1916 and G. O. Mis. No. 3070 dated 23rd August 1932—published in the Fort Saint, George Gazette which permit the Registrar or the Assistant Registrar to institute prosecutions under the Act for defaults on the part of companies or persons in furnishing returns, documents or notices or for any other non-compliance with the provisions of the Act. These Notifications merely permit the Registrar to do what before was not a part of his duty, viz., to lay complaints. They do not purport to restrict a Magistrate in the exercise of his powers under S. 190, Criminal P. C.

Mr. V. T. Rangaswami Ayyangar argues that even though there may be no legal bar to a Magistrate's taking cognizance of an offence on a private complaint, it is not expedient, that any "Tom, Dick or Harry"—to use Mr. V. T. Rangaswami Ayyangar's words—should be permitted to harass members of companies out of motives of private spite or enmity. That argument might be applied just as well, however, to offences under the Penal Code or any other enactment. I therefore find no reason to quash the proceedings before the Sub-Divisional Magistrate and I accordingly dismiss this petition.

C.R.K./G.N. *Petition dismissed.*

2. ('40) 27 A.I.R. 1940 Cal. 232 : 188 I.C. 537 : 41 Cr.L.J. 625 : I.L.R. (1940) 1 Cal. 575 : 44 C.W.N. 454, Surendranath Sarkar v. Kali Pada Das.

Cr. P. C. —

(c) ('41) Chitaley, S. 4 (1) (h) N. 5 Pts. 1 and 4; S. 1 N. 3 Pt. 5; S. 5 N. 6 Pt. 1; S. 190 N. 19.
('41) Mitra, Page 24 N. 13; Page 42 N. 32; Page 602 N. 586.

A. I. R. (29) 1942 Madras 285

MOCKETT J.

In re Karichiappa Goundan —

Appellant.

Criminal Appeal No. 203 of 1941, Decided on 25th April 1941, against conviction and sentence of Court of Session, Coimbatore Division, D/- 18th February 1941.

(a) Penal Code (1860), S. 376—Rape — Proof — Essentials of.

It is an essential part of the proof in rape that there should have been not only an assault but actual penetration. The only witness who can prove that is the woman. In practice, a conviction for rape almost entirely depends on the credibility of the woman so far as the essential ingredients are concerned, the other evidence being merely corroborative. Her testimony is vital in a case where the woman is married and the medical evidence in no way corroborates the charge of rape. The presence of spermatozoa indicating semen found in the woman's genitals or on her saree is by no means final in the case of a married woman.

[P 286*d*,*e*]

(b) Penal Code (1860), S. 376 — Rape— Sessions case— Member of Bar should be appointed as amicus curiæ.

It would be well in Sessions Cases in cases of rape, at least in some of them, if the Sessions Judges appointed a member of the Bar as *amicus curiæ*. [P 287*a*]

G. Gopalaswami — for Appellant.

Public Prosecutor — for the Crown.

JUDGMENT. — The appellant has been convicted of the offence of rape under S. 376, Penal Code. The woman on whom he is alleged to have committed rape is named Subbammal. She lived at a village Poovanallur which is nine miles from Kangeyam and the offence is said to have been committed on 9th December 1940 at lamp-lighting time, which may approximately be said to be about 6 o'clock. The allegation is that Subbammal had gone to Kangeyam where the shandy was and was returning in the evening when she was raped by the appellant. The learned Sessions Judge has accepted the case for the prosecution, has taken a very grave view of the offence which, he considered was committed with considerable brutality, and sentenced the appellant to rigorous imprisonment for five years and to receive 25 stripes under S. 4, Whipping Act. The occurrence, as I have said, is alleged to have taken place at about, 6 P. M., on 9th December. The first information report reached the police at Kangeyam on the next day at about 7-40 A. M. It is a most important document and I will set it out in full :

"Yesterday while I was returning from the Kangeyam shandy with Meenakshi Ammal, Palani Chetty, Subbaraya Chetty, Palaniswami Goundan and Karichiappa Goundan (appellant)—these also came along with us from the shandy. As we were nearing the itteri to the north of Molapalayam, Samiappa Goundan, his younger brother Ponnuswami Goundan, Sellappa Goundan, Muthuswami Goundan and Sundara Goundan—these were sitting in the itteri. On seeing us they observed : 'Why delay ? Look sharp' and immediately Karichiappa Goundan (appellant) who was coming with us, caught me, pushed me down, untied my saree and threatened to stab if I raised any alarm by showing a knife in his hand. The said Palaniswami Goundan, caught hold of Meenakshi Ammal who was coming along with me. Karichiappa Goundan ravished me and threatened to stab if I did not give up my jewels."

She sets out in detail the ornaments which she gave up and proceeds :

"Palaniswami Goundan, left off Meenakshi Ammal, pushed me down and raped me. Then Karichi Goundan and Palaniswami Goundan these went away to Molapalayam with those five who were sitting in the itteri. We returned to the village. Out of fear we stayed in the village itself for the night and today I came and have reported to you."

So it will be seen that this woman alleged the next day that she was threatened with a knife, robbed of her jewellery and raped by the appellant and that Palaniswami Goundan also raped her. At the Sessions she told another story, a very remarkable story. There her version as P. W. 5 was this : On her return home she passed the appellant at the toddy shop at Sambavalasu. He followed. There were three Chettis in front and she and her sister

were walking. The appellant, she said, was walking behind drunk. As they were passing Kannakkankadu, the appellant came in front and told her to stop. As to what happened thereafter this is what she said :

"Then he pushed me down and I shouted out. My sister came towards me but the accused pushed me down on some thorns, pulled up my sari and raped me on the spot. My sister shouted out to the accused and he then threatened to stab her if she remained there much longer. When the accused first struggled with me he showed me a knife and this he showed to the Chettis, P. Ws. 7 and 8, as they came up and they turned tail and went off as soon as they saw it. My sister ran away at the threat and I got up as soon as the accused finished raping."

This is important because those words mean and can only mean that this man had completed the act of intercourse. She proceeds :

"As I was arranging my cloth, the accused caught hold of me and dragged me across the field about 80 yards and again threw me down and raped me. I dared not raise any alarm as he threatened me with the knife. I begged him to let me go, but again he dragged me across the field for about 100 yards, again threw me down and ravished me a third time."

She describes how she went home. Now it will be noticed that there is no word with regard to any robbery, but that she explains. She says that she after getting home that evening reported to her relations and they told her that she must complain of having had her jewels stolen to make her case stronger. That part of her complaint was false. She says she does not remember anything about a second man having ravished her. She had apparently forgotten the relatively minor incident which she described in Ex. G of how Palaniswami Goundan had raped her. At the Sessions the appellant was charged with rape only and Palaniswami Goundan was charged with nothing. The rest of the evidence is as follows : The evidence of P. W. 6 is that she was in this party, that she heard a shout and that she saw her sister being thrown down and that the appellant was on the top of her raping her. She says that the Chettis asked the appellant how he dared to do such a thing, but that he threatened them with a knife and that they at once ran back. These Chettis, who were P. Ws. 7 and 8, are brothers and are cousins of Subbammal. She says that she was threatened not to stay there and so she went back to Malapalayam about ¾ mile, raised an alarm and three Goundans came back with her. They are P. Ws. 9 to 11. The learned Sessions Judge took a very remarkable view in my opinion of this case, because he said that

"if the case depended to any great extent on the testimony of this woman, the accused would be entitled to an acquittal since she has shown herself to be largely unworthy of credit by making these false allegations in her complaint."

Now I consider that on that statement alone the appellant was entitled to an acquittal. It is an essential part of the proof in rape that there should have been not only an assault but actual penetration. The only witness who can prove that is the woman. In practice, a conviction for rape almost entirely depends on the credibility of the woman so far as the essential ingredients are concerned, the other evidence being merely corroborative. Her testimony is vital in a case like this where the woman is married and the medical evidence in no way corroborates the charge of rape. There was no violence revealed in the genital organs (which might be natural in a woman of this age who was several times a mother) and the Chemical Examiner's report takes the case no further. Even had there been spermatozoa indicating semen found in the woman's genitals or on her saree, it would have been by no means final in the case of a married woman. The minor injuries found upon her are in my opinion far too trifling to substantiate a charge of rape and cannot be said to lend truth to her story. Taking the evidence therefore at its highest, nothing more was proved than that some form of violence was used to this woman. If her evidence cannot be believed as a whole, it is quite impossible to say that it can be accepted with regard to the vital part, namely, that she was subjected to an act of sexual intercourse against her will. The examination-in-chief which should have elicited those intimate but essential details necessary to prove rape was content to elicit the replies "I was raped, I was ravished." But the case does not rest there. I have had the advantage in this case of an argument from Mr. G. Gopalaswami and also from the Public Prosecutor. Mr. G. Gopalaswami has pointed out a number of defects. It has been pointed out that the first information report mentions one rape by the appellant and one by Palaniswami Goundan, whereas in her evidence she alleges that she herself was raped three times by the appellant and not by Palaniswami at all. It is most unfortunate in this case that this man was not defended, and I notice that no questions were put in cross-examination by the Court with regard to various matters which called for explanation. A lady doctor was examined and so was Dr. P. S. Vaidhyanathan; and I think he might well have been asked whether in his opinion it was possible for a man—a drunken man—to commit the offence of rape three times within a few moments. He was never asked this. The learned Judge, having virtually rejected the chief and vital witness for the prosecution, says that he can accept the evidence of her sister and two of her three companions supported by that of the three Goundans who formed the "rescue party."

Now as to that, the Public Prosecutor who has most properly in the carrying out of his duty indicated that he cannot support this conviction, has emphasised that this woman went with a false story of robbery to the police and that she went accompanied by P. Ws. 6, 7 and 8. He has pointed out that all these people were examined together, and I think it is quite clear that they were acting together throughout. But if there is any question as to whether the evidence of P. Ws. 7 and 8 can be accepted, let us examine their conduct. The woman who had been raped was their cousin. They came upon the scene and saw what must have been a sexual assault or at least an assault. But they say that being threatened with a knife they ran to their village. That possibly is credible, although it does not show a high standard of courage. Having got to their village and having seen their cousin being assaulted, what did they do ? The answer is nothing whatever. But apparently quite casually they went later to P. W. 5's house and were then informed by her—what I decline to believe—that she had been raped three times by the appellant. They themselves reported the matter to no one that afternoon. I consider their evidence wholly unreliable and a fulsome prop to the evidence of the woman who was admittedly telling a false story of robbery and whose evidence on the face of it is incredible. P. Ws. 9 and 10, however, appear to have been relied upon. After hearing that there had been

this attack, they went to the scene, saw the appellant there and went back to their village and made no report to any one. I decline to believe that these four persons—P. Ws. 7 to 10—if they had really seen or heard that the woman was being raped by an armed man, would not have made a complaint, if not to the village munsif, at least to some of the villagers and gone out in force to deal with the matter.

* * * * *

Before leaving this case, I should like to express an opinion, namely, that it would be well in Sessions cases in cases of rape—at least in some of them —if the Sessions Judges appointed a member of the Bar as amicus curiae. The Bar have never failed to co-operate with the Bench in matters of that sort. I have to-day had the advantage of Mr. G. Gopalaswami's assistance. Rape has been often described as the easiest charge to make and the most difficult to refute. Experience shows that the conduct of defences in these cases is of special difficulty. In England almost as a matter of practice, unrepresented persons charged with rape and other sexual offences are defended under the Poor Prisoners Defence Act. The reason is that cross-examination is of the utmost importance in order to test the complainant's story, especially when the medical evidence is negative. It is lamentable to see in this case that this inarticulate agriculturist was quite undefended. There was virtually no cross-examination at any time of any of the witnesses; and no questions appear to have been asked by the Court. I consider this conviction was wholly unsustainable. The appeal will be allowed, the conviction and sentence set aside and the appellant released.

C.R.K./G.N. *Appeal allowed.*

Penal Code —

(a) ('36) Ratanlal, Page 899 N. "Explanation;" Page 901 N. "Evidence."
('36) Gour, Page 1235 Paras. 4293, 4294 ; Page 1236 Para. 4300.

Cr. P. C. —

(b) ('41) Chitaley, S. 340, N. 6a.
('41) Mitra, Pages 1113 and 1114 N. 967: "Pleader appointed by Court."

A. I. R. (29) 1942 Madras 287

HORWILL J.

In re Peri Rameswara Sarma and others Petitioners.

Criminal Revn. Cases Nos. 698, 699, 700 and Petns. Nos. 656, 657 and 658 of 1941, Decided on 15th October 1941, to revise judgment of Sub-Divisional First Class Magistrate, Amalapuram, in C. A. Nos. 22, 17 and 19 of 1941.

(a) Madras Gaming Act (3 of 1930), Ss. 5 and 10 — Money seized from persons in gaming house—Under S. 5 prosecution need not prove that money was or even intended to be used for gaming—Magistrate can confiscate it if satisfied that it was seized on reasonable suspicion.

Under S. 5 there is no necessity on the part of the prosecution to prove that the money seized from the persons in the gaming house was used or even intended to be used for gaming; because the Police under S. 5 are entitled to seize on reasonable suspicion. The Magistrate, if he considers that the articles were seized on reasonable suspicion, is entitled to order them to be confiscated under S. 10. [P 287*f*,*g*]

(b) Madras Gaming Act (3 of 1930), S. 5— Person from whom money is seized need not be shown to have been gaming.

The person from whom money is seized under S. 5 need not be shown to have been gaming at that moment; as under S. 5, he may be presumed to have been there for the purpose of gaming. [P 287*h*]

V. Viyanna — for Petitioners.

Public Prosecutor — for the Crown.

ORDER. — The petitioners were found in a common gaming house and all of them with the exception of the 14th—and possibly of the 28th—accused, were found gaming. At the time of the search, all the money found on their persons was seized by the police; and the Magistrate ordered the confiscation of all that money. That order was upheld on appeal. These petitions were admitted on the question as to how far the Magistrate was justified in ordering the confiscation of the money found on the persons of the petitioners. Section 5, Madras Gaming Act, authorises the police officer making the search "to seize all instruments of gaming and all monies and securities for money and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming which are found therein. . . . ."

Under S. 10 of the same Act, the trial Magistrate may order all or any of the articles seized or the proceeds of the same to be forfeited. It is thus seen from these two sections that there is no necessity on the part of the prosecution to prove that the money seized from persons in the gaming house was used or even intended to be used for gaming; because the police are entitled to seize on reasonable suspicion. Where the Magistrate considers that the articles were seized on reasonable suspicion, he is entitled to order them to be confiscated. It is extremely difficult to be sure in any case whether or no money found on a person in a gaming house is intended to be used for purposes of gaming. A man might take a large sum of money in his pocket hoping to win, and therefore to use very little money. Yet he may be prepared, if necessary, to stake the whole of what he has in his possession, rather than leave the gaming house a loser. Both the Magistrates have brought their minds to bear on this question and they were satisfied that all the petitioners intended to use the money found on their persons for the purpose of gaming. I am unable to say that there is no foundation for such a finding. A special plea has been made with regard to accused 14 and 28, who were said not to have been gaming at the time. The judgment discloses that accused 28 was found gaming; but even if he was not, I find it difficult to distinguish the case of these two petitioners from the others. It may be true that they were not gaming at that moment; but under S. 5, they may be presumed to have been there for the purpose of gaming. If so, they may have won that money just before the raid was made or may have intended to play with that money afterwards. Under these circumstances, I do not find any reason to interfere with the very wide discretion which the Magistrate has in a matter of this kind. The petitions are dismissed.

C.R.K./G.N. *Petitions dismissed.*

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* A. I. R. (29) 1942 Madras 288 (1)

WADSWORTH J.

Bembiri Kothanath Devaki Kutti Amma's son Padmanabha Nayar — Defendant — Petitioner

v.

Chali Parambil Ezhuvan Vellappan's son Appu alias Theyyan — Plaintiff — Respondent.

Civil Revn. Petn. No. 1157 of 1937, Decided on 7th August 1940, to revise decree of District Munsif, Alathur, in S. C. S. No. 30 of 1937.

(a) Civil P. C. (1908), S. 2 (17) — Scope — Adhikari.

An adhikari receiving money towards arrears of revenue comes within the definition of a "public officer." [P 288*d*]

***(b) Civil P. C. (1908), S. 80 — Scope and object—Suit against person who was public officer at time of cause of action but ceasing to be so at time of suit—Notice is not necessary.**

Notice under S. 80 is not necessary in a suit instituted against a person who was at the time of the cause of action a public officer and is sued in respect of his act as such public officer, but has ceased to be a public officer by the time the suit was instituted.

(Object of section explained.) [P 288*c*,*e*,*f*]

(c) Civil P. C. (1908), S. 2 (17) — Scope — Person who has ceased to be in Government employ.

There is nothing in the definition of a "public officer" in S. 2 (17) to justify the inference that it includes a person who was once in the employ of Government but is so no longer. [P 288*e*]

S. R. Subramanian — for Petitioner.

K. P. Ramakrishna Aiyar — for Respondent.

ORDER. — This revision petition raises the question whether notice under S. 80, Civil P. C., is necessary in a suit instituted against a person who was at the time of the cause of action a public officer and is sued in respect of his act as such public officer, but has ceased to be a public officer, by the time the suit was instituted. The petitioner was an acting adhikari in which capacity he attached the respondent's land for arrears of revenue. To raise the attachment, the respondent paid a sum of money. The present suit is to recover an amount alleged to be in the hands of the petitioner in excess of the amount due towards revenue. There is no doubt that the petitioner at the time of the receipt of this money came within the definition of a public officer, and that his act in receiving the money from the plaintiff was one which he purported to do in his official capacity. If therefore he is to be made to refund an excess collection, the suit is one which would require notice under S. 80, Civil P. C., if the petitioner was at the time of the suit a public officer. It is however contended that under S. 80 notice is required of a suit against a person who was a public officer at the time of the official act which gave rise to the claim even though he is no longer a public officer when the suit is filed. No authority has been quoted for or against this contention; but I am of opinion that on the plain words of the section, the contention must fail. Granted that the section contemplates an act done by a public officer in his official capacity as forming the basis of a suit for which notice is required, one must remember that the opening words of the section are: "No suit shall be instituted against . . . . . a public officer" and to read those words as including a suit against a person who is not a public officer, but was a public officer at the time of the cause of action would be to extend the section beyond its apparent purport. The object of this section is to give time for a public officer threatened with a suit in respect of his official acts to take the orders of his superiors on the question whether the suit shall or shall not be defended and to get permission to use the services of the law officers of the Crown, if necessary. Such considerations would not ordinarily arise in the case of a person who has ceased to be in the employ of the Government at the time of the suit. There is nothing in the definition of a 'public officer' in S. 2 (17), Civil P. C., to justify the inference that it includes a person who was once in the employ of Government but is so no longer. I am of opinion that the learned District Munsif was right in holding that notice under S. 80 was not necessary in this case. The revision petition is therefore dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

C. P. C. —
(a) ('40) Chitaley, S. 2 (17) Note "Public officer."
('41) Mulla, Page 16 Note "Public officer."
(b) ('40) Chitaley, S. 80 N. 5.
('41) Mulla, Page 305 Note "Notice to public officer — Act purporting to be done in official capacity."
(c) ('40) Chitaley S. 2 (17) Note "Public officer" Pt. 4.
('41) Mulla, Page 16 Note "Public officer."

A. I. R. (29) 1942 Madras 288 (2)

HORWILL J.

In re Packirisami Pillai—Accused — Appellant.

Criminal Appeal No. 240 of 1941, Decided on 1st September 1941, against order of Court of Session, East Tanjore Division at Negapatam, D/- 8th March 1941.

(a) Criminal P. C. (1898), S. 162—Statement to police under S. 162 is not substantive evidence—Use of.

A statement made by a witness to the police under S. 162 is not substantive evidence at all and can be used only to contradict statements made during the trial. [P 289*c*]

(b) Criminal P. C. (1898), Ss. 172 and 174 — Case diary—Use of—Absence of statement from diary is not in itself evidence that statement was not made — Proper way to prove omission stated.

Where the record made in the case diary does not purport to be either thorough or complete, the absence of a statement in the case diary is not in itself evidence that such a statement was not made. The proper way to prove an omission is to question the police officer who wrote the diary whether a particular statement was made to him. He may be able to say that it was not made to him because he feels sure that if it had been made it would have found a place in the case diary. If he cannot say so, an omission cannot be proved by filing the case diary. [P 289*d*]

V. T. Rangaswami Ayyangar—for Appellant.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

JUDGMENT. — Accused 1 and 2 in the Court of the Sessions Judge of East Tanjore were charged under S. 304 (1), Penal Code, with causing serious injuries to the person of one Sivaswami Servai which led to his death. They were charged under S. 304 (1) and not under S. 302, Penal Code, because the evidence was thought to show that the deceased had given a blow to accused 1 which justified them in causing such injury to the deceased as would be sufficient to prevent him from causing the necessary further injury. Accused 2 was acquitted because the learned Sessions Judge thought that the circumstances of the case made it probable that he was not present at the scene of the offence when the crime was committed. The appellant was sentenced to 18 months' rigorous imprisonment. Accused 3 was charged with abetting the offence under S. 304 (1); but it was found that he had taken no part in the attack on the deceased and had not instigated the appellants. So he too was acquitted. The occurrence is spoken to by many witnesses including P. W. 4, the wife of the deceased P. Ws. 5 to 8, who are persons distantly connected with the deceased and whose stories developed at different stages to such an extent that the learned Sessions Judge thought it not safe to rely on their testimony.

The learned Sessions Judge came to the conclusion that the deceased stabbed accused 1 upon his eye with a penknife before accused 1 stabbed him; but there is no evidence on the record to show that the deceased used such a weapon, save that there was a cut on the eyebrow which was 1½ inches long and ¼ inch deep. This could have been caused by a sharp weapon; but the fact that it was surrounded by a highly contused area makes it more probable that the injury was caused with a blunt weapon. The doctor who examined him (P. W. 2) says that it could have been caused by a blunt weapon. He adds that it could have been caused by a sharp weapon, but presumably in that case the contusion was caused by a separate blow. The circumstance on which the learned Sessions Judge seems to base his conclusion is a statement made by P. W. 6 to the police under S. 162, Criminal P. C., which was filed to contradict a statement of his in the Sessions Court. Such a statement is of course not substantive evidence at all and can be used only to contradict statements made during the trial. However, whether the injury was caused by a small knife or with a stick, matters little. The blow given by the deceased caused a reasonable apprehension that further injury was possible; but the accused clearly exceeded his right of private defence of his person in causing such severe injuries as he did to the deceased. The sentence imposed by the learned Sessions Judge is a very lenient one. The conviction and sentence are therefore affirmed and the appeal dismissed. The learned Sessions Judge filed a number of statements recorded in the case diary to prove omissions. Although in some extreme cases that might be permissible, it was certainly not proper in the present case. The record made in the case diary does not purport to be either thorough or complete. The absence of a statement in the case diary is not in itself evidence that such a statement was not made. The proper way to prove an omission is to question the police officer who wrote the diary whether a particular statement was made to him. He may be able to say that it was not made to him because he feels sure that if it had been made it would have found a place in the case diary. If he cannnot say so, an omission cannot be proved by filing the case diary.

C.R.K./G N. *Appeal dismissed.*

1942 M/37 & 38

Cr. P. C. —
(a) ('41) Chitaley, S. 162, N. 10 Pts. 18, 21.
('41) Mitra, Page 491, N. 502.
(b) ('41) Chitaley, S. 172, N. 4 Pt. 7.
('41) Mitra, Page 553 N. 538.

A. I. R. (29) 1942 Madras 289

SOMAYYA J.

N. M. V. Vellayappa Chettiar —
Accused — Petitioner

v.

Alagappa Chettiar —
Complainant — Respondent.

Criminal Misc. Petn. No. 765 of 1941, Decided on 4th July 1941, to quash order of attachment.

Criminal P. C. (1898), Ss. 87 and 88—Condition precedent to issue of proclamation under S. 87 and attachment under S. 88 stated — Arrest warrant issued — Magistrate informed that accused had already left India — Issue of proclamation under S. 87 and attachment under S. 88 is without jurisdiction.

Before a proclamation under S. 87 or an attachment under S. 88 can be issued, it must be shown that the accused is absconding or concealing himself so that the warrant for his arrest cannot be executed. Where after the issue of the warrant the Magistrate is informed that the accused had already left India before the warrant was issued, the orders for attachment and proclamation are without jurisdiction inasmuch as since the accused could not have known of the warrant which was issued after he had left India he cannot be said to be wilfully absconding knowing of the warrant. [P 289*h*; P 290*a*]

N. Sivaramakrishna Iyer — for Petitioner.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER.—The Public Prosecutor showed me a copy of the Amin's return on the warrant which was issued for the arrest of accused 2. The return mentions that the Amin was informed that accused 2 had gone to Epoh. Epoh is in the Federated Malay States, and according to the affidavit filed on behalf of the petitioner he left India in March, and that is not contradicted by the complainant in the affidavit which he has filed to-day before me. What is said is that he originally preferred a complaint on 1st February 1941, that the Magistrate forwarded the same to the police for enquiry, that the Court took it on file ultimately and that in the month of April, the complainant got information from the Magistrate that he had already issued notice to the accused on the police report. The complainant states further that on one day which is said by the petitioner's advocate to be 31st May 1941, the complaint was dismissed on the ground that the complainant was absent when called. A fresh complaint was filed on 2nd June 1941, and it is on this fresh complaint that the warrants of attachment and proclamation were issued on 20th June 1941. It is obvious that when the Magistrate was informed that the petitioner had already left India the orders for attachment and proclamation are without jurisdiction, unless he was satisfied that the accused was wilfully absconding, knowing of the warrant. He could not have known of the warrant which was issued after he had left India. When it was clear that the accused had left India in March, it could not possibly be said that he absconded or that he is concealing himself so that the warrant cannot be

executed, which is a condition precedent under
a S. 87, Criminal P. C., for the issue of a proclamation. It is also a condition precedent for the issue of attachment under S. 88. It was at first said that the petitioner was still in India and that he is concealing himself somewhere in India. If this is so, the action of the Magistrate would be perfectly justified. I asked the complainant whether he would state so in an affidavit, and I gave him an opportunity of stating it in an affidavit. In the affidavit filed by him he has not contradicted the statement made on behalf of the petitioner that he left India in March. Under these circumstances, I hold that the orders of proclamation and attachment are without jurisdiction and as such they are set aside.

C.R.K./G.N. *Orders set aside.*

Cr. P. C.—
('41) Chitaley, S. 87 N. 2 and N. 3 ; S. 88 N. 3.
b ('41) Mitra, Page 142 N. 163 ; Page 143 N. 164 ; Page 146 N. 169.

A. I. R. (29) 1942 Madras 290

HORWILL J.

In re Swaminatha Ayyar — Petitioner.

Criminal Revn. Case No. 338 of 1941 (Criminal Revn. Petn. No. 321 of 1941), Decided on 23rd September 1941, to revise judgment of Joint Magistrate of Kumbakonam, D/- 18th December 1940.

Madras General Sales Tax Act (9 of 1939), Ss. 15 and 5 — Word "wilfully" in S. 15 does not qualify words "fails to submit a return" — Sale of hand-woven cloth — Licence necessary under rules under Act — Seller not taking out
c **licence— Subsequent exemption from taxation— Failure to submit return held rendered seller liable to fine.**

The word "wilfully" in S. 15 (a) governs only the words "submits an untrue return" and not the words "fails to submit a return." Every person is supposed to know what the law is and if he fails to act in accordance with the law, then he has to suffer the consequences. [P 290*f*]

A seller of hand-woven cloth was convicted under S. 15 in failing to submit a return as required by the provisions of the Act and the rules made thereunder. Under the rules in force at the time when the seller was said to have committed the offence it was necessary for him to get a licence for selling even hand-woven articles. Subsequently, the Government had ordered that it was not necessary for persons selling
d only hand-woven material to obtain a licence :

Held that as the rules in force at the time required the seller to submit a return, he was guilty of the offence of which he was charged. [P 290*g*]

Held further that although the seller contravened the provisions of the law, it would have been unnecessary for him to have submitted a return if he had taken out a licence; because he had nothing to enter in the return. If he had taken out a licence, then S. 90, Penal Code, would have covered the offence and he would have been entitled to an acquittal; but as he did not take out a licence, he was bound to submit a return. [P 290*g*]

Held also that as the seller was already in possession of a licence under the Sale of Cloth Act of 1937, all that was necessary for him to do was to take that licence to the assessing authority and get an endorsement on it but he failed to do that. [P 290*e*]

N. Rajagopala Aiyangar — for Petitioner.
A. S. Sivakaminathan, for Public Prosecutor — e for the Crown.

ORDER. — The petitioner has been convicted by the Joint Magistrate of Kumbakonam of an offence punishable under S. 15, Sales Tax Act, in failing to submit a return as required by the provisions of the Act and the rules made thereunder, and he has been sentenced to a fine of Rs. 50. The petitioner deals in hand-woven cloth on which, according to S. 5 of the Act, he is exempted from the taxation laid down in S. 3. Under the rules in force at the time when the petitioner is said to have committed this offence, it was however necessary for him to get a licence for selling even hand-woven articles. As he was already in possession of a licence under the Sale of Cloth Act of 1937, all that was necessary for him to do was to take that licence to the assessing authority and get an endorsement on it. He failed to do so. Since that date the Government have ordered that it is not f necessary for persons selling only hand-woven material to obtain a licence. It is contended that S. 15 does not apply to the petitioner because the petitioner did not know what the rules under the Act were and his failure to submit a return was not wilful. Section 15 (a) runs as follows :

"Any person who wilfully submits an untrue return or fails to submit a return as required by the provisions of this Act .... shall .... be liable to a fine ...."

It is argued that the word 'wilfully' governs the second part of the sub-section as well as the first. If this were so, then very few persons could be made liable for failing to take out a license, because every person would naturally plead that he did not know what was written in the Act or in the rules. Every person is supposed to know what the law is; and if he fails to act in accordance with the law, then he g has to suffer the consequences. A person might inadvertently send in a return which was not strictly correct; but he would not be punished for that if the mistake was due to some error in arithmetic or some cause which did not amount to a 'wilful act' in contravention of the rules. As the rules in force at the time required the petitioner to submit a return (see R. 6), the petitioner was guilty of the offence of which he was charged. Although the petitioner contravened the provisions of the law, it would have been unnecessary for him to have submitted a return if he had taken out a licence; because he had nothing to enter in the return. If he had taken out a licence, then I think S. 90, Penal Code, would have covered this offence and he would have been entitled to an acquittal; but as he did not take out a licence, he was bound to submit a return. It has been pointed out that in the Tamil translation of the h Act it is said that a return need only be sent in if the annual turn-over exceeds Rs. 20,000. As the annual turn-over of the petitioner is only Rs. 11,000, it is argued that he was entitled to rely on the Government translation of the Act and that therefore he committed no offence. There might have been some ground for the argument if the accused had put that forward in the lower Court; but the discovery of the Tamil translation seems to have been the act of his counsel rather than of the accused himself. The actual Act gives Rs. 10,000 as the limit below which a return is unnecessary. As the offence of the petitioner was only a technical one and he would not have been liable for any taxation if he had taken out a licence—which is not now necessary—I reduce the fine from Rs. 50 to Rs. 5. The excess fine paid will be refunded.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 291

VENKATARAMANA RAO AND HORWILL JJ.

P. V. P. R. V. R. Veerappa Chettiar and another — *Appellants*

v.

V. AR. V. VR. Sivagami Achi — *Respondent.*

Appeal No. 14 of 1940 (converted into C. R. P. No. 1738 of 1941), Decided on 10th October 1941, against order of Sub-Judge, Devakottai, D/- 16th November 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 19—Appellate decree passed after Act cannot be scaled down under S. 19.

According to the plain language of S. 19, it would not apply to a decree passed after the commencement of the Act. Consequently, a decree of the appellate Court passed after the commencement of the Act whether in the first instance or in modification or reversal or even in confirmation of the decree of the original Court cannot be scaled down under S. 19 : *Case law relied on.* [P 291*g*; P 292*e*]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 19—Appellate decree passed after Act affirming decree of trial Court passed before Act—Appellate Court's decree supersedes lower Court's decree—Decree to be executed is decree of appellate Court and not of Court below — Application under S. 19 should be made to appellate Court.

The final decree in the appeal is the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance, and the decree to be executed is the decree of the appellate Court and not the decree of the Court below : 11 All. 267 (F.B.); 15 Mad. 170; 18 Mad. 214 (F.B.); 32 All. 295 (P.C.) and 26 Mad. 91, *Rel. on.* [P 293*a*]

Consequently, the words "Court which passed a decree" in S. 19 cannot, in the case of a decree of the appellate Court, be said to mean the Court of first instance but must be taken to mean the appellate Court. [P 292*f*]

When the decree of the trial Court passed before the Act is affirmed in appeal after the Act came into force no doubt before the appeal is decided an application to the trial Court under S. 19 is competent, but if before the application is disposed of, the decree is passed by the appellate Court, the latter decree becomes final and the application to the lower Court becomes infructuous. Even if the debt has been scaled down before the appeal is decided, it is the duty of either party to bring the fact before or at the hearing of the appellate Court either by way of appeal or otherwise so that the appellate Court might pass the appropriate decree. To avoid anomalies and multiplicity of proceedings, a party ought to make the application to the appellate Court for the relief he is entitled to under an enactment which came subsequent to the passing of the decree of the original Court and get the necessary relief in accordance with that enactment, before the appellate decree is passed, because once a decree is passed it is not open to a Court to amend or review a decree except under Section 152 or O. 47, R. 1, Civil P. C. The relief under the Madras Act cannot be brought under any of those sections. Therefore the party runs the risk of losing the benefit under the Act if he does not urge before the appellate Court the plea which the new enactment gives him or if he has already obtained a decree in the first Court, he fails to bring it to its notice : 24 Mad. 1 (P. C.), *Ref.*; ('39) 26 A.I.R. 1939 Mad. 483, *Disting.* [P 293*b*, *c*, *d*]

(c) Civil P. C. (1908), O. 41, R. 33 — Appellate Court — Powers of — New Act passed pending appeal — Appellate Court can pass decree in accordance with Act.

The authority of an appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the time of its judgment. It is entitled to pass such a decree as would be in accordance with any later enactment which came into operation subsequent to such date : ('18) 5 A.I.R. 1918 Mad. 1299, *Rel. on.* [P 293*b*]

V. Ramaswami Ayyar — for Appellants.

T. M. Krishnaswami Ayyar and T. K. Sundararaman — for Respondent.

VENKATARAMANA RAO J. — This civil miscellaneous appeal, which was later converted into a civil revision petition, arises out of an application filed under Sec. 19, Madras Agriculturists Relief Act, for scaling down a debt due by the petitioner in respect whereof a decree was passed on 18th September 1935 by the Sub-Court of Devakottai and confirmed by the High Court on 28th February 1939. The learned Subordinate Judge dismissed the application on the ground that though the petitioners are agriculturists within the meaning of the Act, they are not entitled to the benefits thereunder because they have been assessed to property or house tax within two years immediately preceding 1st October 1937 within the meaning of S. 3, cl. (c) of the Act. This view is challenged by the petitioners as unsound. But the learned counsel for the respondent-decree-holder submits that the dismissal of the application could be sustained on the ground that the application under S. 19 was incompetent and the Subordinate Judge of Devakottah had no jurisdiction to grant any relief thereon. His contention is that Sec. 19 of the Act does not apply to decrees passed after the commencement of Madras Act, 4 of 1938, namely, 22nd March 1938, and the appellate decree in this case was passed after the said date, that is, on 28th February 1939, that the said decree has become final and that if the petitioners wanted any relief under the Act, they should have made the application to the appellate Court before the decree was passed by that Court. In support of this contention he relied on the recent decisions of this Court reported in (1940) 2 M.L.J. 202,[1] (1940) 2 M.L.J. 473[2] and (1941) 1 M. L. J. 6[3] Apart from authorities, according to the plain language of S. 19, it would not apply to a decree passed after the commencement of the Act. In (1940) 2 M.L J. 202[1] our learned brothers Wadsworth and Patanjali Sastri JJ., took this view with reference to a decree passed by a trial Court after the commencement of the Act. In that case the suit was brought on 3rd January 1938 and a decree was passed on 18th April 1938. Between these dates the Act came into force that is, on 22nd March 1938. Though the written statement in that case was filed on 30th January 1938, the

1. ('40) 27 A. I. R. 1940 Mad. 910 : 194 I. C. 753 : I.L.R. (1940) Mad. 1023 : (1940) 2 M.L.J. 202, Kottayya v. Venkatapunnayya.
2. ('40) 27 A. I R. 1940 Mad 959 : 194 I. C. 757 : (1940) 2 M.L.J. 473, Kannabiran Pillai v. Govindasami Pillai.
3. ('41) 28 A.I.R. 1941 Mad. 373 : (1941) 1 M.L.J. 6, Ramaswami Udayar v. Ramanatha Chettiar.

learned Judges held that it was the obvious duty of the petitioner to make an application to the Court before the passing of the decree claiming relief under the Act and as he had omitted to do so, the decree must be deemed to have become final. The reason is thus stated by Patanjali Sastri J. at p. 204 :

"All available pleas in answer to a claim should be made the subject of enquiry before the Court passes the decree . . . It may be laudable to rehabilitate agriculturists by a compulsory scaling down of their debts but it could be no part of this object to condone and thereby encourage, their laches in the conduct of legal proceedings. On the other hand, having regard to the expropriatory nature of the provisions, Courts should watch with jealous eye attempts to have the scope of the Act extended, under colour of interpretation, beyond what its terms expressly warrant. I am therefore of opinion, reading the Act as a whole, that the word 'decree' in Ss. 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act."

This principle was extended by our learned brother Wadsworth J. to a case where a trial Court dismissed the suit but on appeal that decision was reversed by the appellate Court after the Act came into force: *vide* (1940) 2 M. L. J. 473.[2] He observed thus :

" At the time when the application was made, there was a good deal of difference of opinion on the question whether a decree passed after the Act came into force could be scaled down. That doubt has, I hope, been finally set at rest by our decision reported in (1940) 2 M.L.J. 202.[1] In the light of that decision, it must be held that the application to the lower Court to scale down the appellate Court's decree under S. 19 was not the proper procedure."

In (1941) 1 M. L. J. 6[3] the above principle was extended also to a case where a decree of the trial Court was modified in appeal after the passing of the Act. That was a decision of a Bench and the learned Judges Wadsworth and Patanjali Sastri remarked thus :

" We have held that S. 19, Madras Act 4 of 1938, has no application to decrees passed after the Act came into force, one reason being that any person who has a contention to urge which will affect such a decree must urge it in the pending proceedings and if he does not urge it he must be taken to have waived it. We see no reason to apply a different principle to proceedings in appeal of which the affected party has had notice."

In C. R. P. No. 1667 of 1939 the question again came up with reference to a decree passed by the District Munsif before the commencement of the Act which was confirmed by the Subordinate Judge before the commencement of the Act and which decree was again confirmed by the High Court in second appeal after the commencement of the Act. The appellate decree was passed by our learned brothers Burn and Lakshmana Rao JJ. When the Civil Revision Petition came up for hearing in the first instance before Wadsworth J. he referred it to a Bench on the ground that there was a reservation in the judgment of the appellate Court that the judgment-debtor might avail himself of the provisions of the Agriculturists Relief Act, though the decree did not contain any reservation in that behalf. In the course of the reference Wadsworth J. expressed the view that the principle laid down in the above cases should be applied even to a case where a decree has been confirmed by the appellate Court. He observed thus : " I do not think that it makes any difference, whether the decree is a reversing one or an affirming one." When the matter came up before the Bench, Burn and Lakshmana Rao JJ. they allowed the civil revision petition observing thus :

" Decrees passed after the commencement of Madras Act 4 of 1938 cannot be amended under S. 19 of that Act: *vide* (1940) 2 M. L. J. 202.[1] The order of the learned District Munsif is therefore wholly without jurisdiction."

It is thus clear that whether the decree of the appellate Court was passed in the first instance or in modification or reversal or confirmation of the decree of the original Court, nevertheless it would be a decree passed after the commencement of the Act and cannot be amended under S. 19 of the Act. If we may say so with respect, we entirely agree with this view as it follows from the plain language of the section. But Mr. Ramaswami Iyer would contend that though this view may be correct in so far as a decree was passed in the first instance by the appellate Court or the original Court's decree was modified or reversed by it, it would not apply to a case where the appellate Court merely confirms the original Court's decree; in the latter case according to him it would only leave the decree of the original Court standing and the only decree to be executed. He further contends that in view of the interpretation placed by Madhavan Nair J. in I.L.R. (1939) Mad. 520[4] on the language "a Court which passed a decree" in S. 19 as meaning even in the case of a decree of the appellate Court the Court of first instance, the application to the Sub-Court in this case was competent. He also contends that, when the Act came into force, his client had a right to apply to the Sub-Court under S. 19 of the Act, that he was not obliged to make an application to the appellate Court, that the debt could have been scaled down by the original Court before the appeal was decided and therefore the said right could not be lost by reason of the confirmation of the decree in appeal. The question is whether these contentions are tenable. Our Court has throughout followed the view taken by Sir John Edge in 11 All. 267[5] :

"In my opinion the effect of S. 579 of the Code (1882) (corresponding to O. 41, R. 35, Civil P. C., 1908) is to cause the decree of the appellate Court to supersede the decree of the Court below even when the decree of the appellate Court is one which merely affirms that decree and does not reverse it or modify it. In my opinion the only decree that can be amended is the decree to be executed, and the decree to be executed is the decree of the appellate Court and not the decree of the Court below."

It is this view that was followed in 15 Mad. 170[6] and later affirmed by the Full Bench in 18 Mad. 214,[7] which has since been followed. I may point out that this view was later approved by the Privy Council: *vide* 32 All 295.[8] As Bhashyam Ayyangar J. explained in 26 Mad. 91[9] :

"When an appeal is preferred from a decree of a

4. ('39) 26 A.I.R. 1939 Mad. 483 : 183 I. C. 596 : I.L.R. (1939) Mad. 520 : (1939) 1 M. L. J. 329, Gangaraju v. Ramayya.

5. ('89) 11 All. 267 (F.B.), Muhammad Sulaiman Khan v. Muhammad Yarkhan.

6. ('92) 15 Mad. 170 : 2 M. L. J. 23, Manavikrama v. Unniappan.

7. ('95) 18 Mad. 214 : 5 M. L. J. 39 (F. B.), Pichu Iyengar v. Sesha Iyengar.

8. (10) 32 All. 295 : 6 I. C. 669 : 37 I. A. 70 : 7 A. L. J. 507 (P. C.), Brij Narain v. Tejbal Bikram Bahadur.

9. ('03) 26 Mad. 91, Kristnamachariar v. Mangammal.

Court of first instance, the suit is continued in the Court of appeal and re-heard either in whole or in part, according as the whole suit is litigated again in the Court of appeal or only a part of it. The final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance."

The contention that the decree of the original Court when it is confirmed in appeal is still the decree to be executed is thus opposed to principle. In regard to the argument based on the decisions in I.L.R. (1939) Mad. 520[4] and the decisions which followed it, they are distinguishable because the decrees passed by the appellate Court in those cases were before the passing of the Act. We therefore think it unnecessary to go into the correctness of the said decisions which was canvassed during the course of the argument. We shall now deal with the contention raised by Mr. Ramaswami Iyer that his client is not obliged to make an application to the appellate Court. It is no doubt true that before the appeal is decided an application to the trial Court under S. 19 is competent, but if before the application is disposed of, the decree is passed by the appellate Court, the latter decree becomes final and the application to the lower Court becomes infructuous. Even if the debt has been scaled down before the appeal is decided, it is the duty of either party to bring the fact before or at the hearing of the appellate Court either by way of appeal or otherwise so that the appellate Court might pass the appropriate decree. As pointed out in 40 Mad. 818[10] at page 822, the authority of an appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the time of its judgment. It is entitled to pass such a decree as would be in accordance with any later enactment which came into operation subsequent to such date. To avoid anomalies and multiplicity of proceedings a party ought to make the application to the appellate Court for the relief he is entitled to under an enactment which came subsequent to the passing of the decree of the original Court and get the necessary relief in accordance with that enactment. The pendency of the appeal suspends the finality of the decree of the original Court and before a final decree is passed by it, all the relief which a party is entitled to and which would have been given by the original Court had the later enactment been in existence on the date on which it passed the decree should be urged before the appellate decree is passed, because once a decree is passed as pointed out by the Privy Council in 24 Mad. 1[11] at page 10, it is not open to a Court to amend or review a decree except under S. 152 or O. 47, R. 1, Civil P.C. And the relief under the Act cannot be brought under any of those sections. Therefore the party runs the risk of losing the benefit under the Act if he does not urge before the appellate Court the plea which the new enactment gives him or if he has already obtained a decree in the first Court, he fails to bring it to its notice.

We are of opinion that the application to the lower Court was incompetent and on this ground the dismissal of the application was proper. In this view, we think it unnecessary to go into the correctness of the other questions raised and considered by the learned Subordinate Judge. In the result the civil revision petition fails and is dismissed, but as the respondent did not raise any objection to the maintainability of the application in the lower Court, we direct each party to bear his own costs both here and in the Court below.

C.R.K./G.N. *Application dismissed.*

C. P. C. —

(b) ('40) Chitaley, S. 38, N. 5 Pt. 1; O. 41 R. 35, N. 4 Pt. 1.
('41) Mulla, Page 157, Pt. (x).

(c) ('40) Chitaley, O. 41 R. 33, N. 4 Pt. 2.
('41) Mulla, Page 1202 Pt. (j).

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10. ('18) 5 A.I.R. 1918 Mad. 1299: 38 I.C. 223 : 40 Mad. 818, Muthuswami Iyer v. Kalyani Ammal.
11. ('01) 24 Mad. 1 : 27 I. A. 197 : 7 Sar. 678 : 10 M.L.J. 221 (P.C.), Kotagiri Venkatasubbamma Rao v. Vellanki Venkata Rama Rao.

A. I. R. (29) 1942 Madras 293

HORWILL J.

In re Chillara Seshamma — Petitioner.

Criminal Revn. Case No. 306 and Petn. No. 290 of 1941, Decided on 5th August 1941, to revise judgment of Sub Divisional Magistrate, Kavali, in C. A. No. 24 of 1940.

(a) Madras District Municipalities Act (5 of 1920), Ss. 249 and 313 — Whether place of sale is coffee-house—Test—Building with considerable accommodation – Regular meals served—All paraphernalia of coffee-house found in building—Building is coffee house.

It must be a question of fact to be decided in each case whether the circumstances under which the coffee is sold will indicate that the place of sale was a coffee-house or not. A person may, for example, sell cups of coffee from a phial having no seating accommodation under circumstances which may indicate that the phial could not be called a coffee-house. Where all the usual paraphernalia of a coffee-house is found in a person's building in which there is considerable accommodation and regular meals are served, the building must be regarded as a coffee-house : 51 M.L.J. (S.N.) 96, *Ref.* [P 294a]

(b) Madras District Municipalities Act (5 of 1920), Ss. 249 and 313 — Building licensed as meals hotel — Whether coffee also can be sold without further license *(Quære)*.

Whether a person who is licensed to use a building as a meals hotel is entitled to sell coffee also without a further licence in the same building. [P 294a]

S. Suryaprakasam — for Petitioner.

Public Prosecutor — for the Crown.

ORDER. — The petitioner has been convicted for not taking out a licence for a coffee-house and that conviction has been upheld on appeal. She has been fined Rs. 5 and been ordered to pay the licence fee of Rs. 6. This revision case was admitted by my learned brother Lakshmana Rao J. because at the time when this petition came up for admission he was shown a short-notes report of a decision by Coutts-Trotter C. J. and Srinivasa Ayyangar J. in Cri. R. C. No. 556 of 1926 reported at p. 96, short notes of 51, M.L.J. I called for the judgment in question. It is a very short one, and it is not very clear from the judgment why it was held that the petitioner in that case was not conducting a coffee hotel. However, in Criminal Revision Case No. 557 of 1926, which was heard with it and in which the facts were very similar, it was held that there was no ground for holding that the Magistrate was wrong in coming to the conclusion that the petitioner in that case did keep a coffee-house. The distinction would seem to lie in the formality or informality under which the coffee or tea was sold. It must be a question of fact

to be decided in each case whether the circumstances under which the coffee is sold will indicate that the place of sale was a coffee-house or not. A person may, for example, sell cups of coffee from a phial having no seating accommodation under circumstances which may indicate that the phial could not be called a coffee-house. In the present case, it is not denied that all the usual paraphernalia of a coffee house was found in the petitioner's building. There was considerable accommodation and regular meals were served.

It has been argued, rather as an afterthought, I think, that since the petitioner was licenced to use the same building as what is described as a meals hotel, she must be entitled to sell coffee also without a further licence. The learned Public Prosecutor thinks that if coffee were served with full meals she might not require a licence, but that if she sells coffee with lighter refreshments, then she would require a licence. It is rather difficult to draw a distinction of this kind; but as the matter comes here only in revision, I do not think it necessary for me to express any opinion on this question which was not raised in the lower Court. I am not prepared to interfere on that ground. The petition is accordingly dismissed.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 294

LEACH C. J. AND HAPPELL J.

R. M. P. R. M. M. Subramanian Chettiar by his Power of Attorney agent M. S. Ramanathan Chettiar — *Petitioner*

v.

Official Receiver, West Tanjore — *Respondent.*

Civil Revn. Petn. No. 977 of 1938, Decided on 27th November 1940, to revise order of Dist. Court, West Tanjore, D/- 14th April 1938.

(a) Provincial Insolvency Act (1920), S. 53— Transfer not in good faith — S. 53 applies even if insolvent had no intention to defeat creditors.

Under S. 53 there must be both good faith and valuable consideration. If there is want of good faith the fact that valuable consideration has passed will not save the transaction. If lack of good faith is proved it is sufficient to enable the Court to pass the order annulling the transaction. The fact that the insolvent and his fellow conspirators may not have had in mind that the transaction would operate to defeat his creditors and acted merely with the object of putting the property beyond the reach of the insolvent's son does not make the transaction any the less a fraud on the creditors. What the Court has to consider is whether the transaction comes within the four corners of S. 53, and if it does, the Court has the power to set it aside. [P 295*a*,*b*]

(b) Provincial Insolvency Act (1920), S. 53— Setting aside transaction on application of Official Receiver—Effect.

In setting aside a transaction on the application of the Official Receiver, the Court is placing the property at the disposal of the Official Receiver for the benefit of the creditors. [P 295*c*]

(c) Provincial Insolvency Act (1920), S. 75— New point — Point raised in trial Court and in memorandum of appeal but dropped in appellate Court—Such point affecting person not party to revision petition cannot be allowed to be raised in revision.

In a proper case the High Court may allow a point of law not taken below to be raised under S. 75; but where the petitioner in a revision before the High Court has raised a certain point in the trial Court and in the memorandum of appeal but has dropped it in the appellate Court, and such a point affects his minor son who is not a party to the petition, the High Court will not allow such point to be raised, more especially where the petitioner has been a party to a conspiracy to defraud his son. [P 295*c*,*d*]

T. K. Sundararaman — for Petitioner.

A. Swaminatha Aiyar and S. Thyagaraja Aiyar — for Respondent.

LEACH C. J. — This application arises out of insolvency proceedings in the Court of the Subordinate Judge of Tanjore. On 27th October 1931, V. Ry. Badranandaji alias Vasudeva Sahib, was adjudicated an insolvent on his own petition, which had been filed on 11th March 1930 The insolvent is a son of an illegitimate son of the late Rajah of Tanjore and as the result of the suit which came up on appeal to this Court in 48 Mad. 1[1] and eventually went to the Privy Council, he became entitled to a considerable share in what is known as the Tanjore Palace Estate So far as the insolvent is concerned, his share was finally decided by the judgment of this Court, which was delivered on 21st January 1924. According to the District Judge of West Tanjore whose order is the subject-matter of this application for revision the insolvent is a man of depraved tastes and has merely led a life of pleasure. It has been established in the present proceedings that in 1928, he was living with a mistress named Ammanna. Ammanna had a daughter, who was the mistress of the petitioner, a Nattukottai Chettiar. On 12th March 1928, the insolvent conveyed the whole of his interest in the Palace Estate to the petitioner. By the same deed he purported to convey to the petitioner the interest of his son, who is a minor. This transfer took place within two years of the petition for adjudication. Respondent 1, who is the Official Receiver, applied to the Subordinate Judge of Tanjore for an order setting aside the transaction under the provisions of S. 53, Provincial Insolvency Act. The application was allowed and on appeal to the District Judge the Subordinate Judge's decision was confirmed. It has been found that the transfer of the insolvent's interest in the Palace Estate to the petitioner was the result of a conspiracy between the insolvent his mistress and the petitioner to defeat the insolvent's son for the benefit of the insolvent's mistress, and the petition falls to be dealt with on that basis. The Subordinate Judge set aside the transaction of 12th March 1928 in its entirety and his order was in no way limited by the District Judge. The petitioner has asked this Court to set aside the District Judge's order under the revisional powers conferred upon the Court by S. 75, Provincial Insolvency Act.

The petitioner has raised three contentions. In the first place he says that, although the transaction was mala fide so far as the son was concerned, that does not make it void as against the creditors and that the parties had no intention of defeating the creditors. In these circumstances it is said that an application will not lie under S. 53, Provincial Insolvency Act. In the second place the petitioner says that assuming the transaction falls within S. 53

1. ('25) 12 A.I.R. 1925 Mad. 497 : 93 I.C. 705 : 48 Mad. 1, Maharaja of Kolhapur v. Sundaram Ayyar,

it can only be set aside when the annulment will bring relief to the creditors. The third contention is that the Court has no power to set aside the transaction so far as it concerns the minor's share in the property. The first contention is really answered by the reading of S. 53. That section says that any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent on a petition presented within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court. Therefore, there must be both good faith, and valuable consideration. If there is want of good faith, the fact that valuable consideration has passed will not save the transaction. The lack of good faith has been proved and this was sufficient to enable the Court to pass the order annulling the transaction. It may be mentioned, however, that only part of the consideration passed. The fact that the insolvent and his fellow conspirators may not have had in mind that the transaction would operate to defeat his creditors and acted merely with the object of putting the property beyond the reach of the son for the benefit of his father's mistress does not make the transaction any the less a fraud on the creditors. The insolvent admittedly owed large sums of money and was unable to pay his debts. In transferring the property he was defeating his creditors. But what the Court has to consider is whether the transaction comes within the four corners of S. 53, and if it does the Court has the power to set it aside.

There is no substance in the second contention and it was not pressed below. The transaction is clearly one which can be set aside under S. 53 and in setting it aside the Court is giving relief to the insolvent's creditors. The Court is placing the property at the disposal of the Official Receiver for the benefit of the creditors. We are not prepared to allow the petitioner to raise the third contention. It was mentioned in the petitioner's affidavit in the trial Court and in the memorandum of appeal to the District Court, but it is obvious that it was dropped in the Courts below because their judgments are silent on the question. The minor has not been a party to this petition and as the point was not taken below we cannot allow the petitioner to ask that the position should be altered to the minor's disadvantage in his absence. In a proper case the Court may allow a point of law not taken below to be raised under S. 75, Provincial Insolvency Act, but this is not a case in which we consider the discretion should be exercised in favour of the petitioner. He has been a party to a conspiracy to defraud the insolvent's son and as he did not press this point either before the Subordinate Judge or the District Judge he will not be allowed to take it here in an application for revision. The result is that the petition fails and will be dismissed with costs in favour of the Official Receiver.

C.R.K./K.S. *Petition dismissed.*

A. I. R. (29) 1942 Madras 295

KING AND LAKSHMANA RAO JJ.

In re Ammu Pujary — Appellant.

Criminal Appeal No. 433 of 1941, Decided on 1st October 1941, against order of Court of Session, South Kanara Division, in C. C. No. 19 of 1941.

(a) Penal Code (1860), S. 97 — Accused while apprehending further violence from his assailant committing violence upon him — Right of self-defence is established.

When an accused person commits an act of violence upon another person in circumstances which prove that he is apprehending further violence from that person, nothing further need be proved to establish that the accused is acting in the exercise of his right of self-defence. When circumstances show that unmistakably, it is wrong to throw upon the accused the burden of proving that he had in fact consciously exercised his right of self-defence when he used his knife. Of course situations may arise in which in spite of the fact that some violence is being used against an offender, he regards that violence as negligible and acts with the deliberate intention of killing, and without any intention at all of defending himself. [P 295*h*; P 296*a*]

(b) Penal Code (1860), S. 97 — Murder — Onus is on accused to show circumstances justifying his causing death.

In the case of a charge of murder it is for the accused to make out that circumstances existed which would justify his causing the death of the deceased. [P 296*b*]

Public Prosecutor — for the Crown.

KING J. — The appellant has appealed from jail against his conviction by the learned Sessions Judge of South Canara on two charges, one for the murder of the deceased Giriappa and secondly, for causing hurt by a dangerous weapon to P. W. 3. The learned Judge in convicting the appellant of murder has held that he did not kill Giriappa in exercising the right of private defence. It seems to us that the learned Judge's reasoning in regard to this part of the case is open to much criticism. The learned Judge concedes in para. 11 of his judgment that according to the case for the prosecution itself, facts were established which gave the appellant the right of private defence. The facts were that the deceased had struck him with a stick and was prepared to strike him a second time and the learned Judge held that there were grounds for his apprehending that he would be hurt. But in paras. 11 and 12, the learned Judge unduly stresses the proposition that the appellant must prove that he bona fide believed that he was about to be killed or to suffer grievous hurt before he can plead the right of private defence at all. This mistaken view is repeated at the conclusion of para. 13 ; and in para. 15 the learned Judge in analysing the situation does so, so subtly as to require the appellant to prove that he had what he calls the "problem" of self-defence before his mind and that with that "problem" in view, he deliberately took the action he did in order to save his life. By this kind of reasoning the learned Judge has of course excluded any possibility of consideration of a plea that the appellant was justified in defending himself but had exceeded his right of self-defence and therefore his offence might be reduced from the offence of murder to that of culpable homicide not amounting to murder. We desire to make it clear that, when an accused person commits an act of violence upon another person in circumstances which prove that he is apprehending further violence from that person, nothing further need be proved to establish that the accused is acting in the exercise of his right of self-defence. Circumstances themselves show that unmistakably, and the learned Judge is wrong in throwing upon the accused the burden of proving that he had in fact consciously exercised his right of self-defence when he used his knife. Of course situations are conceivable in which, in spite of the fact that some violence is being used against an offender, he regards that violence as negligible and

he acts with the deliberate intention of killing, and a without any intention at all of defending himself. But these circumstances have not been made out in the present case. It is clear from the evidence that physically speaking the deceased was a more robust man than the appellant. It is clear that he used a fairly stout stick in order to beat him and threaten him. One can only therefore make the natural presumption that, when the appellant took out his knife and stabbed the deceased, he was doing so in order to prevent his receiving any further injuries himself.

The question then arises whether the appellant was so far justified in his action as to be entitled to an acquittal or whether his offence amounts to culpable homicide not amounting to murder. We are unable to hold that the appellant has made out any facts sufficient to show that he was justified in caus ing death. His case was that he received blows b upon the head but none of the prosecution witnesses admits any such fact. They speak of the one blow delivered by the deceased as falling upon the appellant's person or body. The appellant was medically examined on 15th January which was nine days after the offence and there were no marks of any injuries then found upon him. It seems clear from that fact that no serious blow can have been inflicted upon him by the deceased. It is of course for the appellant to make out that circumstances existed which would justify his causing the death of the deceased. This, in our opinion, he has quite failed to make out. On the other hand, as we have already pointed out, the circumstances which are held to have been proved by the learned Judge himself according to the evidence for the prosecution show beyond doubt that in using his knife the appellant must have been acting in the exercise of his right c of self-defence, and must have exceeded that right because all that he could reasonably have apprehended was the infliction upon himself of simple hurt. In these circumstances we set aside the conviction for murder and convict the appellant instead of culpable homicide not amounting to murder, and for this offence sentence him to rigorous imprisonment for five years. The conviction and sentence under S. 324, Penal Code, are confirmed and we order that the sentences shall run concurrently.

C.R.K./G.N. *Order accordingly.*

Penal Code —

(a) ('36) Ratanlal, Page 206, Note "Defence of person"
('36) Gour, Page 363 Pts. 4 and 7.
(b) ('36) Ratanlal, Page 210 Pt. 2.
('36) Gour, Page 1002 Pt. 3.

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A. I. R. (29) 1942 Madras 296

WADSWORTH AND PATANJALI SASTRI JJ.

Minor Nagarajan represented by his adoptive mother and guardian Indra Bai Ammal — Decree-holder —
Petitioner

v.

P. T. Krishna Aiyar alias Krishna Rao and another — Respondents.

Civil Misc. Petn. No. 403 of 1939 (converted into Civil Revn. Petn. No. 775 of 1941), Decided on 3rd April 1941, to revise the order of Sub-Judge, Trichinopoly, D/- 20th February 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 23 — No appeal lies from order on application under.

No appeal lies from an order allowing an application under S. 23, but the appeal may be treated as a revision. [P 296*h*]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 23—Properties sold in execution of mortgage decree—Mortgagor selling equity of redemption pending mortgage suit cannot be said to have interest in property within S. 23.

Where a mortgagor sells the equity of redemption pending the suit on the mortgage and the properties are sold in execution of the mortgage decree, the mortgagor cannot be said to possess an interest in the property sufficient to satisfy cl. (1) of S. 23. The most that the mortgagor could get by redeeming the mortgage would be a right to the return of the mortgage deed with an endorsement of discharge and the f delivery of the title deeds of the land, which he would then have to hold as a trustee for his vendee. [P 297*a*, *c*]

(c) Madras Agriculturists Relief Act (4 of 1938), S. 23 — Agriculturist debtor must own interest at time of sale.

The clause "where in execution of any decree any immovable property in which an agriculturist had an interest has been sold" contemplates the existence of an interest owned by an agriculturist at the time of the sale: C.M.A. Nos. 255 and 258 of 1939, *Foll.* [P 297*a*]

(d) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) — Usufructuary mortgagee of agricultural land.

A usufructuary mortgagee of agricultural land would prima facie be an agriculturist unless dis- g qualified under one of the provisos to S. 3 (ii). [P 297*d*]

(e) Practice—Revision—Contention of petitioner upheld by lower Court but rejected by High Court—Petitioner should be given opportunity to establish subsidiary contention which he would have raised in lower Court had it rejected his contention.

Where the applicant has succeeded in the lower Court on the basis of his general contention but that contention has been negatived by the High Court, it is not proper for the High Court to refuse to the applicant an opportunity to establish a subsidiary contention upon which he could have fallen back in the lower Court had the lower Court rejected his main contention. [P 297*e*]

K. V. Sesha Ayyangar — for Petitioner.

T. K. Sundararaman — for Respondents. h

WADSWORTH J. — This appeal is preferred against an order allowing an application under S. 23 of Madras Act, 4 of 1938. No appeal lies but a petition has been filed to convert the appeal into a civil revision petition. We have allowed that petition subject to payment of the deficient court-fee and have treated the appeal as a civil revision petition. The decree which gave rise to the sale was passed in a suit on a simple mortgage dated 17th May 1928. The suit was filed in 1934. While the suit was pending the mortgagor sold the equity of redemption to defendant 8 and the sale deed recites that the sale was subject to a usufructuary mortgage in favour of defendant 6. The preliminary decree was passed on 7th March 1935. Subsequently, there was a final decree and certain items were sold before Act 4 of 1938 was operative. On 17th November 1937, the

decree-holder brought to sale items 4 and 5 and purchased them himself. On 20th June 1938, that is to say, within the period allowed under S. 23 of the Act, the mortgagor applied under S. 23 to set aside the sale of these items. The learned Subordinate Judge held that the mortgagor being an agriculturist by reason of the ownership of other lands, had an interest in the land sold and was entitled to apply on the basis that S. 23 does not require that the applicant must have had an interest in the land sold either on 1st October 1937, or thereafter. This view of the law requires modification in the light of our decision in C. M. A. Nos. 255 and 258 of 1939. In the judgment in that case, we observed that the clause "where in execution of any decree any immovable property in which an agriculturist had an interest has been sold" contemplates the existence of an interest owned by an agriculturist at the time of the sale. We also held that it was not necessary that the judgment-debtor who applied to the Court on the basis that he was an agriculturist entitled to the benefits of the Act should be the same agriculturist as the person who had an interest at the time of the sale. It follows from this decision that the basis of the decision of the learned Subordinate Judge is to some extent incorrect.

The respondent here, the mortgagor, has sought to support the decision on two different grounds; firstly, he has contended that since the mortgagor as a judgment-debtor has a right to redeem the mortgage, this right of redemption, subsisting on the date of the court auction sale, is an interest in the property sold We cannot accept this contention. Whatever may be the position in the case of a decree on a usufructuary mortgage or a mortgage by conditional sale, on the facts of the present case, the most that the mortgagor could get by redeeming the mortgage would be a right to the return of the mortgage deed with an endorsement of discharge and the delivery of the title deeds of the land, which he would then have to hold as a trustee for his vendee. We cannot accept the contention that such a right connotes an interest in the property sufficient to satisfy cl. (1) in S. 23 of Act 4 of 1938. The case in 40 M.L.J. 497[1] which has been cited by the respondent has no bearing on the present facts.

The second contention is that, granting that there must be an agriculturist with an interest in the property sold at the time of the sale, defendant 6 is such a person. It appears from the judgment of the learned Subordinate Judge that the sale by the mortgagor to defendant 8 was subject to usufructuary mortgage in favour of defendant 6. Defendant 6 was impleaded in the suit and he appeared by an advocate. The decree recites that he was impleaded as a person claiming a right to enjoyment of the mortgaged property. We do not know what was the extent of defendant 6's usufructuary mortgage nor whether it was subsisting at the time of the sale; nor has it been established that defendant 6 is an agriculturist The lower Court however proceeds on the assumption that defendant 6's usufructuary mortgage was subsisting and if so, since the land in question is agricultural land he would prima facie be an agriculturist unless disqualified under one of the provisos to S. 3 (ii) and it would be incumbent upon the decree-holder to establish the disqualification. It is contended on behalf of the appellant that this Court is not justified in instituting an inquiry into the question of defendant 6's status and interest in the absence of a specific averment in the application that defendant 6 had at the time of the sale such an interest as would provide a basis for the application by the mortgagor. In fact the application contains no express averment as to the existence of an interest in any agriculturist at the time of the sale and in the lower Court it does not appear to have been realised that this was a matter of any importance The applicant having succeeded on the basis of his general contention, that as the mortgagor of the property and the judgment debtor he himself had such an interest as would entitle him to maintain the application and that contention having been negatived by this Court, it does not seem to us right to refuse to the applicant an opportunity to establish a subsidiary contention upon which he could have fallen back in the lower Court had the lower Court rejected his main contention More especially is it desirable to show this amount of latitude in view of the fact that at the time when this application was heard by the trial Court there was a very considerable doubt as to the precise effect of the words used in the opening portion of S. 23. In the result therefore treating this appeal as a revision petition we allow the petition and set aside the order of the trial Court and remand the application for fresh disposal directing the lower Court to take such evidence as may be tendered regarding the existence of an interest in favour of defendant 6 at the time of the Court sale in these items and the question of the agriculturist status of defendant 6. Costs in this Court will abide the result.

C.R.K./K.S. *Order set aside.*

1. ('21) 8 A.I.R. 1921 Mad. 157 : 63 I.C. 937 : 44 Mad. 564 : 40 M.L.J. 497 (F.B.), Sundaram v. Mamsa Mavuthar.

Civil P. C. —

(e) ('40) Chitaley, S. 115 N. 2, Pt. 7.

A. I. R. (29) 1942 Madras 297

WADSWORTH J.

Muthusamia Pillai — Petitioner

v.

R. S. A. Sankara Ayyar — Respondent.

Civil Revn. Petn. No. 899 of 1939, Decided on 18th February 1941, to revise decree of Dist. Munsif, Ambasamudram, in S. C. S. No. 488 of 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 8, 9 — Re-opening of settlements or re-appropriation of payments under S. 9 — When justified stated.

Unless a debt falling under S. 9 relates back to a debt incurred before 1st October 1932 so as to invoke the provisions of S. 8, there is nothing in S. 9 to justify the re-opening of settlements or the re-appropriation of payments on the basis of a hypothetical original principal. [P 297*h*]

R. Sundaralingam — for Petitioner.

T. M. Ramaswamy Iyer — for Respondent.

ORDER. — The account starting in 1933 has a series of settlements, each giving rise to a fresh principal. The lower Court has given a decree on the basis of the last settlement with interest thereafter at five per cent. on the amount so settled under S. 9 of Act 4 of 1938. This is correct. Unless a debt falling under S. 9 relates back to a debt incurred before 1st October 1932 so as to invoke the provisions of S. 8, there is nothing in S. 9 to justify the re-opening of settlements or the re appropriation of payments on the basis of a hypothetical original principal. The petition is dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

a **A. I. R. (29) 1942 Madras 298**

WADSWORTH AND PATANJALI SASTRI JJ.

Vasudevan Nambudiri — Petitioner

v.

Unnimaya Anterjanam — Respondent.

Civil Revn. Petn. No. 678 of 1940, Decided on 13th October 1941, to revise decree of Sub-Judge, Ottapalam, D/- 25th November 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 8 — Member of Hindu joint family joining with manager in renewal of note executed by manager alone is also entitled to scale down debt under S. 8.

For the purpose of a renewal under the explanation to S. 8 there must be a substantial identity of the debt and of the parties. If an individual or family is a party to a succession of documents, one renewing the other and there is no break in the real identity of the debt, as by partition, that individual or family can scale down the debt even though others may have been parties at one stage or another to the different documents. When there is a debt due from a joint family acknowledged by the execution of promissory notes by different coparceners, each is in fact on behalf of the family renewing a liability by which the family was bound under the previous documents executed by other coparceners. Although when it comes to the execution of the decree, the coparcener's personal properties may only be liable if he has personally signed the bond, he is in fact signing as a coparcener and as a coparcener he has been liable through the whole series of bonds. Looked at in this way, it does not seem to be practicable to treat the coparcener who signs for the family as a different person incurring a different liability from the other coparceners who are bound by the debt, although in fact the actual executant of the bond may suffer a decree against his personal properties in addition to the joint family properties. Therefore where a member of a Hindu joint family joins with the manager in the renewal of a note executed by the manager, such member is entitled under explanation to S. 8 to trace back his liability to the original principal advanced and to scale down the debt under S. 8 : ('41) 28 A.I.R. 1941 Mad. 202 and ('41) 28 A.I.R. 1941 Mad. 356, *Rel. on.*

[P 298*d*, *f*, *g* ; P 299*a*]

K. P. Raman Menon — for Petitioner.

P. Govinda Menon — for Respondent.

ORDER. — The petitioner was defendant 2 in a small cause suit filed on a promissory note dated 25th April 1936, executed by defendant 2 himself and by his father defendant 1. This promissory note can be traced back to four earlier notes all executed by defendant 1 alone for himself and for the family of which he was the manager. The parties are Nambudiri Brahmins. The lower Court has, under Madras Act 4 of 1938, scaled down the debt under S. 8 as against defendant 1 and the joint family assets. Against defendant 2 personally the Court has given a decree based on the suit promissory note with interest reduced under the provisions of S. 9. Defendant 2 contends that on the basis of the previous decisions of this Court, he having been bound as a member of the joint family by the earlier notes, is entitled under the explanation to S. 8 to trace back his liability to the original principal advanced in 1924 and to scale down the debt under S. 8. The lower Court has not given any reasons for treating the liability of defendant 2 differently from the liability of the joint family but it has been contended by Mr. Govinda Menon for the respondent that the decision is correct for the following reasons. Under the Act, an undivided Hindu family is a person. So long as we are concerned only with the liability of the family it does not matter how that family may have been represented in the various documents succeeding each other, so long as there is a single debt and the same person, namely, the joint family, is the debtor. But it is contended that, when an individual coparcener makes himself personally liable for a joint family debt, it must be deemed that there are two liabilities due from two persons, one the liability due from the joint family person and the other the liability due from the individual person; and it is therefore contended that, when the individual person only becomes liable under the last note executed in 1936, he in his individual capacity, is entitled to relief only under S. 9 and not under S. 8.

There is a certain plausibility in this reasoning but we have come to the conclusion that not only does it run counter to the view taken by implication in a considerable number of our decisions, but also it is not the correct way of looking at the matter having regard to the principles laid down in the Act. We have of course recognised that for the purpose of a renewal under the explanation to S. 8 there must be a substantial identity of the debt and of the parties If an individual or family is a party to a succession of documents, one renewing the other, and there is no break in the real identity of the debt, as by partition, we have recognised that that individual or family can scale down the debt even though others may have been parties at one stage or another to the different documents. When we have a debt due from a joint family acknowledged by the execution of promissory notes by different coparceners, each is in fact on behalf of the family renewing a liability by which the family was bound under the previous documents executed by other coparceners. Although when it comes to the execution of the decree, the coparcener's personal properties may only be liable if he has personally signed the bond, he is in fact signing as a coparcener and as a coparcener he has been liable through the whole series of bonds. Looked at in this way, it does not seem to be practicable to treat the coparcener who signs for the family as a different person incurring a different liability from the other coparceners who are bound by the debt, although in fact the actual executant of the bond may suffer a decree against his personal properties in addition to the joint family properties. This is the view which we have taken in a large number of cases, although the point has not been previously argued as it has been put before us to-day. Instances of such cases may be found in (1940) 2 M.L.J. 786[1] and (1941) 1 M.L.J. 39.[2]

These decisions have been followed in many more decisions which have not been reported and it seems to us that very clear reasons would be necessary to justify us in departing from the principle underlying these decisions.

It has been argued that this case stands on a different footing because the defendants are Nambudiries belonging to a community in which until 1933 property was ordinarily impartible and in which a junior coparcener could not oridinarily bind the family. It does not seem to us that these considera-

1. ('41) 28 A.I.R. 1941 Mad. 202 : (1940) 2 M.L.J 786, Periakaruppan Chettiar v. Appaji Naidu.
2. ('41) 28 A.I.R. 1941 Mad. 356 : (1941) 1 M.L.J. 39, Ramasubbier v. Rama Iyer.

tions really affect the present case, for the manager of the family was a party to all the notes and defendant 2 signed in addition to the manager, probably as a matter of more abundant caution at the instance of the creditor. In the result we must allow this civil revision petition and modify the lower Court's decree so as to make defendant 2 personally liable only to the same extent as defendant 1. The petitioner will be entitled to his costs in revision.

C.R.K./K.S. *Petition allowed.*

A. I. R. (29) 1942 Madras 299

SOMAYYA J.

Visalakshi Ammal and others — *Appellants*

v.

Coimbatore Janopakara Nidhi Ltd. and another — *Respondents.*

Second Appeal No. 863 of 1940, Decided on 27th October 1941, against decree of Sub-Judge, Coimbatore, in A. S. No. 6 of 1939.

Contract Act (1872 as amended in 1930), Ss. 148, 178-A and 178 - Goods entrusted for safe custody—Pledge by depositee is invalid.

The amendment of 1930 has not effected any change in the law as to the right of a gratuitous bailee or a person entrusted with the goods for a specific purpose. Entrusting a person with goods for safe custody is a species of bailment. [P 300*c*,*e*]

Where it is only a case of safe custody, the pawnor has no title at all voidable or valid nor "juridical possession" as opposed to bare custody. If the contract of bailment is valid, he gets only a right to be in custody and if it is voidable for reasons mentioned in Ss. 19 and 19-A, Contract Act, even then, it cannot come under S. 178-A, because it is not a case of the pawnor's getting a defective title or 'possession.' Nor is S. 178 applicable as it is confined to cases of mercantile agents. [P 300*b*,*e*]

Consequently, the old rule that a person cannot give to another a title higher than what he himself has and which is subject to certain exceptions embodied in Ss. 178 and 178-A continues to apply and the goods entrusted for safe custody cannot be the subject of a valid pledge by the depositee : 4 Cal. 497 ; 24 Bom. 458 ; 27 Mad. 424 ; ('22) 9 A. I. R. 1922 Mad. 44 and 11 Bom. 704, *Approved.* [P 300*b*]

S. Panchapagesa Sastri and G. Natarajan — for Appellants.

P. V. Rajamannar and K. Subba Rao — for Respondents.

JUDGMENT. — The question in this second appeal is whether after the Contract Amendment Act of 1930 which came into force on 1st July of that year, jewels entrusted for safe custody can be the subject of a valid pledge by the depositee. The lower appellate Court found that the respondent bank took the pledge bona fide and without any notice of the defect in the title of the pawnor and that the pledge is valid. The second appeal is filed by the owners of the jewels. The appellants contend that the pawnor is not entitled to create a valid pledge in respect of the jewels which were merely entrusted for safe custody. It is urged by the respondent that having regard to the amendment of the various sections, the prior decisions of this and the other High Courts that a pledge made under such circumstances is not valid do not apply to cases arising after the amendment. The relevant sections old and new are :

NEW	OLD
178. Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same : provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.	178. A person who is in possession of any goods, or of any bill of lading, dock warrant, ware house keeper's certificate, or warrant or order for delivery, or any other document of title to goods may make a valid pledge of such goods or document:
178-A. Where the pawnor has obtained possession of the goods pledged by him under a contract voidable under S. 19 or S. 19-A, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.	Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption, that the pawnor is acting improperly.
	Provided also that such goods or documents have not been obtained from the lawful owner or from any person in lawful custody of them by means of an offence or fraud.

It is found by both the lower Courts that the jewels were entrusted for safe custody to the pawnor and the lower appellate Court finds that the pawnee, i.e., the bank took the pledge in good faith. On these facts, is the pledge valid ? Sections 178 and 178-A after amendment correspond to S. 178 before amendment. Section 178 as it stood before the amendment in so far as it relates to our case said this :

" A person who is in possession of any goods may make a valid pledge of such goods provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly; provided also that such goods have not been obtained from their lawful owner, or from any person in lawful custody of them by means of an offence or fraud."

The case of a servant being in custody of the goods of the master, 4 Cal. 497,[1] the case of a wife being in custody of the goods of the husband, 24 Bom. 458,[2] at p. 464, the case of a person getting possession under an agreement of hire, 27 Mad. 424[3] and 45 Mad. 173,[4] and the case of a person to whom goods were entrusted for safe custody 11 Bom. 704,[5] came up for consideration before the amendment and

1. ('79) 4 Cal. 497 : 3 C. L. R. 398, Biddomoye Dabee v. Sittaram.
2. (1900) 24 Bom. 458 : 2 Bom. L. R. 403, Seager v. Hakma.
3. ('04) 27 Mad. 424, Nagananda v. Bappu.
4. ('22) 9 A.I.R. 1922 Mad. 44 : 70 I. C. 448 : 45 Mad. 173 : 42 M. L. J. 32, Ramaswami Gupta v. Kamalammal.
5. ('87) 11 Bom. 704, Shankar Murlidhar v. Mohanlal Jaduram.

the decisions held that in such cases the persons who pawned them had no possession in law treating the expression 'possession' as that which an owner has in his goods. They held that mere physical custody is not 'juridical' possession which is contemplated by S. 178: *see* 24 Bom. 458.[2] Now the position has been made clear by the new Ss. 178 and 178-A. New S. 178 is confined to cases of mercantile agents. S. 178-A says that if the pawnor obtains possession of the goods under a contract which is voidable under S. 19 or 19 A, Contract Act, then, a pledge by him would be valid if the pledgee had no notice of the want of defect of titles provided also that the contract had not been rescinded at the time of the pledge. Thus, S. 178-A applies to cases where the pawnor obtained possession of the goods under a contract which is bad under Ss. 19 and 19-A, Contract Act. Here it is not a case where the pawnor obtained possession of the goods under a contract which is voidable for coercion, misrepresentation, fraud or undue influence which are the four categories provided for by Ss. 19 and 19-A. In the cases not covered by S. 178-A, the old rule that a person cannot give his alience a title higher than what he himself has continues to apply. The ordinary rule is that a person cannot give to another person a title higher than what he himself has That rule is subject to certain exceptions which are embodied in Ss. 178 and 178-A. Section 178 does not apply because it is confined to cases of mercantile agents. Section 178-A does not apply because possession of the goods was not obtained under a contract which is voidable under Ss. 19 and 19 A for coercion, undue influence, fraud or misrepresentation.

It was urged that by the recent amendment the Legislature extended to bona fide pledgees protection even in cases where possession of the goods was obtained under a voidable contract and that this assumes that where the goods were obtained under a valid contract, the pledge must be a fortiori valid. The argument is put thus: where the pawnor gets the goods by practising fraud, misrepresentation or undue influence, the pledge is valid provided the further conditions laid down by the section are fulfilled Why then is the pledge invalid where he got possession under a contract and which is not open to any of the above infirmative circumstances? Entrusting a person with goods for safe custody is a species of bailment. Bailment is a contract under S. 148, Contract Act. If the contract of bailment is vitiated by fraud or misrepresentation or undue influence, even then the goods can be the subject of a valid pledge. If so, it is urged that it must be so in a case where the contract of bailment under which the goods were obtained by the pawnor is not open to any of the infirmative circumstances just mentioned. This argument assumes that if the contract of bailment is vitiated under Ss. 19 or 19-A, the pawnor can create a valid pledge. The pawnor does not get possession he gets only bare custody A person in custody of goods under a contract of bailment of this kind would still continue to be under the same disability as before. Further, the wording of Sec. 178-A appears to indicate that by reason of the contract which is bad for fraud, undue influence etc, the pawnor should obtain title to the goods and possession thereof in the strict sense, i. e., juridical possession such that an owner has. Section 178-A says that where the pawnor has obtained possession of the goods under a voidable contract, a pawnee gets a good title provided the pledgee acts in good faith and without notice of the pawnor's defect of title. This means that but for the fraud, coercion, misrepresentation or undue influence, the pawnor would have got a perfectly valid title. Where it is only a case of safe custody, the pawnor had no title at all voidable or valid nor 'juridical possession' as opposed to bare custody. If this contract of bailment is valid, he gets only a right to be in custody and if it is voidable for reasons mentioned in Ss. 19 and 19-A, Contract Act, even then, it cannot come under S. 178-A, because it is not a case of the pawnor's getting a defective title or 'possession' as explained above. As Messrs Pollock and Mulla have pointed out in the latest edition (Edn. 6) on pp. 550 and 551, the result is the same both before and after the amendment in the case of a gratuitous bailee or of a person who is entrusted with the goods for a specific purpose.

I hold that the lower appellate Court is wrong in the view that it has taken that the pledge is valid. The decree of the lower appellate Court is therefore reversed and that of the District Munsif restored with costs here and in the lower appellate Court. The order of the District Munsif as to costs of that Court will stand. The jewels will be returned to defendants 2 to 5. Leave refused.

C.R.K./G.N. *Appeal allowed.*

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* A. I. R. (29) 1942 Madras 300

SOMAYYA J.

Kalitheertha Pillai — Appellant

v.

Chellathammal alias Ammamuthammal and others — Respondents.

Second Appeal No. 409 of 1940, Decided on 7th November 1941, against decree of Dist. Court, Tinnevelly, D/- 27th October 1939.

(a) Hindu law—Adoption—Validity—Consent of majority of sapindas is not always necessary —Sapindas of equal grade—Two out of six consenting—Others' refusal actuated by improper motives—Adoption is valid.

The consent of the majority of the sapindas is not always essential for the validity of an adoption. It is not a question of majority or minority. A mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act it will be presumed that when the majority give their consent such assent was given on bona fide grounds. But where the majority refuse, it is open to the widow to prove that the refusal was actuated by improper motives. When the majority give or withhold their assent from improper considerations, such assent or dissent will be of no avail to the party relying on it. [P 301*e*, *f*]

Consequently, where only two out of the six sapindas of equal grade give their consent to the adoption and it is found that the withholding of their consent by the rest was actuated by improper motives, the adoption is valid: 23 Mad. 486 and 26 Mad. 627, *Rel. on.* [P 301*d*, *e*, *f*]

*** (b) Hindu law—Adoption — Joint family—Widow has no inherent power to adopt—Husband's authority not given—Widow must seek consent of sapindas within joint family — Sole male member minor or lunatic—Widow cannot adopt with consent of divided sapindas.**

In Madras, the widow of a deceased member of a joint Hindu family has no inherent power to make an adoption. If the husband did not give his authority and the widow has to get the consent of the sapindas it is only within the joint family that she must seek the requisite assent. Where there are no sapindas either agnates or cognates to give the requisite authority or where the only sapinda in exis-

tence refuses to give his consent though improperly, a the widow cannot ignore that refusal though improper, and act upon the consent of a divided kinsman and therefore in such a case she cannot make a valid adoption at all. Even where the sole male member of the joint family is a lunatic or a minor, she has no right to travel outside the joint family and make an adoption with the consent of the divided sapindas: ('40) 27 A.I.R. 1940 Mad. 950, *Rel. on*; *Case law discussed.* [P 302*g*; P 303*c*,*d*]

A. V. Viswanatha Sastri and R. Sundaralingam — for Appellant.

K. R. Rangaswami Ayyangar and S. Venkatesan — for Respondents.

JUDGMENT. — This case raises a very important question whether the widow of a deceased member of a Hindu joint family can make a valid adoption to her husband with the consent of the b divided sapindas when there is only one coparcener alive who by reason of mental infirmity is not in a position to give or withhold his consent. Plaintiff had a brother Sethuramalingam Pillai who died on 6th January 1926 leaving two widows, defendants 1 and 2 and a daughter defendant 3. At that time the father of the plaintiff and Sethuramalingam Pillai was alive and he died in July 1926 leaving a widow defendant 6 in the suit. Defendants 1 and 2 adopted defendant 4 with the consent of certain divided sapindas of their husband on 11th December 1930. At that time, it is common ground that the plaintiff was suffering from some mental infirmity. Paragraph 8 of the plaint states that from the beginning of the year 1926, the plaintiff was not in a sound state of mind and para 10 states that since the beginning of the year 1931 the plaintiff completely recovered from the unsound state of mind from which he had been c suffering for about five years. The trial Court (the Subordinate Judge of Tinnevelly) held that the plaintiff was from January 1926 to January 1931 so totally devoid of his senses as to disqualify him from inheriting his father's properties. On appeal the District Judge confirmed the finding of the trial Court that the appellant was insane at the time of the adoption. The plaintiff being the only coparcener and his state of mind being such as has been found by both the lower Courts, the question is whether the adoption made by defendants 1 and 2 with the consent of divided sapindas is valid in law. There were six divided sapindas and two of them gave their consent and the remaining four wrote refusing to give their consent. The six agnatic relations were of equal degree of relationship being the sons of the plaintiff's grandfather's brothers.

The main reason given by the four reversioners d for withholding their consent is, as stated in the replies, that the plaintiff was in proper senses and that therefore there was no necessity for an adoption. This has been found by both the lower Courts to be false and that at the time when their assent was sought, the plaintiff was actually insane. For this reason both the lower Courts have held that the refusal by the four dissenting sapindas was actuated by improper motives. I have gone through the several replies and I agree with the lower Courts that the reasons given for withholding their consent are wholly improper Thus, we are left with the consent of two persons whose consent is beyond any attack. On the authority of the decisions of this Court in 23 Mad. 486[1] and 26 Mad. 627[2] the adoption would be valid notwithstanding four out of the six sapindas of equal grade withholding their consent because e their refusal was actuated by improper motives. In a case of this kind it is not a question of majority or minority. If the majority of the sapindas consent, then there will be a presumption in favour of the consent being bona fide. But where the majority refuse, it cannot be said that it is not open to the widow to prove that the refusal was actuated by improper motives. On p. 488 in 23 Mad. 486[1] Subramania Ayyar J. says this :

" It should, at the same time, be borne in mind that a mere numerical majority, whether in favour of or against an adoption, will not by itself determine the question. Adoption being a proper act it will be presumed that when the majority give their consent such assent was given on bona fide grounds. If however it be shown that the majority give or withhold their assent from improper considerations, such assent or dissent will be of no avail to the f party relying on it."

In 26 Mad, 627[2] Benson and Bhashyam Ayyangar JJ. referred to the above observations with approval. It is urged by the learned advocate for the appellant that a widow can make an adoption only if she gets the consent of the majority of the sapindas and where, as in this case, she has not been able to get the consent of the majority, the adoption is not valid. I do not agree with the contention. No decision has been brought to my notice which says that the consent of the majority of the sapindas is always essential for the validity of an adoption. I therefore hold that the adoption is not invalid on this ground.

The next and the most important question is whether defendants 1 and 2 were entitled to get the consent of the divided agnates for the reason that the plaintiff was at the time of the adoption mentally g defective and not in a position to give or withhold his consent. It is urged for the appellant that the Judicial Committee has definitely laid down that in the case of joint families, the widow of a deceased coparcener must seek the requisite authority within that family. If the husband himself gave his authority, she might adopt. But if the husband did not give his authority and the widow has to get the consent of the sapindas, it is urged that it is only within the joint family that she must seek the requisite assent. Mr. Viswanatha Sastri urges that as the joint family continues even when one male member exists, a widow cannot make an adoption unless she gets the consent of that person and that if that person refuses his consent even though for improper reasons, she cannot travel outside the joint family and seek the authority of divided sapindas. His next proposition is that even where the sole h male member of the joint family is a lunatic or a minor, she has no right to travel outside the joint family and make an adoption with the consent of the divided sapindas. 12 M.I.A. 397[3] at pp. 441 and 442 was a case of a divided family but the Judicial Committee stated the law as to the case of a joint family in the following terms :

"The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family—i. e., undivided—that question is of comparatively easy solution. In such a case, the widow, under the law of all the Schools

1. (1900) 23 Mad. 486 : 10 M.L.J. 73, Venkatakrishnamma v. Annapurnamma.
2. ('03) 26 Mad. 627 : 13 M.L.J. 239, Subramaniam v. Venkamma.
3. ('67-69) 12 M.I.A. 397 : 2 Suth. 135 : 2 Sar. 361 (P. C.), Collector of Madura v. Mootoo Ramlinga Sethupathi.

which admit this disputed power of adoption, takes a no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will."

The case of a joint family came up for decision before the Judicial Committee in 1 Mad. 69.[4] There the widow of the holder of an impartible estate ignored the husband's coparcener and got the consent of a divided sapinda. She also set up the written authority of the husband. The Judicial Committee held in favour of the written authority and upheld b the adoption. But they laid down the law on the subject having regard to the way in which Hollaway J. treated the question in the High Court. At page 81 they say this :

"Positive authority does not do more than establish that, according to the law of Madras, which in this respect is something intermediate between the stricter law of Bengal and the wider law of Bombay, a widow, not having her husband's permission, may adopt a son to him, if duly authorized by his kindred. If it were necessary, which in this case it is not, to decide the point, their Lordships would be unwilling to dissent from the principle recognized by the Travancore case, viz., that the requisite authority is, in the case of an undivided family, to be sought within that family. The joint and undivided family is the normal condition of Hindu society. An undivided Hindu family is ordinarily c joint not only in estate, but in food and worship, therefore, not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members, or by the manager to whom they have expressly or by implication delegated the task of regulation. The Hindu wife upon her marriage passes into and becomes a member of that family. It is upon that family, that as a widow, she has her claim for maintenance. It is in that family that, in the strict contemplation of law, she ought to reside. It is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her. There seems to be strong reasons against the conclusion that, for such a purpose as that now under consideration, she can at her will travel out of that undivided family and obtain the authorization required from a separated d and remote kinsman of her husband."

In 41 Mad. 998,[5] Mr. Ameer Ali delivering the judgment of the Judicial Committee referring to the *Ramnad case*, 12 M.I.A. 397,[3] says this at p. 1009 :

"That the requisite authority in the case of an undivided family is to be sought by the widow within that family ; that it is in the members of that family that she must presumably find such counsellors and protectors as the law makes requisite for her ; and that she cannot at her will travel out of that undivided family and obtain the authorization required from separate and remote kinsmen of her husband."

Dealing with a case of joint family in Bombay where a widow has inherent power to make an e adoption, after referring to the case in 12 M. I. A. 397[3] and the decisions in Madras, the Judicial Committee said this in 57 Bom. 157[6] at p. 172 :

"The board held that the consent to be obtained, when the family was undivided, must be the consent not of a separated kinsman who had no interest in the property, but of his (the husband's) coparceners to whom his interest had passed on his death by survivorship, and it was in this connexion that the observations of the board quoted above were made."

The learned advocate for the respondents does not dispute the general proposition that ordinarily in the case of a joint family, the authority must be sought within that family. He urges, however, that where the sole surviving male member is a lunatic and therefore incapable of giving his consent, his very existence must be ignored and that she can in f that case go outside the family and get the consent of the divided sapindas. He relies upon certain observations of the Judicial Committee in 43 Mad. 650[7] at p. 654. After referring to the case in 41 Mad. 998[5] they said this :

"This does not mean that the consent of a near sapinda who is incapable of forming a judgment on the matter, such as a minor or a lunatic, is either sufficient or necessary; nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, his dissent may be disregarded. Nor does it contemplate cases where the nearest sapinda happens to be in a distant country and it is impossible without great difficulty to obtain his consent, or where he is a convict or suffering a term of imprisonment. The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of g forming an intelligent and honest judgment on the matter."

These remarks were made with reference to divided family and hence they are of no assistance to a case where in a joint family the male members are either minors or persons who by reason of their defective mental capacity are unable to form an intelligent opinion on the question whether a new coparcener should be introduced by the widow making an adoption. This question is not covered by direct authority but it has been held that a widow has no inherent power to make an adoption and that therefore where there are no sapindas, either agnates or cognates to give the requisite authority or where the only sapinda in existence refuses to give his consent though improperly, she cannot make a valid adoption at all. This had been decided by a Bench h of this Court in (1940) 1 M L.J. 779[8] and in so doing the learned Judges relied upon the observations of the Judicial Committee in I.L.R. (1938) Mad. 551[9] at p. 560. The Judicial Committee there say :

"Their Lordships would not be prepared to hold on the authorities that the only kinsmen whose assent need be sought are the agnates, nor is there

4. ('76-78) 1 Mad. 69 : 3 I. A. 154 : 3 Sar. 583 : 3 Suth. 263 (P. C.), Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo.

5. ('18) 5 A.I.R. 1918 P. C. 97 : 48 I. C. 706 : 41 Mad. 998 : 45 I.A. 265 (P.C.), Veerabasavaraju v. Balasuryaprasada Rao.

6. ('33) 20 A. I. R. 1933 P. C. 1 : 141 I. C. 9 : 57 Bom. 157 : 60 I. A. 25 (P. C.), Bhimabai v. Gurunathagouda Khandappa Gowda.

7. ('20) 7 A. I. R. 1920 P. C. 4 : 56 I. C. 391 : 43 Mad. 650 : 47 I. A. 99 (P. C.), Kristnayya v. Lakshmipathi.

8. ('40) 27 A.I.R. 1940 Mad. 950 : 194 I.C. 845 : (1940) 1 M.L.J. 779, Vijjula v. Gopalakrishnamma.

9. ('38) 25 A.I.R. 1938 P.C. 34 : 172 I.C. 724 : 65 I.A. 93 : 32 S.L.R. 328 : I.L.R. (1938) Mad. 551 (P.C.), Balasubramania v. Subbaraya.

any evidence as to what sapindas of Irrudalaya were in existence at the date of the Rani's adoption. Their Lordships think moreover that it would be equally difficult for them to hold that under the Madras law there would be any residuary power in the widow to adopt in the absence of sapindas, but the contention was so clearly abandoned in India that it is not necessary to consider it further."

There the contention had been abandoned in the lower Courts and therefore the Judicial Committee after making the above observations did not make a definite pronouncement. The question however directly arose for decision in (1940) 1 M.L.J. 779.[8] There, there was only one sapinda and he refused to give his consent and his refusal was found to be improper and yet the adoption was held to be invalid. Thus, a widow has no inherent power to make an adoption in a case where the only sapinda improperly refuses to give his consent. In the case of a joint family, if the only surviving coparcener is an adult free from any mental defect and refuses to give his consent though improperly, it seems to me, that a widow of a deceased coparcener cannot ignore that refusal though improper, and act upon the consent of a divided kinsman. This is the view expressed in Mayne's Hindu law, Edn. 10 at p. 219 :

"There is however the distinction that in the case of a joint family, adoption would mean the introduction of a new coparcener into the joint family. On principle it would seem she can adopt with the assent of a substantial majority of the coparceners in the family. But it is fairly clear that even where the coparceners improperly refuse their assent, she will not be entitled to adopt with the assent of her husband's divided kinsmen, as it would be introducing into the joint family a coparcener against their will."

There are grave reasons why a widow ought not to be allowed to travel outside the joint family even when the surviving members are minors or persons incapable of giving their consent by reason of mental defect. As in this case, the person who is mentally defective may recover. In fact, in this case he recovered within a few months after the adoption. In the case where the sole coparcener is a minor, his rights ought not to be affected by the action of a divided kinsman. If, as the Judicial Committee stated, the fact that their right in the joint family property is affected by the introduction of a stranger into the family is the reason for directing a widow to seek the requisite assent within the joint family, then, it stands to reason that where, for instance, the sole surviving member is a minor, his rights ought not to be affected by the consent given by a divided kinsman. So also in the case where the sole member is mentally defective. Inherent power in a widow being ruled out, the position of defendants 1 and 2 in this case is no better and no worse than that of the widow in (1940) 1 M. L. J. 779.[8] I therefore hold that the adoption of defendant 4 by defendants 1 and 2 is invalid for want of requisite authority. The decisions of the lower Courts are reversed and a decree is given in favour of the plaintiff. Under the circumstances of this case, each party will bear his or her own costs throughout. Leave to appeal is granted. At the time when I delivered the judgment, it was not noticed that there are other issues in the suit which have to be tried before a decree is given as prayed for. Therefore, the proper order to pass is to reverse the decrees of the lower Courts and to send the case back to the trial Court for trying the other issues and to pass an appropriate decree. Court-fee paid on the second appeal will be refunded. As directed already each party will bear its own costs upto date. Costs of further proceedings will be provided for by the lower Court.

C.R.K./G.N. *Appeal allowed.*

Hindu law —

(a) ('40) Mulla, Page 525 S. 462 (2).
('38) Gour, Page 188 Pts. 1 and 3 and Pages 188 and 189 Notes 536 and 537.

(b) ('40) Mulla, Page 527 Pts. (j) and (k).
('38) Gour, Pages 178-179 N. 511, P. 187 N. 532 and P. 191 N. 544.

A. I. R. (29) 1942 Madras 303

SOMAYYA J.

M. Kuppuswami Mudaliar — Appellant

v.

S. Pannalal Sowcar — Respondent.

Second Appeal No. 989 of 1939, Decided on 12th December 1941, against decree of Sub-Judge, Chittoor, in A. S. No. 59 of 1938.

Limitation Act (1908), Art. 49 — Plaintiff entrusting specific moveable property to defendant on understanding that it would be returned —Suit to recover property or value—Limitation starts on defendant's refusal to return property.

Where the plaintiff entrusts specific moveable property to the defendant on the understanding that the same would be returned to the plaintiff, limitation for a suit for the return of the property or its value starts when the defendant's possession becomes unlawful. The defendant's possession in such a case being permissive to start with, cannot become unlawful unless there is at least a refusal on the part of the defendant to return the property. A mere demand by the plaintiff will not be enough. Until the defendant asserts title in himself or until he refuses to return the property his possession does not become unlawful. Mere silence on demand being made does not constitute such refusal: 35 Mad. 636, *Rel. on.* [P 304*e*, *g*]

A. Viswanatha Ayyar — for Appellant.

V. T. Rangaswami Ayyangar and K. Ramaswami Ayyangar — for Respondent.

JUDGMENT.—The plaintiff whose suit for the recovery of certain empty Standard Oil Company four gallon drums or their value has been dismissed by the lower appellate Court is the appellant in this second appeal. The defendant, while admitting that he received these drums, pleaded that he had returned the drums. Both the lower Courts disbelieved this plea and held that the defendant had not returned any of the drums. The suit has been dismissed by the lower appellate Court on the ground that it is barred by limitation under Art. 49, Limitation Act. That Article runs thus :

"Suit for other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three years.	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful."

In this case the plaint alleged that specific moveable property was to be returned and that that was the understanding. The prayer is for the return of these drums. Then it was alleged that the defendant was wrongfully detaining them. Therefore, on the allegations in the plaint limitation would start

when the defendant's possession became unlawful. a The lower appellate Court held that possession became unlawful when demand was made by the plaintiff six months after the drums were given. The drums were given in 1928. The demand was made in the early part of 1929 and the drums were not given. That the defendant's possession became unlawful in 1929 is the view of the lower appellate Court. In this Court, in addition to supporting this view of the lower Court, Mr. V. T. Rangaswami Iyengar, the learned advocate for the respondent, has put forward another point, namely, that the suit was not for the recovery of specific moveable property or for compensation for wrongfully detaining the same. He says that it could not have been in the contemplation of the parties that the very same drums should be returned and that the suit is really for the recovery of similar drums or for their value. If this contention is accepted, Art. 49 would not b apply. The plaintiff made a distinct allegation in the plaint that the contract was that the defendant who took by way of loan 203 empty Standard Oil Company four gallon drums did so on the understanding and undertaking that they would be returned to the plaintiff after use by the defendant. This allegation makes it clear that the very same drums were to be returned. In the written statement as the defendant took up the stand that he had returned all the drums, he contented himself with saying that the allegations in para 3 of the plaint are incorrect. There is no plea that, even if they were not returned, the contract was that identical drums were not to be returned but only drums of similar quality.

The plaintiff examined himself and deposed that, after the defendant became the agent he wanted c some empty drums for his use, that he gave the drums and that the arrangement was that the defendant should return the drums to him whenever they were required. It is clear that the plaintiff's evidence is that the very drums should be returned. There was no cross-examination on this point. Advantage is taken of a statement in the evidence of the plaintiff's clerk that the defendant was to return drums of similar nature. It appears to me that what the witness meant is that if he had done it, probably there would have been no trouble in plaintiff accepting them. Any way having regard to the fact that the plaintiff's statement was not challenged in cross-examination, I am not prepared to accept the statement of the clerk in cross-examination. On the pleadings and on the evidence of the plaintiff, I hold that the suit is for the recovery of specific moveable property. I may also mention that this aspect was not suggested in the lower Courts and both the lower d Courts proceeded on the footing that specific articles were to be returned and that, when on demand the defendant did not return them forthwith, his possession became unlawful. So, we have to see whether the view of the lower appellate Court that when there was a demand and non-compliance, the defendant's possession became unlawful is correct.

In this case the evidence is that about six months after the entrustment there was a demand and that the defendant did not return the drums. The plaintiff says that shortly before the suit and before the registered notice Ex. H was given, he made oral demands and that the defendant was promising to return them. He was cross-examined on this point and was asked on how many occasions he made the demand and whether he mentioned the 203 drums in all these demands. Here again there is no cross-examination specifically on the point whether the defendant did not promise to return the drums. Even apart from this promise to return the drums, e I am of opinion that in a case of this kind the defendant's possession did not become unlawful until there was a refusal by him to return the drums. He came into possession of the drums with the consent of the plaintiff. It was permissive possession to start with. Permissive possession cannot become unlawful unless there is at least a refusal on the part of the defendant to return the drums. A mere demand by the plaintiff will not be enough. Unless the defendant openly asserts that he was not going to return the drums, his possession cannot be said to be unlawful. This point is in my opinion directly covered by the decision of a Bench of this Court (Benson and Sundara Iyer JJ.) in 35 Mad. 636.[1] There a jewel was handed over to the defendant for raising money by pledging it with a third party. The defendant raised money and advanced it to the plaintiff. f The plaintiff repaid the loan and asked the defendant to return the jewel and the defendant promised to get it and return it. He never refused to return the jewel until two years before the date of the suit. The plaintiff made a written demand for the return of the jewel on 18th August 1904. The defendant's refusal to return the jewel was on 29th April 1906 by means of notice and the suit was instituted on 18th February 1908 within three years of the defendant's refusal but more than three years after the plaintiff's demand. Dealing with the question when the defendant's possession became unlawful the learned Judges say :

"The defendant must be taken to have held possession of the jewel on behalf of the plaintiff until the date of Ex. 3. We are therefore of opinion that under Art. 49, Limitation Act, 1908, the suit is not barred by limitation. We are unable to agree with g Mr. Srinivasa Iyer's contention that mere silence on defendant's part when he received Ex. B would on this account amount to refusal."

They referred to and relied upon the decision of the Calcutta High Court in 12 C. W. N. 1010[2] at p. 1014. Sitting as a single Judge I am bound by this decision. It is unnecessary for me to refer to the Calcutta decision which was followed in the above case or to any other cases. I hold that the defendant's possession which to start with was permissive did not become unlawful until he asserted title in himself or until he refused to return the drums. The refusal was admittedly within three years before the date of suit. I therefore reverse the decree of the lower appellate Court and restore that of the District Munsif with costs here and in the lower appellate Court. The defendant will have two weeks from today to return the drums. Leave to h appeal refused.

C.R.K./G.N. *Appeal allowed.*

1. ('12) 35 Mad. 636 : 12 I.C. 207 : 22 M.L.J. 152: (1911) 2 M.W.N. 190, Gopalaswami Iyer v. Subramania Sastri.
2. ('08) 12 C.W.N. 1010, Gopal Chandra Bose v. Surendranath Dutt.

Limitation Act —

('41) Chitaley, Art. 48, N. 7, Pt. 4 and Art. 49, N. 8, Pt. 2.
('38) Rustomji, Page 712, Pt. (4).

A. I. R. (29) 1942 Madras 305

WADSWORTH AND PATANJALI SASTRI JJ.

K. Lakshmappa and another — *Appellants*

v.

Talasani Venkata Reddi — *Respondent.*

Appeals Nos. 606 and 607 of 1940, Decided on 2nd December 1941, against order of Dist. Court, Anantapur, D/- 6th September 1940.

Provincial Insolvency Act (1920), S. 75 (3)— Recording of finding that Court had jurisdiction is not order within S. 75 (3).

The recording of a mere finding, albeit in a formal manner, that the Court has jurisdiction to entertain an application cannot be deemed to be an order within the meaning of S. 75 (3). A decision upon jurisdiction has only the effect of regulating procedure and where it is not sufficient to dispose of the application, hardly stands on a different footing from a ruling as to the admissibility of a document tendered or the relevancy of a question put and objected to in the course of the trial. Such decisions as to details of procedure and admissibility of evidence may, no doubt, be regarded as orders in a sense but such decisions by themselves are not open to appeal apart from the final decision disposing of the application or matter : 7 M. I. A. 283 (P.C.) ; ('33) 20 A.I.R. 1933 Mad. 500 ; ('36) 23 A.I.R. 1936 Rang. 525 and ('34) 21 A.I.R. 1934 Lah. 194, *Rel. on.* [P 305*h*]

Consequently, no appeal lies from the decision of the Insolvency Court that it had jurisdiction to entertain the application to scale down the debt under the Madras Agriculturists Relief Act.[P 306*b*]

K. Srinivasa Rao — for Appellants.

V. S. Narasimhachar — for Respondent.

PATANJALI SASTRI J.—These two connected appeals arise out of an application presented to the Court of the District Judge, Anantapur, exercising jurisdiction in insolvency for scaling down the debt due to the appellant in each case in accordance with the provisions of the Madras Agriculturists Relief Act. The appellant in C. M. A. No. 606 held a promissory note executed by the insolvent debtor, the respondent in these appeals, and the appellant in C. M. A. No. 607 had obtained a decree against him. Both the creditors had proved their debts but the respondent objected to their payment in full by the Official Receiver on the ground that the debts should be scaled down under the Madras Agriculturists Relief Act. The Official Receiver overruled the objections and paid the full amount of the principal with interest at six per cent. per annum as provided in S. 48 (2), Provincial Insolvency Act. Thereupon the respondent filed I. A. Nos. 21 and 31 of 1939 in the Court below praying that the debts should be scaled down and that the sums paid by the Official Receiver in excess of the amounts due as scaled down should be recovered from the appellants. While these applications were pending, the respondent also applied to the Court for annulment of his adjudication on the ground that all his creditors had been paid in full, and the adjudication was annulled on 31st July 1940. The petitions referred to above were heard on 6th September 1940 on the preliminary objection raised by the appellants that the Insolvency Court had no jurisdiction to scale down the debts under Madras Act 4 of 1938, and the learned Judge pronounced what is styled an "order" holding that the Court had jurisdiction to entertain the applications and posting them for trial on the merits to 23rd September 1940. The appellants have brought these appeals with the leave of this Court challenging the correctness of this decision.

Mr. V. S. Narasimhachariar, the learned counsel for the respondent, has raised a preliminary objection to the maintainability of these appeals on the ground that the so-called order of the lower Court is nothing more than a finding on one of the points arising for determination in the petitions filed by the respondents which still await disposal, and that no appeal lies under S. 75, Provincial Insolvency Act, against a mere finding where it does not lead to or involve a disposal of the matter in which it is made. Sub-s. (3) of that section under which these appeals have been filed provides that a person aggrieved by any order other than those specified in Sch. 1 made by a District Court otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court by leave of the District Court or of the High Court. It is argued for the appellants that the Court below having formally expressed its decision upon one of the points for determination in the applications and issued also a decretal order, there is here an "order" made by a District Court otherwise than in appeal, and that the appeals are therefore competent under the provisions referred to above. Our attention was also called to the definition of "order" in S. 2, cl. (14), Civil P. C., as "formal expression of any decision of a civil Court which is not a decree" and stress was laid on the fact that, while the Code prohibits appeals from orders save as otherwise expressly provided therein (S. 104), S. 75, sub-s. (3) provides for a right of appeal from any original order of a District Court other than those specified in Sch. 1. It was therefore urged that no limitation ought to be placed upon appeals from such orders by reading into the provision any restrictive or qualifying words from consideration of expediency.

While we are sensible of the difficulty of stating in sufficiently clear-cut and definite terms what is and what is not an order for the purposes of S. 75, Provincial Insolvency Act, we are convinced that the recording of a mere finding, albeit in a formal manner, that the Court has jurisdiction to entertain an application cannot be deemed to be an order within the meaning of that section. A decision upon jurisdiction has only the effect of regulating procedure and, where it is not sufficient to dispose of the application, hardly stands on a different footing from a ruling as to the admissibility of a document tendered or the relevancy of a question put and objected to in the course of the trial. Such decisions as to details of procedure and admissibility of evidence may, no doubt, be regarded as orders in a sense but it could not, we apprehend, have been intended that such decisions should by themselves be open to appeal apart from the final decision disposing of the application or matter. The consequence of holding that such decisions are appealable might well be to make them conclusive unless they are displaced in appeals preferred against them by the party who is adversely affected and, as pointed by their Lordships of the Privy Council in 7 M. I. A. 283[1] at page 302 nothing would be "more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing (i. e., from every interlocutory order) ;

1. (1857-59) 7 M. I. A. 283 : 3 W. R. 45: 1 Suther 325 : 1 Sar. 645 (P.C.), Maharaja Moheshur Singh v. Bengal Government.

whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities."

A somewhat close analogy is to be found in the decision of this Court in 64 M. L. J. 735[2] where it was held that findings on objections raised by a judgment-debtor in an execution application on the ground of lack of jurisdiction and limitation could not be made the subject of appeal when such finding did not result in the dismissal of the application but led to its adjournment for further hearing. It will be noticed that S. 2 (2), Civil P. C., makes "the determination of any question within S. 47" a "decree" and S. 96 provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction save where otherwise expressly provided. Notwithstanding this wide language used, this Court (Beasley C. J., and Bardswell J.) held that no appeal lay observing :

"No final order has been passed in execution by the learned Subordinate Judge. He has merely dealt with the two legal objections which were raised in the course of the execution proceedings. By his order he has not stopped execution proceedings from going on. What he has done quite obviously is to make an order that they are to go on to a final determination. In my view, the learned Subordinate Judge has made no order as yet which can be the subject of an appeal."

The position here is similar. The view we have expressed above is also in accord with the decision of the Rangoon High Court in A.I.R. 1936 Rang. 525[3] under S. 8, Presidency Towns Insolvency Act and of the Lahore High Court in A.I.R. 1934 Lah. 194[4] (a case of refusal to frame issues). We therefore uphold the preliminary objection and dismiss these appeals but make no order as to costs as the appellants might well have thought it necessary to file these appeals lest it should subsequently be argued by the respondent that the decision now under appeal has become conclusive.

C.R.K./G.N. *Appeals dismissed.*

2. ('33) 20 A.I.R. 1933 Mad. 500 : 144 I. C. 929 : 64 M. L. J. 735, Zamindar of Bodinaickanur v. Kamarajapandia Naicker.

3. ('36) 23 A.I.R. 1936 Rang. 525 : 166 I. C. 68, Vellayyappa v. Official Assignee.

4. ('34) 21 A.I.R. 1934 Lah. 194 : 152 I. C. 222 : 35 P. L. R. 155, Bal Mukund v. Kalyandas.

* A. I. R. (29) 1942 Madras 306

WADSWORTH AND PATANJALI SASTRI JJ.

Chavakula Venkatakrishnayya — *Petitioner*

v.

Talluri Malakondayya and another — *Respondents.*

Civil Revn. Petn. No. 156 of 1939, Decided on 17th November 1941, to revise order of Dist. Court, Guntur, D/- 9th September 1938.

Provincial Insolvency Act (1920), S. 6 (e)— Fact of sale of debtor's property in execution of decree is sufficient for purposes of S. 6 (e) — Subsequent setting aside of sale is immaterial —Words "property has been sold in execution of a decree" in S. 6 (e) of Act and O. 21, Rr. 89 and 90, Civil P. C.— Meaning of.

The enumeration of the various acts of insolvency in S. 6 contemplates those acts which in the public eye shake the credit of a debtor and are likely to cause a scramble amongst the creditors for his assets. The words "property has been sold in execution of a decree", in O. 21, Rr. 89 and 90, Civil P. C., refer not to an indefeasible sale, but to a sale which has been actually held but which may be set aside as a result of subsequent proceedings. No greater weight can be given to the words "property has been sold in execution of the decree" in S. 6 (e), Provincial Insolvency Act than they carry in Rr. 89 and 90 of O. 21, Civil P. C., to which S. 6 (e) naturally relates. Consequently, the fact of a sale of the debtor's assets in execution of a decree is enough for purposes of S. 6 (e) and a subsequent deposit whereby the sale is set aside or a subsequent objection founded on some material irregularity resulting in the setting aside of the sale, will not alter the fact that the property was sold in execution of the decree : ('38) 25 A. I. R. 1938 Lah. 819 ; ('33) 20 A.I.R. 1933 Cal. 564; (1785-1800) 100 E. R. 33 and ('40) 27 A.I.R. 1940 Mad. 375 (F.B.), *Disting.*

[P 307*a*,*b*,*d*,*e*]

M. S. Ramachandra Row and A. Bhujanga Rao — for Petitioner.

K. Ramamurthy for K. Kotayya — for Respondents.

WADSWORTH J. — The petitioner here was adjudged an insolvent on a creditor's application under S. 9, Provincial Insolvency Act, and the order of adjudication was confirmed in appeal. The civil revision petition challenges the correctness of this appellate order. The grounds on which the adjudication was challenged in the Courts below relate to the subsistence of the debt in favour of the petitioning creditor, having regard to an alleged agreement for sale and also having regard to a possible retrospective operation of Act 4 of 1938. These contentions are not now pressed. The argument before us has been confined to the question whether the judgment of this Court in C. M. A. No. 330 to 332 whereby the court sale which formed the act of insolvency has been set aside, would warrant the cancellation of the order of adjudication. The judgment referred to was passed on 23rd October 1941 so that at the time of the adjudication and also at the time when the appeal to the lower Court was heard, the contention which has been urged before us could not have been advanced. It is argued that there is no act of insolvency when a sale in execution has been held and that sale has not been confirmed or having been confirmed, has been set aside as a result of a deposit under R. 89 of O. 21, Civil P. C.

There appears to be no decided case covering this actual point. Two cases have been quoted, A. I. R. 1938 Lah. 819[1] and A.I.R. 1933 Cal. 564,[2] in which it was held that the date of the sale for the purpose of limitation to an application under S. 9, Provincial Insolvency Act, is not the date of the confirmation, but the date of the actual sale. We have also been referred to (1785-1800) 100 E. R. 33[3] in which it was held that a clear and unequivocal act of bankruptcy such as suspension of payment cannot be explained away by the subsequent circumstance that the creditor was paid. It seems to us that none of these cases really touch the point which we have to decide. Under S. 6 (e), Provincial Insolvency Act, a debtor commits an act of bankruptcy if any

1. ('38) 25 A.I.R. 1938 Lah. 819 : 179 I.C. 367 : 40 P.L.R. 841, Lal Chand v. Bhoga Ram.

2. ('33) 20 A.I.R. 1933 Cal. 564 : 145 I. C. 429 : 57 C. L. J. 148 : 37 C. W. N. 535, Kanailal v. Tinkari Deo.

3. (1785-1800) 100 E. R. 33, Colkett v. Freeman.

of his property has been sold in execution of the decree of any Court for payment of money. Under O. 21, Civil P. C., we find both in R. 89 and in R. 90 the words "where any immovable property has been sold in execution of a decree" used to indicate a sale which has been held and awaits confirmation and one which is liable to be set aside either as a result of a deposit or as a result of an objection to the procedure. That is to say, the words "property has been sold in execution of a decree", when used in O. 21, Civil P. C., refer not to an indefeasible sale, but to a sale which has been actually held but which may be set aside as a result of subsequent proceedings. It seems to us that there is no apparent necessity for giving greater weight to the words in S. 6, Provincial Insolvency Act, than they carry in the relevant rules of O. 21 to which cl. (e) of S. 6, Provincial Insolvency Act, naturally has reference. The enumeration of the various acts of insolvency in S. 6 seems to contemplate those acts which in the public eye shake the credit of a debtor and are likely to cause a scramble amongst the creditors for his assets. The man may actually be solvent, but may still commit an act of insolvency by suffering something to be done which shakes his apparent credit, as when he disappears from his normal dwelling house or hides himself from his creditors or under the corresponding provision of the Presidency Towns Insolvency Act, suffers some attachment of his property in execution of a decree to subsist for 21 days. All these are outward and visible signs that a man's credit has been shaken and they are circumstances which are likely to cause a panic amongst his creditors. Consequently they justify any creditor in asking the Court to step in and see that there is a fair distribution of the debtor's assests.

Having these considerations in mind it is but natural that the Legislature should lay down as one of the criteria for judging whether a man's ostensible credit has been shaken, the fact of a sale in Court of his assets in execution of a decree. The question whether the sale is eventually set aside for some irregularity or whether the debtor eventually finds it to his interest to deposit the amount of the particular decree is not really material. It is the very fact that his circumstances are sufficiently embarrassed to make him to submit to a sale of his property, which justifies the creditor in asking the Insolvency Court, to take charge of his estate. We have had our attention drawn to a Full Bench decision in I.L.R. (1940) Mad. 441[4] to which we were both parties in which it was held that an adjudication based on an alleged fraudulent preference would necessarily have to be cancelled or annulled on a judicial finding that there was no fraudulent preference. But that decision apart from its being concerned with the question whether the adjudication is to be annulled or not seems to us to depend on quite different considerations. If there is no fraudulent preference, there is no act of insolvency and a judicial finding which binds the parties that there has been no such fraudulent preference, destroys once and for all the basis of the insolvency. But as we read S. 6 (e) when there has in fact been a sale in execution a subsequent deposit whereby the sale is set aside or a subsequent objection founded on some material irregularity resulting in the setting aside of the sale, will not alter the fact that the property was sold in execution of the decree. We do not wish to say anything which will be read as deciding that an insolvency petition could or could not be maintained on the strength of a sale which had been set aside before the insolvency petition was presented; nor do we wish to prejudice any application to annul the adjudication which might be preferred on the basis that the setting aside of the sale is a sufficient reason for the annulment of the insolvency. These are matters with which we are not now concerned. We confine ourselves to holding on the facts of this case that the property of the insolvent has been sold in execution of a decree notwithstanding the fact that this Court in appeal has set aside the sale and we are of opinion that the setting aside of the sale is not a sufficient reason for cancelling the order of adjudication in revision. In this view we dismiss the civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

4. ('40) 27 A. I. R. 1940 Mad. 375 : 189 I. C. 573 : I. L. R. (1940) Mad. 441 : (1940) 1 M. L. J. 228 (F.B.), Periakaruppan v. Arunachalam.

A. I. R. (29) 1942 Madras 307

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Elatath alias Muthetath Mallisseri Narayanan Nambudiri and others— *Appellants*

v.

Etacheri Kunnath Chathukutti Nayar and others — *Respondents.*

Appeal No. 437 of 1938 and Civil Misc. Petn. No. 5946 of 1941, Decided on 21st October 1941, against decree of Sub-Judge, Tellicherry D/- 28th July 1937.

(a) Malabar Compensation for Tenants' Improvements Act (1 of 1900), S. 6 (2)— Kanom— Suit for redemption by jenmi—Jenmi can set off decree for arrears of rent obtained by him against kanom amount and value of improvements even if decree is barred by limitation : ('27) 14 A.I.R. 1927 Mad. 189=98 Ind. Cas. 563, *OVERRULED.*

In a suit by the jenmi for the redemption of a kanom the jenmi is entitled to set off the arrears of rent due to him without any regard to limitation against the kanom amount and the value of improvements : 7 Mad. 545 ; 8 Mad. 381 and 8 Mad. 415, *Rel. on.* [P 309b]

The jenmi does not lose his right to set off even if a decree for rent had been obtained in its behalf : ('27) 14 A.I.R. 1927 Mad. 189, *Approved.* [P 309b]

Even if the decree for arrears of rent has become barred by time, the jenmi does not lose his right to have it set off against the kanom amount and the value of improvements : ('27) 14 A.I.R. 1927 Mad. 189=98 I. C. 563, *OVERRULED* ; 16 Cal. 307 (P.C.), *Rel. on* ; ('19) 6 A.I.R. 1919 Mad. 59 and ('17) 4 A.I.R. 1917 Mad. 258, *Ref.* ; 20 All. 401 (P.C.), *Not approved.* [P 309b,c]

(b) Limitation Act (1908), Art. 182 — Execution application returned for amendment — Application not represented within time fixed by Court—Order returning application held not wrong—Application held could not be deemed to be pending.

The execution application presented by the decree-holder was returned by the Court to rectify certain defects namely the claim for costs made by the petitioner was obviously in excess of what was actually due to him and certain draft sale papers which had been required to be produced were not produced.

The application, however, was not re-presented within the time fixed by the Court :

Held that the order returning the application for rectification of defects could not be said to be unjustifiable or wrong. [P 310*d*]

Held further that the decree-holder, having failed to comply with the proper order of the Court within the time given to him, could not advance the contention that the application which had been with him throughout should be deemed to be pending. [P 310*e*]

(c) Malabar Compensation for Tenants' Improvements Act (1 of 1900), S. 11 — Tenant building compound wall — Compensation must be granted unless landlord can show that old walls were repaired.

A tenant who has built compound walls is entitled to compensation therefor unless the landlord can show that the tenants had only repaired the old walls. [P 310*e*]

(d) Malabar Compensation for Tenants' Improvements Act (1 of 1900), S. 10 — Tenant claiming compensation for trees — Onus is on him to show that trees were grown by him.

A tenant claiming compensation in respect of certain trees must prove that the trees were grown by him. It is not for the landlord to show that the trees were not grown by the tenant. [P 310*e*]

(e) Mortgage—Costs—Redemption suit.

Ordinarily the mortgagor is liable to pay the costs of the mortgagee in a redemption suit. [P 310*f*]

(f) Madras Agriculturists Relief Act (4 of 1938), S. 15—Decree in suit by jenmi for redemption of kanom passed in 1937 before Act modified by High Court after Act by reducing amount decreed to defendants under S. 6 (2), Malabar Compensation for Tenants' Improvements Act after allowing full set off to plaintiff for arrears of rent—S. 15 not being retrospective held did not apply.

The decree in the suit by the jenmi for the redemption of a kanom was passed in July 1937 before the Act came into force and was only modified by the High Court after the Act came into force by reducing the amount that was decreed in favour of the defendants under S. 6 (2), Malabar Compensation for Tenants' Improvements Act, after the full set off allowable to the plaintiff in respect of a decree for arrears of rent which at the date of the suit had become time barred had been taken into consideration :

Held that S. 15, Agriculturists Relief Act, not being retrospective in character could have no application. Moreover the only decree that S. 6 (2), Malabar Compensation for Tenants' Improvements Act, contemplated was one for improvements after the arrears of rent, etc., had been set off. Consequently, the arrears of rent embodied in the decree for which a set off ought to have been allowed by the trial Court would be wiped off in any case and could not be held to have been decreed. Nor could those arrears of rent be regarded as due or payable after the Act came into force. [P 310*h* ; P 311*a*]

K. Kuttikrishna Menon — for Appellants.

P. Govinda Menon — for Respondents.

Appeal No. 437 of 1938

ABDUR RAHMAN J.—The main question to decide in this appeal relates to the plaintiff's claim for setting off the arrears of the rent due to him by the defendants against the value of improvements found to be payable by the former to the latter. A decree was secured by the plaintiff Devaswom in regard to the arrears of rent but it has become barred by limitation. The properties in suit including certain other items of property, sixty-three in all, belong to the plaintiff Devaswom. They were demised by it on a kanom of Rs. 116 to defendants 1 to 55, who were members of a tarwad, for a period of five years so far as paddy lands were concerned and for a period of twelve years in respect of parambas. It appears that a kuzhikanom deed was executed by the plaintiff Devaswom on 26th February 1917 in favour of one V. Krishnan Nair who was then karnavan of the defendants' tarwad. Since he died without executing a corresponding marupat, the marupat on the basis of which the present suit was instituted, Ex. A was executed by the next karnavan Kunhoonhan Nair and defendant 2 in favour of the plaintiff Devaswom, on 9th June 1917. The plaintiff Devaswom assigned one year's rent. The assignee brought a suit O. S. No. 175 of 1922, obtained a decree, and in execution the tenancy rights of defendants 1 to 55 were sold and purchased by defendant 56. The other defendants who are now in possession are claiming under defendant 56.

The plaintiff Devaswom brought a suit O. S. No. 487 of 1921 for the recovery of rent due for the year 1096 (corresponding to 1920-21) in respect of both paddy lands and parambas and obtained a decree for the same on 17th December 1923. The amount claimed in the suit as rent forms one of the amounts which is being claimed in the present suit. The plaintiff Dewaswom brought another suit O. S. No. 373 of 1922 for rent and for recovery of paddy lands alone, shown as items 33 to 63 in the marupat. This was decreed although items 62 and 63 in the marupat were excluded from the decree on the ground that they were parambas and the suit in regard to them was premature. The items of property which were recovered in the execution of the decree passed in that suit do not form the subject-matter of the present suit. The suit for redemption, out of which the present appeal arises was instituted by the plaintiff Devaswom for the recovery of paramba lands on payment of a kanom of Rs. 116. Arrears of rent amounting to Rs. 6305-6-11 including those for which the decree was passed were asked to be set off against the value of improvements found to be payable to the tenants by the plaintiff. The defendants claimed the value of improvements in excess of the amount claimed by the Devaswom but contended that the arrears of rent for which the decree had been obtained could not be set-off, against the improvements due to them as the decree had become barred by time.

The Subordinate Judge of Tellicherry passed a decree for redemption in favour of the plaintiff Devaswom on payment of the value of improvements due to various defendants detailed in the judgment but accepted the plea advanced by the defendants and refused to allow the set-off to the plaintiff in respect of the amount for which the decree had been obtained. The plaintiffs appeal and the first contention as stated above advanced on their behalf is that they were legally entitled to have the amount of rent covered by the decree in O. S No. 487 of 1921 set-off under S. 6 (2), Malabar Compensation for Tenants' Improvements Act (I of 1900) against the improvements decreed in favour of the defendants in spite of the fact that the decree in its favour might have been barred by time. It was also contended that the decree passed in O. S. No. 487 of 1921 was not barred by time in fact; but on hearing the learned counsel for the appellants, we were not satisfied that

this contention had any force and we did not for reasons which we will give later in this judgment call upon the other side to address us on that point. The third contention advanced on behalf of the appellants was that the improvements in regard to items 44, 64, 66 and 66-A should not have been allowed by the lower Court. This question is discussed in para. 65 of its judgment. Mr. Govinda Menon who appeared in this case on behalf of some of the respondents did not oppose this contention as he said that the clients for whom he was appearing had no concern with this claim made on behalf of the appellant. It was urged in the end that costs should not have been awarded against the plaintiff when it had substantially succeeded in the suit. The last three questions being of minor importance, we would like to address ourselves to start with on the first question that is by far the most important one to be determined in this appeal.

In view of the decisions of this Court in 7 Mad. 545,[1] 8 Mad. 381[2] and 8 Mad. 415,[3] it was not disputed that a jenmi was entitled to set off the arrears of rent due to him without any regard to limitation against the kanom amount and the value of improvements. Nor was it, in view of A.I.R. 1927 Mad 189[4] contested that the plaintiff could have lost his right to set off even if a decree for rent had been obtained in its behalf, provided that it had not become barred by time on the date on which the present suit was instituted. But it was contended that if a decree for arrears of rent had been obtained by a jenmi and it is allowed to be barred by time, the jenmi would not retain the right to have it set off against the kanom amount and the value of improvements. The question to decide is whether this contention is correct. Our attention has not been drawn to any decision in which this question had directly arisen for decision but reliance was placed on certain observations of Devadoss J. in A. I. R. 1927 Mad. 189[4] (which were admittedly in the nature of obiter) and of Krishnan J. in a decision by a Division Bench of this Court in 41 Mad. 1043.[5] The question in our view really turns on a correct interpretation of S. 6 (2) which reads as follows :

"If in such a suit the Court finds *any sum of money due by the defendant to the plaintiff for rent or otherwise in respect of the tenancy*, the Court shall set off such sum against the sum found due under sub-s. (1) and shall pass a decree declaring as the amount payable to him on ejectment the amount (if any) remaining due to the defendant after such set-off."

The words underlined (italicised here) by us are, in our opinion, important and it cannot be reasonably argued that arrears of rent will not remain due even if a decree has been passed in regard to them, but which has remained unsatisfied. There is a great deal of difference between a decree becoming unenforceable in a Court of law by lapse of time and thus making it impossible for a decree-holder to realise his dues by a process of Court and a decree becoming satisfied. Limitation in such cases bars the remedy but does not extinguish the right. The unpaid rent must still be regarded as due although it may not be possible for the person to whom the rent is due to bring a suit again for realising that debt from his debtor. If limitation cannot prevent debt which is uncovered by a decree, from being claimed by a jenmi by way of set-off against the kanom amount and improvements as held in 7 Mad. 545,[1] 8 Mad. 381[2] and 8 Mad. 415,[3] and if the mere passing of a decree, if it is alive, does not, on the ground of merger or any other principle of law, debar a plaintiff, as held in A.I.R. 1927 Mad. 189[4] from getting a set-off under the aforesaid section of the Tenants' Improvements Act, there can be nothing in our opinion, which can be held to debar a plaintiff from getting a set-off in spite of the fact that the decree had become barred by time. It is instructive to compare the words "amount due by the plaintiff to the defendant" in this sub-section with the words "legally recoverable" in O. 8, R. 6, Civil P. C. It has been held that if the defendant's claim is barred by the law of limitation at the date of suit it cannot be pleaded by way of set-off under the provisions of the Code of Civil Procedure; but the Courts have in construing that section confined that rule to a legal set-off merely, while in cases of equitable set-off claimed by a defendant no such exception has been engrafted for the simple reason that in granting equitable set off the Court is not necessarily confined to the limits introduced in O. 8, R. 6, Civil P. C. The ordinary cases between lessors and lessees may be different. It has been held in a Madras case, 39 Mad. 939,[6] that it was not open to a lessee to claim by way of equitable set off an unliquidated claim for damages which was barred at the date of suit. The same rule cannot however be applied to a kanom where the landlord is declared bound by the statute to pay for improvements effected by the tenant during the period of his tenancy which is usually 12 years and a tenant has to be made liable to pay the whole of the rent due by him to his landlord before a decree declaring the amount payable to him for improvements can be passed only after the set-off for rent in respect of the tenancy has been allowed to the landlord. We are aware of the dictum of Devadoss J. in A.I.R. 1927 Mad. 189,[4] where he said that a decree that was barred by limitation could not be set off but we really see no reason or principle on which, in view of the clear words of S. 6 (2), Tenants' Improvements Act, it can be supported. Reliance was placed by Mr. Govinda Menon on the observations of Krishnan J. in 41 Mad. 1043[5] where that learned Judge accepted the principle of the American law given by Jones in S. 936 of his treatise on Mortgages which was to the effect that :

"The merger of the note in a judgment does not extinguish the debt and the mortgage continues a lien till it is satisfied or the judgment is barred by statute of limitation."

The other learned Judge Mr. Justice Phillips constituting the Division Bench was not however prepared to go to that extent. He observed as follows :

"It would appear that under American law the respondent's contention is correct (*vide* Jones on Mortgages, S. 936) but the position is not so clear either in English or Indian law, for, it would appear from a passage in 21 Halsbury 325 that the original charge would still remain unless the decree became satisfied and it is questionable whether a decree that has become barred by limitation is on the same footing as a decree that has been satisfied."

Since there was no question of set off in 41 Mad.

1. ('84) 7 Mad 545, Achuta v. Kali.
2. ('85) 8 Mad. 381, Kanna Pisharoti v. Kombi Achan.
3. ('85) 8 Mad. 415, Unnian v. Rama.
4. ('27) 14 A. I. R. 1927 Mad. 189 : 98 I. C. 563, Kunhi Krishnan v. Kunhipennu.
5. ('19) 6 A. I. R. 1919 Mad. 59 : 49 I. C. 123 : 41 Mad. 1043 : 35 M.L.J. 414, Mangeshwar Narain Rao v. Shiva Rao.
6. ('17) 4 A. I. R. 1917 Mad. 258 : 32 I. C. 80 : 39 Mad. 939 : 30 M. L. J. 59, Vyravan Chetti v. D. Nataraja Desikar.

a 1043[5] such as is being claimed by the plaintiffs in the present suit, it is unnecessary in the circumstances to consider Krishnan J.s observations more closely. The decision in that case can be no authority for the contention that if the decree for rent had been obtained the amount decreed would cease to be due as rent under the Compensation for Tenants' Improvements Act even if the decree is barred by limitation. In our opinion, the decision of their Lordships of the Judicial Committee in 16 Cal. 307[7] goes to show that there could have been no merger in spite of the decree having been passed in favour of the mortgagee for certain interest so as to preclude him from claiming the same amount in a redemption suit instituted against him subsequently by the mortgagor. The judgment of their Lordships of the Privy Council may have been, as remarked by the learned Judges in 20 All. 401[8] at p. 407 very brief; but the summary of the decision of the Judicial b Commissioner against which the appeal was taken to the Privy Council given in the facts of that case and the argument addressed to their Lordships of the Judicial Committee leave no room for doubt as to the contention advanced before them and as to the view which ultimately prevailed. The mortgagee in 20 All. 401[8] had, in the words of the learned Judges of the Allahabad High Court "preferred to seek one remedy" and his debt should have been on this principle regarded by their Lordships of the Privy Council in the Calcutta case to have become merged in the decree and was only payable under the decree and not otherwise. But it was not so held by their Lordships.

The relationship between the parties in the present case is really that of a mortgagor and mortgagee and in taking an account between the parties c which S. 6 (2) contemplates, the plaintiff who is in the position of the mortgagor would, in our opinion, and in accordance with the language of that sub-section be entitled to a set-off even in regard to a decree that was barred by limitation. The other questions need not detain us long. It was contended on behalf of the appellant that the decree in favour of his client was not barred by limitation. This contention was based on the fact that an application for execution was presented by him on 7th August 1933 but it was returned by the Court on 10th August 1933 to rectify certain defects that existed in the petition. It was not re-presented by him. Relying on certain decisions of this Court, it was argued that the application for execution which was according to law should not have been returned and the effect of the wrongful return by the Court was that the application should be deemed to be pending. We do not d however agree with that contention. Whatever may have been the effect of the order of the execution Court, if it was not justified, it cannot be said in this case that the order passed by the execution Court on 10th August 1933 was an unjustifiable or a wrong order. The claim for costs made by the petitioner was obviously in excess of what was actually due to him and the application had therefore to be returned for amendment. Moreover, certain draft sale papers had not been produced and they were required to be produced. The execution Court had given three weeks' time for amendment and for the production of the papers and having failed to comply with the proper order of the Court within the time given to him he cannot advance the contention that the application which had been with him throughout should have been deemed to be e pending.

The improvements to which objection has been taken by the appellants should not have been in our opinion allowed in regard to items 64, 66 and 66-A although the grant in regard to item 44 appears to be justified. As for the last item, the tenants appear to have built the compound walls and unless the plaintiff had shown that they had only repaired the old walls compensation should have been and was rightly granted. In regard to item 64 however the onus was on the defendants to establish that they had effected the improvements for which they could have claimed compensation and not for the plaintiff Devaswom to show that the trees had not been grown by the tenants. That would be the proof of negative fact and unless the law required the plaintiff to prove a negative fact, which it did not, it should have been proved by the defendants. Similarly f the statement of D. W. 4 should not have been, in the absence of the marupat, accepted in regard to items 66 and 66-A. As for costs, there is no reason why we should interfere with the discretion exercised by the Court below. Ordinarily, the mortgagor is liable to pay the costs of the mortgagee in a redemption suit. But, in the circumstances of the case, the Court had decreed only a portion of the costs in regard to court-fee and in regard to the expenses of a commission incurred by them. In other respect, they were directed to bear their own costs. There is no reason why we should interfere with that discretion. The result is that the appeal will be accepted to the extent that the item covered by the decree in O. S. No. 487 of 1921 would be allowed to be set off as against the claim for improvements allowed to the defendants. The claim for improvements in regard to items 64, 66 and 66-A g is disallowed. The plaintiff will have, in the circumstances, three-fourth of the costs of this appeal. Time for redemption is extended by three months from this date. An application has been filed by Mr. Govinda Menon under S. 15, Madras Agriculturists Relief Act (4 of 1938). It may be posted for hearing next week.

C. M. P. No. 5946 of 1941.

ABDUR RAHMAN J.—It has been contended by Mr. Govinda Menon that since the amount of rents covered by the decree is being allowed by us for the first time now, it should be deemed to have been discharged as his client had in accordance with the provisions of S. 15, Madras Agriculturists Relief Act, deposited the sum due for faslis 1347 and 1346 before the dates mentioned in that section. In view however of the decree that was passed in this case in July 1937 before the Agriculturists h Relief Act came into force, and which we are now only modifying by reducing the amount that was decreed in favour of the defendants under S. 6 (2), Malabar Compensation for Tenants' Improvements Act (1 of 1900) after the full set of allowable to the plaintiff had been taken into consideration, we are of opinion that S. 15, Agriculturists Relief Act, not being retrospective in character, can have no application and the amount due for improvements allowed to the defendants should have been decreed by the lower Court after the arrears of rent included in the decree that is now barred by limitation had been taken into account. Viewed thus, the rent could not be regarded as due or payable after the Act came into force. The only decree that S. 6 (2), Malabar Compensation for Tenants' Improvements Act, contemplates is one for improvements after the arrears of rent, etc., have been set off. The rent

7. ('89) 16 Cal. 307 (P.C.), Hewanchal Singh v. Jawahar Singh.

8. ('98) 20 All. 401 : 1898 A.W.N. 90 (P.C.), Imdad Hasan Khan v. Badriprasad.

would thus be wiped off in any case and cannot be held to have been decreed. It would therefore follow that the rents alone included in the sum of Rs. 1960 for which the decree was passed excluding costs and interest would be deducted out of the improvements and the balance that is found to be due after the amount of rents has been deducted will remain payable to the defendants. The parties are directed to bring in a draft decree.

C.R.K./G.N. *Order accordingly.*

Limitation Act —
(b) ('41) Chitaley, Art. 182, N. 129 Pt. 24.
('38) Rustomji, Page 1692 N. "Striking off: Proceedings still pending" and Page 1759 N. "Informal or defective application—Amendment."
C. P. C.—
(e) ('40) Chitaley, O. 34 R. 7, N. 6 Pt. 1.
('41) Mulla, Page 1069 Pt. (s).

A. I. R. (29) 1942 Madras 311

SOMAYYA J.

B. A. Anthonimuthu Pillai — Appellant

v.

V. K. Naganatha Ayyar and others — Respondents.

Second Appeal No. 950 of 1940, Decided on 10th December 1941, against decree of Sub-Judge, Tuticorin, in A. S. No. 120 of 1938.

(a) Tort—Wrongful attachment—Damages—Municipality not being able to realise arrears of house tax from owner moving Magistrate to take action under Sch. 4, R. 36, Madras District Municipalities Act—Magistrate issuing warrant to attach moveables found inside owner's house —House occupied by owner's divided brother—Tax Superintendent being asked to do so pointing out house to constable—Constable attaching moveables as per warrant and Superintendent attesting search list — Action against Municipality and Superintendent by owner's divided brother for damages held not maintainable.

The municipality not being able to realise arrears of house tax from the owner moved the Magistrate under Sch. 4, R. 36, Madras District Municipalities Act. The Magistrate thereupon issued a warrant for the attachment of moveables found inside the house. The house however was not in the occupation of the owner, but that of his divided brother. On being asked to do so, the Tax Superintendent accompanied the constable to whom the warrant was entrusted for execution and pointed out the house in question. The moveables in the house were attached as per warrant and the search list was attested by the Tax Superintendent. The owner's brother whose moveables were attached brought an action for damages for wrongful attachment against the municipality and the Tax Superintendent :

Held that there was no case against the Tax Superintendent and the suit against him was rightly dismissed. [P 312*b*]

Held further that the municipality was entitled to move the Magistrate to take action under R. 36 and the further proceedings were all taken by the Magistrate. Therefore, the Municipal Council in moving the Magistrate to take action against the defaulter did no more than what it was justified under the law to do and therefore the suit against the Municipal Council as well was rightly dismissed. [P 312*b*,*c*]

(b) Tort — Seizure of goods authorised by warrant — No action lies for damages even if warrant was improperly obtained.

If goods are seized under a writ or warrant however improperly obtained which authorised the seizure, the seizure is lawful and no action for damages will lie in respect of the seizure unless the person complaining can establish a remedy by some such action as for malicious prosecution : ('31) 18 A.I.R. 1931 P.C. 28, *Rel. on.* [P 313*a*,*c*]

N. S. Sundaram — for Appellant.

A. Swaminatha Ayyar and S. Thayagaraja Ayyar — for Respondents.

JUDGMENT.—One K. A. Anthonimuthu Pillai was the owner of two houses Nos. 60 and 61 in Vaniarvilai Street, Tuticorin. The municipal tax for house No. 61 was in arrears. The owner K. A. Anthonimuthu Pillai was prosecuted The Bench Court convicted and fined him and also directed him to pay up the arrears. The arrears were not paid and the Bench Court then issued a warrant to attach the moveables of K. A. Anthonimuthu Pillai. The warrant proved infructuous. The Court then issued a second warrant through the Sub-Inspector of Police to attach all the moveables found in the house No. 61. That house was then occupied by the defaulter's divided brother B. A. Anthonimuthu Pillai. Attachment was effected by the Head Constable to whom the warrant was entrusted for execution by the Sub-Inspector. When the warrant was returned at one time saying that the house was locked, the following order was passed by the Magistrates :

"The warrant should be executed properly. It is no use saying that the house is under lock and that the accused is absent from the town. Steps should be taken to attach all the moveable properties found inside the house of the accused and the village Munsif's *attakshi* obtained for doing so. The warrant should be returned for execution on or before 10th June 1936 without fail.

(Sd) N. M. Roche Victoria, 21-5-1936,
President in charge."

Thereupon the Head Constable took the village Munsif and proceeded to execute the warrant. On that occasion they sought the help of defendant 1, the Tax Superintendent of the municipality and he was asked by the municipal authorities to render help to the constable. Defendant 1 pointed out the house and later attested the search list which was prepared by the Head Constable. The present suit was laid against four defendants, the first being the Tax Superintendent, the second the Head Constable, the third the village Munsif and the fourth, the Municipal Council of Tuticorin. The plaintiff's case is that there is enmity between him and defendant 1 and that he got the others to execute the warrant by attaching all the properties of the plaintiff, B. A. Anthonimuthu Pillai including moveables which are not attachable under S. 60, Civil P. C., and under the provisions of the District Municipalities Act which embody the prohibition contained in S. 60, Civil P. C. Both the lower Courts dismissed the suit and the appellant urges that the dismissal is wrong for the reason that his properties were attached for the arrears due by his brother K. A. Anthonimuthu Pillai. He says that he was not the defaulter and that the President could only issue a warrant for the attachment of the moveables of the defaulter and that if his moveables were attached, he was entitled to damages on the ground of wrongful attachment. He also says that even wearing apparel, cooking

vessels and bedding were attached all of which are not attachable and that the whole thing was engineered by defendant 1.

Both the lower Courts have found that the plaintiff has not proved that there was any enmity between the appellant and respondent 1, the Tax Superintendent and the appellant's case that he was at the bottom of the whole thing is not proved. What has been found against respondent 1 is that he pointed out the house No. 61 to the Head Constable and that too on being asked to do so. Evidence to the effect that there was a protest against the attachment of the articles on the ground that they belonged to B. A. Anthonimuthu Pillai and that respondent 1 asked the Head Constable to go on with his attachment notwithstanding the fact that the moveables did not belong to the defaulter is disbelieved. On these findings there was no case against respondent 1 and the suit against him was rightly dismissed. He was not a party to the attachment. He did not point out the articles to be attached and he took no part in it. He showed the house no doubt but it is not the case of the appellant that by merely showing the house, he was guilty of any illegal conduct. The subsequent attestation of the search list does not carry the case further. I therefore agree with the lower Courts in holding that respondent 1 was not liable for any damages for the wrongful attachment, if any, of the goods of the appellant. Respondent 4, the Municipal Council, must also be exonerated because there is nothing to show that respondent 4 sought the attachment of the moveables of the appellant. They complained, as they were entitled to do, to the Magistrate that the arrears were not paid. Under R. 30 (1) of Sch. 4, District Municipalities Act, if the amount due on account of any tax is not paid within fifteen days, the executive authority may recover by distraint the amount due on account of the tax together with the warrant fee and the distraint fee. Clause (2) says:

"If for any reason the distraint, or a sufficient distraint, of the defaulter's property is impracticable, the executive authority may prosecute the defaulter before the Magistrate."

Under Rule 36 (1) :

"Every person who is prosecuted under sub-r. (2) of R. 30 shall be liable, on proof to the satisfaction of the Magistrate that he wilfully omitted to pay the amount due by him or that he wilfully prevented distraint or a sufficient distraint, to pay a fine not exceeding twice the amount which may be due by him on account of the tax and the warrant fee."

Then clause (2) of R. 36 says :

"Whenever any person is convicted of an offence under sub-r. (1), the Magistrate shall, in addition to any fine which may be imposed, recover summarily and pay over to the Municipal Council the amounts, if any, due under the heads specified in cls. (a) and (b) of sub-r. (1)."

In this case the municipality tried to recover the arrears and they failed. They tried to execute a warrant against the moveables of the defaulter and there again they were unable to get anything. Then the defaulter was prosecuted under cl. (2) of R. 30. It was proved to the satisfaction of the Magistrate that he wilfully omitted to pay the amount due by him. Then the Magistrate convicted him of that offence and sentenced him to pay the fine and under cl. (2) of R. 36, the Magistrate issued the warrant that all the moveables found in premises No. 61 should be attached. This he was certainly entitled to do and there would have been no trouble if the warrant had been confined to the moveables of the defaulter, but under R. 35, if the tax due on account of any building remains unpaid at the end of the period specified in sub-r. (1) of R. 30, the executive authority may, if the said tax has remained unpaid for more than twelve months, require the occupier for the time being of such building to pay the amount within a specified time and may distrain and sell any moveable property found in the building. In certain cases, even the moveables which do not belong to the defaulter, if found on the premises, may be liable to attachment. In this case, rightly or wrongly, the Magistrate issued a warrant directing the attachment and seizure of the moveables found inside the house No. 61. All that the Municipal Council is said to have done is to move the Magistrate to take action under R. 36. This the Municipal Council was entitled to do and the further proceedings are all taken by the Magistrate. Therefore, the Municipal Council in moving the Magistrate to take action against the defaulter did no more than what it was justified under the law to do and therefore the suit against the Municipal Council as well was rightly dismissed. Then coming to the case of respondents 2 and 3—the Head Constable and the Village Munsif—it is clear from what has just been said that they were acting under the express orders of the Magistrate in attaching all the moveables found in the house in question. The Village Munsif is not said to have done anything more than what he was directed to do under the warrant, namely, to attest the search warrant. As regards the Head Constable, he obeyed the warrant as he was bound to do and he is not concerned with the question whether the warrant was rightly issued or wrongly issued. Under the Judicial Officers' Protection Act of 1850 :

"No officer of any Court or other person, bound to execute the lawful warrants or orders of any . . . Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

That is, if the warrant authorised it and he executed the warrant, he is protected under this section. The question is put beyond doubt by the decision of the Judicial Committee in a case from Ceylon 61 M. L. J. 330.[1] There certain goods which once belonged to the insolvent were removed to a godown belonging to the appellant. The defendant in the action moved the Court to issue a search warrant because he suspected that it was really the goods of the insolvent which were removed to the appellant's godown. It was however found that they had been lawfully sold to the appellant sometime before the insolvency and that the ownership passed to the appellant and they ceased to be the insolvent's goods. The insolvency Court issued a search warrant and the respondent went with the officer entrusted with the execution of the search warrant and pointed out the goods to be seized. Those goods were seized and ultimately it was found that they were not the goods of the insolvent. The appellant sued the respondent for damages for wrongful attachment and for the loss sustained by him. The Supreme Court of Ceylon dismissed the action holding that there was no malice proved. The Judicial Committee reversed the decision holding that the attachment in that case authorised only the seizure of the insolvent's goods which may be found in the premises belonging

1. ('31) 18 A.I.R. 1931 P.C. 28 : 130 I.C. 310 : 61 M.L.J. 330 (P.C.), Ramanathan Chetty v. Meera Saibo Marikar.

to the appellant and that it did not authorise the
a seizure of any goods found in those premises. They say that if the seizure was not authorised by the order, then the case stands on a different footing altogether. They said this:

"A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorised the seizure, the seizure is lawful and no action will lie in respect of the seizure, unless the person complaining can establish a remedy by some such action as for malicious prosecution. If, however, the writ or warrant did not authorise the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice."

In that particular case the search warrant ran in the following terms:

"These are therefore by virtue of the Insolvent
b Ordinance, 1853, to authorise and require you with necessary and proper assistants to enter in the daytime into the premises aforesaid and there diligently to search for the said property and if any property of the said insolvents shall be there found by you on such search that you seize the same to be disposed of and dealt with according to the provisions of the said Ordinance."

The warrant did not authorise the seizure of all goods found in those premises but directed him diligently to search for the property of the insolvent and said that if any property of the insolvent was found on such a search, then, the officer was to seize the same to be disposed of according to the orders of the Insolvency Court. This decision gives the distinction to be drawn between a case where an act was authorised by the warrant however improperly obtained, and a case where it was not autho-
c rised by the warrant. In this case, the seizure of the goods in question was certainly authorised by the warrant. As stated already, it directed the officer in express terms to seize all the goods found on the premises. The goods in question were found in the premises and their seizure was therefore authorised by the warrant. In such a case, there is no room for any action for damages, unless, as the Judicial Committee says, the case is brought under some other head of tort such as malicious prosecution or otherwise. The suit was therefore rightly dismissed against all the respondents and the appeal is dismissed with costs (one set). No leave.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 313

SOMAYYA J.

d *Kori Kotrabasavva — Appellant*

v.

Araganji Veerabhadrappa and another — Respondents.

Second Appeal No. 412 of 1940, Decided on 8th December 1941, against decree of District Court, Bellary, D/- 24th October 1939.

(a) Hindu law — Maintenance — Widow — Widow's daughter and son-in-law when can be maintained.

Ordinarily it is only the widow that can claim to be maintained from the property left by her husband. The daughter, if indigent, may be maintained, but the daughter's husband and others cannot be maintained. If there is enough income and if it is not a question of borrowing, then it is open to the widow to maintain the son-in-law and other persons as well; but if it is a question of borrowing then the e question would be whether the widow was entitled to incur any expenditure for the maintenance of any one except herself. It is only if the daughter is indigent and if her husband is not able to protect her that the mother would be entitled to borrow even for the purpose of maintaining the daughter. [P 314*d,e*]

(b) Hindu law — Maintenance — Widow — Widow is entitled to live in same state in which she lived during her husband's life-time — But maintenance should be fixed with regard to circumstances of family.

Where a widow or the widow and her daughter are to be maintained out of the property left by the widow's husband, they are entitled to live in the same state in which they were living during the widow's husband's lifetime, but having regard to f the circumstances of the family, the Court can fix a reasonable sum as maintenance. [P 314*f*]

(c) Hindu law—Widow—Necessity—Widow handing over to creditor most of income realized on harvest in shape of grain and day after day taking sums from him for daily consumption — Whether particular amount taken binds reversion.

Where most of the income when realized on harvest is handed over by the widow to the creditor in the shape of grain and day after day she goes on taking from the depositee sums required for the daily consumption or for other daily needs and also making payments, the Courts have to be careful in saying whether the general balance at the end of a long period of such continued dealings is really such as would be binding on the reversion. In such a case merely because a particular amount, say Rs. 15 or g Rs. 20 was taken for the purpose of paying kist, it does not mean in the first instance that it is a borrowing nor would it lead to the conclusion that it is necessary to borrow it. The Court must see whether the amount was drawn from out of the deposits or it is a fresh loan; if it is having regard to the general income of the family whether the widow can be held to be justified in borrowing for the payment of the kist. [P 314*g,h*]

Kasturi Seshagiri Rao — for Appellant.

V. S. Narasimhachar — for Respondents.

JUDGMENT. — This is a reversionary action filed by the daughter of one Basalingappa for a declaration that a mortgage decree and the proceedings in execution of that decree in O. S. No. 299 of 1934 are not binding upon her. The properties in h question admittedly belonged to her father Basalingappa, who died before 1913, leaving a widow who died after the suit and the plaintiff, his daughter. Respondent 1 and respondent 2's grandfather lent monies to the widow and ultimately a mortgage deed for Rs. 3500 was executed on 7th September 1922. On this mortgage, a suit was filed by respondent 1 against the mortgagor, the widow impleading the co-mortgagee's grandson as a defendant. A mortgage decree was passed and the properties were purchased by respondent 1. The present suit is filed for a declaration that the mortgage, the decree in the suit and the sale in execution are not binding on the plaintiff, the next reversioner. The suit was decreed by the trial Court but on appeal the District Judge reversed the decision of the trial Court and held that the mortgage was proved to be binding on the estate of Basalingappa. Exhibit 12, the mortgage in favour

of respondent 1 and the grandfather of respondent 2 was executed on 7th September 1922 for Rs. 3500 partly in discharge of an earlier mortgage, Ex. 8 and also in discharge of the amounts due on further dealings. The prior mortgage, Ex. 8 was of the year 1919 and it was for a sum of Rs. 1500. By the time of Ex. 12, the amount due under it is said to have amounted to Rs. 1966. The amount of Rs. 3500 for which Ex. 12 was executed was made up of Rs. 1966 due under the prior mortgage, Ex. 8, Rs. 809, the amount due on dealings, and Rs. 725 due on a promissory note executed by the plaintiff's husband. Exhibit 8 was in turn executed in respect of prior dealings. Apparently it was in discharge of Exs. 5, 6 and 7 but this is not quite clear and the matter requires investigation.

The learned District Judge relies upon Exs. 1 to 4 which are said to be patti books, the account books themselves not having been produced. Except in a few cases, so far as I have examined the entries with the help of the advocates on either side, no purposes are mentioned as against most of these items. From Ex. 1 it appears that there was a debt due by Basalingappa to the extent of Rs. 200 and that it was reduced to Rs. 100 by the widow. And then Ex. 2 shows that in 1915 the debt due was reduced to Rs. 16. So in 1916 the amount due was only Rs. 16. The Judge says that the reduction could not have been out of the income but that it must have been out of borrowings effected from third parties by the widow. But he does not refer to any evidence and the evidence has to be canvassed to see whether this statement of the Judge is based on any evidence. The estate left by Basalingappa consisted of 40 acres of dry land. The Judge says in para. 17 that the income according to respondent 1 himself would be Rs. 300 to 400 in a good year, Rs. 100 to 200 in a bad year and the net income on lands would be Rs. 100 to 200; that is, if the lands are leased out the income would be Rs. 100 to 200, otherwise, if they are cultivated by the widow with the help of farm servants it will be Rs. 100 to 200 in a bad year and Rs. 300 to 400 in a good year. There is no attempt to find out how much of the 40 acres was leased out and how much was cultivated by the family. That some lands were cultivated by the widow is shown by the fact that several of the amounts borrowed from respondent 1 and his co-mortgagee are said to have been for agricultural purposes, purchase of bulls, payment to field labourers and for cultivation expenses. A finding must be arrived at on the evidence available as to what roughly was the income, which the widow was getting from her lands. In this connexion, when the defendant himself gives the figures at Rs. 300 to 400 or Rs. 100 to 200 the Court may safely take the higher figure because it is not likely that the defendant would be making much of a mistake in giving that sum.

Then another point requiring mention is that the Judge in para. 15 seems to take it that even the son-in-law's maintenance would be a proper charge on the family. He says that the widow had to maintain not merely herself but the daughter and son-in-law as well and that Rs. 300 or even Rs. 600 cannot be said to be unreasonable in their circumstances. This seems to me to be absolutely unsupportable. Ordinarily, it is only the widow that can claim to be maintained from the property left by the husband. The daughter, if indigent, may be maintained but you cannot go further and say that the daughter's husband and others also should be maintained. If there is enough income, and if it is not a question of borrowing, then it is open to the widow to maintain the son-in-law and other persons as well; but if it is a question of borrowing, where it is said that the estate is bound by all these loans, then the question would be whether the widow was entitled to incur any expenditure for the maintenance of any one except hereslf. There is no evidence that the son-in-law was indigent. On the other hand, there are indications that he was having some trade of his own. Unless the Court can say that the maintenance of the daughter is reasonable in the circumstances of this case, having regard to the husband's circumstances, the amount borrowed for her maintenance cannot be claimed to be a charge against the reversion. A daughter goes out of the family on her marriage. Thereafter, for her maintenance she is to look to her husband's family and not to her father's family. It is only if she is indigent and if her husband is not able to protect her that the mother would be entitled to borrow even for the purpose of maintaining the daughter. That question has to be considered and without a finding on this point the view of the learned Judge that all the three ought to be maintained cannot be supported. This will have a very material bearing on the general question considered by the Judge. If only the widow or the widow and the daughter are to be maintained then the question would be what would be a reasonable sum to be spent for their maintenance, having regard to the circumstances of the family. No doubt they must keep body and soul together and they must live, that is, they would be entitled to live in the same state as they were living during Basalingappa's time. But people whose income is only Rs. 200 cannot say that they require Rs. 50 or 30 per month. There are very many people who maintain themselves on much less than that and it is a question what amount can be reasonably said to be required for the purposes of the maintenance.

Another point which appears from the account pattis, Exs. 1 to 4 is that it looks as if these creditors constituted themselves general bankers for the widow. They seem to have been lending from day to day for rice, for dal, for payment of assessment and for every conceivable purpose. There are several cases in the Ceded Districts in which most of the income when realised on harvest is handed over to the creditor in the shape of grain and day after day they go on taking from the depositee sums required for the daily consumption or for other daily needs. In a case of that kind Courts have to be careful in saying whether the general balance at the end of a long period of such continued dealings is really such as would be binding on the reversion. In such a case merely because a particular amount, say Rs. 15 or 20 was taken for the purpose of paying kist, it does not mean in the first instance that it is a borrowing, nor would it lead to the conclusion that it is necessary to borrow it. Their whole income was with the depositee and they go on drawing from out of it. Are they drawing from out of the deposits or are they fresh loans? If they are loans, having regard to the general income of the family, is it a case in which the widow can be held to be justified in borrowing for the payment of the kist? This is not a case of a stranger bona fide advancing monies to the widow. It is a case when right from the very beginning, that is, from the time of the death of the husband the creditors have had continuous dealings with the widow, they lending time after time at short intervals and payments being made by the widow. It is not possible to say from the extracts of the accounts whether the payments generally really represent the income which the widow got from the lands. These questions have to be considered before

we can say that the mortgage for Rs. 3500 is binding on the estate when only seven years before the total indebtedness was only Rs. 16. The decree of the lower appellate Court is set aside and the appeal remanded to the lower appellate Court for fresh disposal in the light of the above observations. The Court fee paid on the memorandum of second appeal to be refunded. The other costs will abide and will be provided for in the revised decree.

C.R.K./G.N. *Appeal remanded.*

Hindu law—
(a) ('40) Mulla, Page 584 S. 546.
('38) Gour, Page 322 Pt. (9).
(b) ('40) Mulla, Page 597 Pts. (v) and (w).
('38) Gour, Page 336 S. 102 and Page 337 Pt. (1).
(c) ('40) Mulla, Page 206, N. 195.
('38) Gour, Page 1109, N. 2588.

A. I. R. (29) 1942 Madras 315

KING AND LAKSHMANA RAO JJ.

K. A. Ramier — Appellant

v.

Minor Indiran Ramaswami Pandia Thalavanar through his mother and guardian Gomathi Nachiar — Respondent.

Appeals Nos. 439 of 1939 and 20 of 1940, Decided on 28th October 1941, against order of Sub-Judge, Tinnevelly, D/- 25th March 1939.

Madras Impartible Estates Act (2 of 1904), S. 4—Applicability of Act—Holder of impartible estate can incorporate into it other immovable property owned by him—Incorporation—Proof of—Villages not part of impartible estate treated as impartible by zamindar and many of his successors—Succession to villages governed for generations on footing of their being impartible—Villages must be deemed to be incorporated into impartible estate.

It is incorrect to say that the Act can apply only to the estates mentioned in the schedule, as they existed at the time of the Permanent Settlement in 1802, and in so far as they are recognized in the sanads then granted. The Act must apply to an estate as it was constituted at any time in or after 1904 which is material in any litigation. If therefore at the time when proceedings are sought to be taken in execution against certain items of property they formed portions of the estate such proceedings must fail. An impartible estate is not something which is permanently fixed and incapable of either diminution or augmentation and in regard to the latter kind of change the holder of an impartible estate can, if he wishes, incorporate into it any other immovable property which he owns. The question whether such incorporation has or has not taken place is one of intention, and such intention can be proved either directly or as a presumption from other facts.

[P 315*g*,*h*]

But the act of incorporation must be the act of the owner himself and not of anyone who is managing his estate for him : ('40) 27 A.I.R. 1940 Mad. 814, *Rel. on.* [P 316*a*]

The fact that there is no specific differentiation of the incomes of the after-acquired property and of the impartible estate is not sufficient to prove incorporation. [P 316*a*]

Where certain villages not forming part of the impartible estate were treated by the zamindar and many of his successors as impartible and not private property, and succession to those villages has proceeded for generations on the understanding that they were impartible, such treatment constitutes the act of incorporation of the villages into the impartible estate. It is not necessary that the property incorporated shall cease to possess any separate identity for any purpose whatever. [P 316*b*,*d*]

T. R. Sangameswara Iyer — for Appellant.

K. R. Rangaswami Ayyangar and C. R. Pattabiraman — for Respondent.

KING J. — The question at issue in these appeals is whether two items of property belonging admittedly to the zamindar of Talaivankottai, can be proceeded against in execution of personal decrees obtained against the zamindar's late father. These items of property are : (1) A bungalow at Courtallam acquired by the then zamindar in 1905 ; (2) the villages of Dharukapuram and Pattakurichi granted in inam to a remote ancestor of the zamindar in 1207. The second appeal is concerned with the former item only. There the District Judge has held that this property is liable to attachment. In the first appeal the Subordinate Judge of Tinnevelly has held that both items are not so liable.

The estate of Talaivankottai is one of those mentioned in the schedule to the Madras Impartible Estates Act (2 of 1904). If therefore these items of property are part of that estate, it would seem to follow that they cannot be taken in execution of a personal decree such alienation being prohibited by S. 4 of the Act. The learned advocate for the appellant in C. M. A. No. 439 has, however, propounded the novel theory that the Act can apply only to the estates mentioned in the schedule, as they existed at the time of the Permanent Settlement in 1802, and in so far as they are recognized in the sanads then granted. There being no proof that the second item with which we are concerned is included in the sanad he contends that the Act cannot apply to it—and a fortiori the Act cannot apply to property acquired after 1802. We are totally unable to accept this argument in the absence of any support for it in the definitions contained in the Act itself. It is, we think, sufficiently obvious that the Act must apply to an estate as it was constituted at any time in or after 1904 which is material in any litigation. If therefore at the time when proceedings were sought to be taken in execution against these two items of property they formed portions of the Talaivankottai estate such proceedings must fail. The law is clear that an impartible estate is not something which is permanently fixed and incapable of either diminution or augmentation, and in regard to the latter kind of change it is now well-settled that the holder of an impartible estate can, if he wishes, incorporate into it any other immovable property which he owns. The question whether such incorporation has or has not taken place is one of intention, and such intention can be proved either directly or as a presumption from other facts. These appeals must therefore be decided on this issue of fact whether the two items of property have been incorporated or not in the Talaivankottai estate.

In regard to the Courtallam bungalow the evidence of incorporation is very meagre. The learned Subordinate Judge relies only upon Ex. 9 which is a report from the Collector of Tinnevelly sent in 1922 to the Court of Wards in which it is stated that as the Estate Manager says that the bungalow was purchased with the estate funds the bungalow may be treated as part of the impartible estate, and upon the fact that there is nothing in the accounts of the

zamindari to show that the income from the bungalow has been kept separately from the zamindari's general income. In regard to Ex. 9, there is no specific proof that the recommendation of the Collector was acted upon by the Court of Wards. Even if it were, it is insufficient to effect incorporation as A.I.R. 1940 Mad. 814[1] lays it down that the act of incorporation must be the act of the owner himself and not of anyone who is managing his estate for him. So far as the accounts are concerned, the evidence that there is no specific differentiation between two heads of income is, in our opinion, far from being sufficient to prove incorporation. This part of the zamindar's case, it may be mentioned, was not seriously pressed by the learned advocate who appeared for the zamindar. It must therefore be held that the Courtallam bungalow has not been shown to be part of the impartible estate and may therefore be proceeded against in execution.

The principal evidence with respect to the inam villages is furnished by the records of two suits one in 1817 and the other in 1859, which show conclusively that at those periods the Courts held that the right of succession to these villages must be governed by the rules of succession relating to impartible estates. This evidence seems to us, though it is, of course not available in support of any strict plea of res judicata, to prove conclusively that at some period long before 1817 the villages must have been incorporated with the zamindari proper. The learned advocate for the appellant in C. M. A. No. 439, while accepting the fact that the successions to the villages have proceeded for generations on the understanding that the villages were impartible argues that they have never lost their identity as a separate item of property, and never became completely merged in the zamindari. In support of this argument he relies upon the facts that the villages were not included in the sanad at the Permanent Settlement, and were enfranchised in 1865 by the Inam Commissioner. We do not think that these facts are sufficient to show that the villages had not been incorporated in the zamindari. In 1802, of course, the main question in which Government and the zamindar were alike interested was the determination of the amount of peishkush to be paid. This was long before the legal doctrine of incorporation had been thought of, and any omission on the part of the then zamindar to claim that these villages on which revenue was already being paid in the form of quit rent, should be included in his sanad as property upon which peishkush was payable cannot, in our opinion, outweigh the significance of the fact that the villages had been treated by that zamindar and many of his predecessors as impartible estate and not private property. It is such treatment which constitutes the act of incorporation. It is not necessary that the property incorporated shall cease to possess any separate identity for any purpose whatever. Here, though the separate identity remained in regard to the relationship between the zamindar and the Government, it had disappeared entirely in regard to the all important questions of succession and alienability and the other incidents of property held as impartible estate.

We are therefore of opinion that in regard to these villages the order of the learned Subordinate Judge is right, and must be confirmed. In regard to the bungalow, as we have already said, his order must be set aside. To that extent the appellant's execution petition will be restored to file and the Subordinate Judge directed to dispose of it according to law. The parties in this civil miscellaneous appeal will give and take proportionate costs throughout. C. M. S. A. No. 20 of 1940 requires no separate discussion. It is dismissed with costs.

C.R.K./G.N. *Order accordingly.*

1. ('40) 27 A.I.R. 1940 Mad. 814 : 196 I. C. 778 : 43 Cr. L. J. 81 : (1941) 2 M. L. J. 353, Kamarajendra Ramaswami Kamayya Nayakker v. Virulakshmi Ammal.

A. I. R. (29) 1942 Madras 316

ABDUR RAHMAN J.

In re Narayana Reddiar — Petitioner.

Civil Revn. Petn. No. 424 of 1940, Decided on 19th September 1941, to revise order of Dist. Munsif, Cuddalore, D/- 9th September 1939.

Civil P. C. (1908), S. 151—Plaint rejected for non-payment of deficit court-fee — Plaintiff filing review application and tendering deficit court-fee along with it — Review application rejected — Plaintiff held entitled to refund of deficit court-fee—Court held could return same under S. 151—Ss. 13, 14 or 15, Court-fees Act held did not apply.

The plaint was rejected by the Court for the plaintiff's failure to pay the deficit court-fee. Subsequently, the plaintiff put in an application for review of the order rejecting the plaint and along with it tendered the deficit court-fee. The review application was rejected and the Court refused to refund the deficit court-fee :

Held that the plaintiff was entitled to return of the court-fee which was tendered with the review application and although Ss. 13, 14 or 15, Court-fees Act, had no application the Court could grant a certificate for refund under its inherent powers under S. 151, Civil P. C.: ('28) 15 A. I. R. 1928 Pat. 29, *Disting.* [P 317*a*,*b*]

T. E. Ramabhadrachariar — for Petitioner.

Government Pleader — for the Government.

ORDER. — This is a revision against an order refusing an application for the grant of a certificate in respect of court-fee paid by the plaintiff to the extent of Rs. 183-14-0 on 11th January 1939 in the following circumstances. A suit for money due on a hypothecation bond was instituted by the plaintiff in the Court of the District Munsif of Cuddalore. The plaint had a stamp of rupee one to start with, but it appears that a stamp of Rs. 70 was paid later on while the suit was pending. The plaint should have had a stamp of the value of Rs. 254-14-0. There was thus a deficit of Rs. 184-14-0. Since the plaintiff did not make up this deficiency, his plaint was rejected on 9th January 1939. Two days later, he applied for a review of this order by I. A. No. 139 of 1939 and along with this application for review he tendered the deficit court-fee of Rs. 183-14-0; but his application was rejected on 25th April 1939. The petitioner therefore asked for a certificate authorising him to receive the refund of court-fee. This was refused on the ground that if the sum of Rs. 71 which was paid by him when the suit was pending could not be refunded to him the sum of Rs. 183-14-0 would not be equally refundable. In coming to that conclusion the District Munsif relied on 6 Pat. 602[1] but the case has obviously no application. In that case the appellant had applied for refund of court-fee that he had affixed on the

1. ('28) 15 A. I. R. 1928 Pat. 29 : 105 I. C. 742 : 6 Pat. 602 : 9 P.L.T. 337, Janak Prasad v. Askaran Prasad.

memorandum of appeal. Had he paid the court-fee after the appeal was dismissed, this decision might have had some application to the facts of the present case. But there the money was paid in before the appeal was disposed of. The plaintiff is not asking for a refund of Rs. 71 which he had paid before the suit was dismissed. The reasoning therefore given by the lower Court for the dismissal of this application is fallacious. A court-fee of Rs. 183-14-0 was put in by the plaintiff with his application with the object of its being utilised if and when the application for review was accepted by the Court. If the application for review was not to be accepted as in this case it was not, the court-fee put in with the petition for review would have had to be refunded. In accordance with the rules, the court-fee stamp in this case was cancelled as soon as it was put in. What the lower Court should have done when it rejected the application for review was therefore to grant a certificate to the petitioner authorising him to receive the amount which he had paid. It is true that Ss. 13, 14 or 15, Court-fees Act, have no application, but it has been held that the court-fee can be refunded under the inherent powers of the Court. It may be that the court-fee in this case was not paid by a mistake of either party or in obedience to a wrong order of the Court, but it is equally clear that it was not meant to be utilised until the petition for review presented on behalf of the petitioner was accepted by the Court. The Munsif was therefore wrong in rejecting the application for the grant of a certificate. He should have granted one under S. 151, Civil P. C. I would therefore accept the revision and direct that a certificate in regard to the court-fee of Rs. 183-14-0 should be issued to the petitioner by the lower Court.

C.R.K./G.N. *Revision accepted.*

C. P. C.—
('40) Chitaley, S. 151, N. 4 Pt. 3 and O. 47 R. 1, N. 29 Pt. 1-c.
('41) Mulla, Page 480 Pt. (f).

A. I. R. (29) 1942 Madras 317

VENKATARAMANA RAO J.

Tiruturaipundi Sri Bana Oushadeeswara Swami Temple represented by Trustees — Appellants

v.

N.R. Samiappa Mudaliar and others— Respondents.

Second Appeal No. 156 of 1939, Decided on 23rd October 1941, against decree of Sub-Judge, Tiruvarur, in A. S. No. 2 of 1938.

(a) Practice — Second appeal — New point— Point not raised in lower Courts nor in memorandum of second appeal allowed to be raised as case was one of trust.

A point which was not raised in the lower Courts nor in the memorandum of grounds of second appeal was sought to be raised at the time of argument to the effect that the respondent who was a trustee had purchased certain property which ought to be surrendered to the trust. It was allowed to be raised having regard to the fact that it was a case of trust. [P 318*d*]

(b) Trusts Act (1882), S. 88—Scope — Property ceasing to be trust property—Person subsequently becoming trustee is not debarred from purchasing it.

Section 88 assumes that the property must be trust property at the date of purchase or that the trustee must have purchased an outstanding claim on it such as an encumbrance. Therefore, a trustee is not debarred from purchasing a property which was once a trust property but had become lost to the trust before he became a trustee and has become the absolute property of another by adverse possession. [P 318*f,g*]

B. Sitarama Rao, K. Swaminatha Iyer and G. R. Jagadisan — for Appellants.

K. Bhashyam Ayyangar, T. R. Srinivasan and R. Sundaralingam — for Respondents.

JUDGMENT. — This is an appeal from the judgment of the learned Subordinate Judge of Tiruvarur dismissing the suit of the plaintiffs in reversal of the decree of the District Munsif of Tiruturaipundi decreeing the suit. The suit is in ejectment. The plaintiff who is the Sri Bana Oushadeeswaraswami Temple seeks to recover possession of 24 cents of land comprised in R. S. Nos. 183/3 and 183/5 in Tiruturaipundi, Tanjore District. The said property and a plot north of it were found by both the lower Courts to belong to the temple before 1899. Defendant 1 who is respondent 1 in the appeal is in possession. He claims title to the suit property under a purchase dated 28th July 1924 from one Rangaswami Mudaliar. Defendant 2 is his nephew in whose name the property was purchased but it is admitted that the said purchase was for the benefit of defendant 1. It is also admitted that the suit plot and the plot north of it were given to the ancestors of one Rajammal on Kesavargam tenure and that Rajammal was in enjoyment of the said property in 1890 but by reason of the non-performance of the services she incurred forfeiture and lost her rights in the said land. It appears from the evidence that the plot north of the suit property was purchased in execution of a decree in O. S. No. 272 of 1890 on the file of the District Munsif of Tiruturaipundi by one Ramalinga Mudaliar the father of defendant 1. The temple appears to have obtained possession of the said plot but so far as the suit plot is concerned, Rajammal was not ousted from it and she continued in possession. At the date of the said purchase, the said Ramalinga Mudaliar was the trustee of the temple. After his death a suit (O. S. No. 11 of 1899) was filed in 1899 against his undivided brother Arunachala Mudaliar to recover possession of the said property. The said litigation appears to have ended in a compromise. Two transactions came into existence then which are evidenced by Exs. B and A. Exhibit B is a lease deed executed by Arunachala in favour of the then trustee Subbaraya Ayyar of the plot in the said O. S. No. 11 of 1899 for a period of 10 years. Arunachala was on that date not a trustee of the temple, the lease deed being dated 28th January 1899. Two days thereafter another lease deed of the said plot Ex. A bearing 30th January 1899 was executed by one Thiagaraja in favour of Subbarayar. The case for the plaintiffs is that Thiagaraja was only a nominee of Arunachala but on account of some misunderstandings between the parties the documents had to be compulsorily registered in May 1899.

It is found by the learned Subordinate Judge that so far as the suit plot was concerned possession was not taken from Rajammal and given to Thiagaraja but Rajammal continued in possession of the said property. There is no evidence that possession was ever after given to Thiagaraja by the trustees of the temple under Ex. A. A few days before the registration of Exs. A and B Rajammal sold the property to

one Doraiswami Mudaliar under Ex. 1. He leased a the property to one Nataraja Pillai and the said lessee was in occupation under the said lease. After the death of Doraiswami Mudaliar, his sons alienated the suit property under Exs. 4 and 5 to one Rangaswami Mudaliar from whom defendant 2 purchased. Arunachala became a trustee in June 1899. Subsequent to his death, defendant 1 became a trustee in 1921 and continued to be so till 1925. On 30th April 1924, the trustees of the temple purported to execute a lease deed of a portion of plot Ex. E to one Kayarohanam Pillai but he does not seem to have taken possession thereunder and there is no evidence that possession was taken by him or that he paid any rent. The finding of the learned Subordinate Judge is that both Exs. A and E are nominal documents. In para. 33 of his judgment, the learned Subordinate Judge finds that Ex. A was a sham transaction and no enjoyment passed to Thiagaraja under it, that b the rent deed Ex. E was obtained for ulterior purposes and was not acted upon and the lessee did not get possession of the property. The learned Judge also finds that the sale deed, Ex. 1 executed by Rajammal in favour of Doraiswami Mudaliar and the subsequent dealings with the sons of Doraiswami Mudaliar were all genuine transactions, that Rajammal and her successors alone have been in possession of the property in spite of Exs. A and E, that adverse possession commenced to run against the temple from the date of forfeiture incurred by Rajammal and whether the date is taken to be 1890 or 1899, the right to the temple was barred by limitation after 12 years from either of those dates.

Mr. Sitarama Rao who appears for the plaintiff temple did not challenge any of the findings of fact nor the view of law taken by the learned Subordinate c Judge regarding limitation and adverse possession consequent on the forfeiture of Rajammal. But he contends that on the date of purchase by defendant 2, defendant 1 was a trustee of the temple and he must be deemed to hold the said property for the benefit of the temple and surrender the property to it. He relies on S. 88, Trusts Act, and the decisions of the Privy Council in 51 Cal. 299[1] and 48 Cal. 1019.[2] I may state at once that the question in this aspect was not raised in either of the Courts below. Mr. Bhashyam Ayyangar on behalf of defendant 1 contends that it would be unfair to his client if that is allowed to be raised now. Mr. Sitarama Rao concedes that it was not raised in the lower Courts and in fact even in the memorandum of grounds of second appeal the question in this form was not raised. The case was fought out in both the lower Courts on the assumption that Arunachala was a lessee of the suit d property, that defendant 1 while holding it as lessee could not acquire title to it in derogation of the trust and that neither Rajammal nor her successors acquired any title by adverse possession. On both these points, the findings of the lower appellate Court were against the temple and on those findings the plaintiffs cannot succeed. This is also conceded by Mr. Sitarama Rao. But however having regard to the fact that this is a case of trust, I allowed the point to be raised to see how far there is a basis for this contention and if so, whether I should remand this case or what relief has to be given to the plaintiffs if the contention is found to be sustainable. Section 88, Trusts Act runs thus : e

" Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained."

On the date of the purchase in 1924, defendant 1 was not in possession of the suit property either as lessee or in any other capacity. When he assumed office of trustee, the temple was not in possession of it and the right of the temple was barred by limitation and no suit by the temple to recover possession could have been successfully maintained. It had f therefore by that time ceased to be trust property and was the absolute property of Rangasami. The question therefore is, is a trustee, and I may state he is one of the five trustees, debarred from purchasing the property which was once a trust property but had become lost to the trust before he became a trustee? Section 88 assumes that the property must be trust property at the date of purchase or that the trustee must have purchased an outstanding claim on it such as an encumbrance. As I have said above, the property ceased to be trust property and there was no outstanding encumbrance, nor could it be said there was an adverse claim either. The claim must be such that it could be resisted by a suit and not one which by prescription resulted in a complete loss of title and ceased to be an outstanding claim. It is not disputed that if a trustee sells trust property to a stranger and subsequently purchases it from him g the purchase would be valid though he could not have done so if the sale in favour of the stranger was not completed. The reason is the moment the property is sold in proper exercise of the powers of a trustee, the trust is at an end and the subsequent purchase by the trustee, cannot be deemed to be a purchase of the trust property: *vide* (1889) 60 L. T. 514.[3] The question therefore is, can this principle be applied to the case of property lost to the trust by adverse possession ? What Mr. Sitarama Rao contends is that the property S. No. 183/3 still stands in the name of the temple in the Settlement Register, that defendant 1 was one of the trustees when Ex. E was executed and that it was therefore the duty of defendant 1 as trustee to protect the interests of the trust and that when he purchased the said property he must be deemed to have entered into dealings of the said property under circumstances which are adverse h to the trust which resulted in a pecuniary advantage to him. If the title to the trust property had become lost by adverse possession long before the date of purchase and the property could not be recovered by a suit, it is not possible to see what steps should be taken by a trustee to preserve it. If he does not purchase it, a stranger might have purchased it and the temple could not recover it from him. If this point had been raised in the lower Court, evidence could have been let in by defendant 1. In regard to the pecuniary advantage all that Mr. Sitarama Rao says is that defendant 1 appeared to have purchased at a price less than its proper value and he must have done so by reason of his position as a trustee. But defendant 1's case is that the purchase was

1. ('24) 11 A.I.R. 1924 P. C. 34 : 81 I. C. 752 : 51 Cal. 299 : 51 I. A. 24 (P. C.), Nagendra Bala Dasi v. Dinanath Mahish.

2. ('22) 9 A.I.R. 1922 P.C. 235: 62 I.C. 76: 48 Cal. 1019 : 48 I. A. 258 (P. C.), Peary Mohan Mukerji v. Monohar Mukerji.

3. (1889) 60 L. T. 514 : 37 W. R. 200 : 53 J. P. 357, Re Postlethwaite ; Postlethwaite v. Rickman.

made in the name of defendant 2 because if the purchaser comes to know that he was purchasing it, he would put a higher price for it. And there is no evidence on record to show that any pecuniary advantage was gained by reason of his position as trustee, because the point was not raised and the evidence of the parties was not directed with reference to it.

The question is whether the case should be remanded for this purpose. The purchase was made in 1924 and the suit was laid in 1935. Defendant 1 ceased to be a trustee within a few months after the sale and thereafter he has been openly dealing with the property as owner paying house tax, collecting rent and this open dealing must have come to the knowledge of the trustees of the temple. If trustees had really thought they had a claim in respect of the said property, it is hardly likely that they would not have taken immediate steps to recover the property. On the other hand, they waited for nearly ten years after defendant 1 ceased to be a trustee to file the present suit and they did not raise the question that defendant 1 by taking advantage of his position as trustee obtained pecuniary advantage in respect of the said property. I therefore think that in the circumstances it is not fair to allow this point to be raised and remand the case for the said purpose. On the findings given by the lower appellate Court, the appeal must fail. But in regard to the actual relief the suit property comprises 24 cents and defendant 1's purchase relates only to 21 cents. Defendant 1 is therefore directed to give possession of the remaining three cents to the temple to be mentioned in the schedule to the decree. Subject to this modification the appeal fails and is dismissed. In the circumstances of the case, I direct each party to bear his own costs throughout. Leave to appeal refused.

C.R.K./K.S. *Decree modified.*

C. P. C.—

(a) ('40) Chitaley, Ss. 100 & 101, N. 55 Pt. 16.
('41) Mulla, Page 374 Pt. (a).

A. I. R. (29) 1942 Madras 319 (1)

LAKSHMANA RAO J.

In re Shroff Bodanna — Petitioner.

Criminal Revn. Case No. 443 and Petn. No. 422 of 1940, Decided on 20th September 1940, to revise order of Stationary Sub-Magistrate, Kurnool, D/- 7th June 1940.

Criminal P. C. (1898), Ss. 550 and 523 — Disposal cannot be postponed indefinitely.

The disposal of property seized by the police under S. 550 cannot be indefinitely postponed. The Magistrate must deal with the application under Section 523. [P 319*c*]

V. Rajagopalachari — for Petitioner.

Public Prosecutor — for the Crown.

FACTS. — The petitioner was carrying on the business of shroff and pawn broker. The police took possession of a number of jewels which were pledged with him by third parties and seized them on suspicion in spite of protest that he was a bona fide pledgee of the articles. The articles were sent to the Stationary Sub-Magistrate, Kurnool. The said articles seized had at the time of their seizure tied to each of them a ticket in which the particulars of the debt were noted. No charge sheet was filed for a period of nine months and the petitioner applied to the Stationary Sub-Magistrate, Kurnool stating that the properties seized were not stolen properties, that in any event he is a bona fide pledgee of the articles seized and that he is entitled to a return of the jewels and offered to produce account books and evidence to that effect. The Stationary Sub-Magistrate did not pass any order and when finally pressed he passed an order dated 9th August 1940 putting off the matter and assigning no reasons. Against this order the petitioner has filed the revision petition.

ORDER. — The disposal of property seized by the police under S. 550, Criminal P. C., cannot be indefinitely postponed and the Stationary Sub-Magistrate of Kurnool is directed to deal with the application of the petitioner under S. 523, Criminal P. C., in accordance with law.

C.R.K./R.K. *Order accordingly.*

Cr. P. C. —

('41) Chitaley, S. 523, N. 6.
('41) Mitra, Page 1693, N. 1364 "Order under this section."

A. I. R. (29) 1942 Madras 319 (2)

KUNHI RAMAN J.

Malabar District Board, Calicut through Collector, Malabar District as Special Officer of the Malabar District Board — Petitioner

v.

United Motor (Coimbatore) Ltd., by Managing Agent, G. Doraiswami Naidu — Respondent.

Civil Revn. Petn. No. 138 of 1940, Decided on 3rd December 1941, to revise decree of Dist. Munsif, Calicut, D/- 3rd August 1939.

Madras Local Boards Act (14 of 1920, as amended by Act 11 of 1930), S. 166 (4) and S. 199 Rules under, R. 7 — Board recovering larger amount than legally leviable under Act—Party paying amount can come to Court and ask for refund—R. 7 is no bar—No question of estoppel arises.

It may be open to the District Board to refuse a license or to refuse to compound a criminal prosecution but it is certainly not open to the District Board to levy a larger sum than that which is permissible under the Local Boards Act for granting a license. If a larger amount than what can be legally levied under the Act is recovered, it is open to the party who has made such a payment to come to a Court of law and ask for redress, by way of refund. Rule 7 is no bar since it refers to fee legitimately collected and not to any fee that was not legally payable but which was collected. Nor does any question of estoppel arise in such a case. [P 320*c*,*d*,*e*]

P. Govinda Menon — for Petitioner.

K. Rajah Ayyar and V. Seshadri — for Respondent.

ORDER. — The defendant Board is the petitioner. The suit was for recovering two-thirds of the license fee paid by the plaintiff-company in respect of a motor bus that was plying within the limits of the petitioner-District Board. The trial Court has decreed the suit and from that decision this civil revision petition is filed. To appreciate the arguments advanced on behalf of the petitioner, it is necessary, to set forth briefly the facts of the case. The plaintiff-company owning a number of motor buses plying in the Coimbatore District and also in the neighbouring District of Malabar used a motor bus

on the roads of the Malabar District in the first quarter of 1937 without obtaining a license for such use from the District Board of Malabar. This was detected and the plaintiff was prosecuted under the Local Board's Act of 1930 then in force. When notice of the prosecution was served on the plaintiff-company, they started negotiations with the object of compounding the prosecution. In the course of the corrospondence that passed between the parties, the District Board of Malabar informed the plaintiff-company that the prosecution would be withdrawn in case the full license fee for the first quarter of 1937 together with Rs. 7-8-0 prescribed as the compounding fee was paid by the plaintiff-company. The plaintiff-company then pointed out to the Malabar District Board that under the provisions of S. 166 (4), Local Boards Act, since the full license fee was paid for the vehicle in question to the District Board of Coimbatore, it would be enough if one-third the license fee was paid to the District Board of Malabar. The section provides for only this amount being levied when a license to ply such a vehicle is granted in an adjacent District. To that letter there was no response from the District Board of Malabar. Thereupon, the plaintiff-company paid up the full license fee of Rs. 195 together with Rs. 7-8-0 being the compounding fee and applied to the District Board for refund of two-third of Rs. 195. The prosecution was compounded by the District Board, but the District Board refused to refund two-thirds of the license fee. Thereafter, the suit referred to above was filed for recovering that amount and it has been decreed as already stated.

The learned counsel for the petitioner argues that the plaintiff-company was estopped from claiming refund of two-thirds the amount of the tax and that in any event, the payment having been made voluntarily, R. 7 of the Rules framed under the Local Boards Act of 1920 would apply according to which an application for refund was not maintainable in the circumstances. I am not satisfied that any question of estoppel arises. There is a definite fee prescribed for compounding a criminal prosecution and that is Rs. 7-8-0. This amount was paid by the plaintiff-company. There is no provision of law under which the District Board can recover anything more than one-third the prescribed license fee in respect of the motor vehicle in the present case. The circumstances in which the payment was made show clearly that it was not a voluntary payment. Both before and after the payment, the plaintiff-company had put forward its contention that it was liable to pay only one-third the license fee and not the full license fee which was claimed by the District Board. It may be open to the District Board to refuse a license. It may also be open to the District Board to refuse to compound a criminal prosecution. But it is certainly not open to the District Board to levy a larger sum than that which is permissible under the Local Boards Act for granting a license. In the present case that was what actually happened. If a larger amount than what can be legally levied under the Act is recovered, it is open to the party who has made such a payment to come to a Court of law and ask for redress. The conduct of the plaintiff-company in plying a bus clandestinely without obtaining a license and without paying the license fee can certainly not be regarded as correct or honourable, but these considerations cannot justify collection of a larger amount as license fee than what is permitted by the statute relating to the subject.

The provisions of R. 7 relied on by the learned counsel for the petitioner cannot also be of any use to the petitioner. The opening words of R. 7 are: "The fee paid for the grant or renewal of a license shall not be refunded. . . . " Reference is certainly made in this clause to the fee legitimately collected and not to any fee that was not legally payable but which was collected. It is not stated that in the present case any license was issued. As a matter of fact the payment was made for the first quarter of 1937 after the expiry of that quarter. In these circumstances, it seems to me that the decision of the lower Court in respect of two-third the license fee is correct and there is no ground for interference. But this is certainly not a case in which the respondent-company should be allowed any costs either here or in the Court below in view of their conduct. Therefore, the order of the lower Court awarding costs to the respondent shall be set aside. This is also not a case in which the plaintiff should be allowed any interest on the amount of the excess payment. The decree shall therefore be only for Rs. 130 without any order for costs either here or in the Court below. The decree of the lower Court shall be amended accordingly.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 320

LAKSHMANA RAO J.

Thottilakath Puthiapurayil alias Kurikkalavita Kunhabdulla — Petitioner

v.

Thottilakath Puthiapurayil alias Kurikkalavita Abubacker (minor) and others — Respondents.

Civil Revn. Petn. No. 524 of 1941, Decided on 9th September 1941, to revise proceedings of Collector, Malabar at Calicut, D/- 15th November 1940.

Madras Mappilla Murumakkattayam Act (17 of 1939), S. 20 (1) and (3)—Petition under S. 20 (1)—Orders can be passed before partition suit under Chap. 3 of Act is finally disposed of.

It is incorrect to say that orders cannot be passed on a petition under S. 20 (1) until the suit for partition under Chap. 3 of the Act has been finally disposed of inasmuch as S. 20 (3) requires proceedings under Chap. 3 to be stayed during the pendency of the petition under S. 20 (1). [P 320*h*]

B. Pocker — for Petitioner.

D. A. Krishna Variar — for Respondents.

ORDER.—The view of the Collector that orders cannot be passed on a petition under S. 20 (1) of the Madras Act 17 of 1939 until the suit for partition under Chap. 3 of the Act has been finally disposed of, is opposed to S. 20, cl. (3) which requires proceedings under Chap. 3 to be stayed during the pendency of the petition under S. 20 (1) and his order cannot for that reason be sustained. It is accordingly set aside and the petition under S. 20 (1) is remanded to him for disposal according to law. Costs up to date will abide and follow the result.

C.R.K./G.N. *Order set aside.*

A. I. R. (29) 1942 Madras 321

VENKATARAMANA RAO J.

Manickam — Appellant

v.

District Board, Trichinopoly — Respondent.

Second Appeal No. 893 of 1938, Decided on 18th August 1941, against decree of Court of Small Causes, Trichinopoly, D/- 21st March 1938.

(a) Madras Local Boards Act (14 of 1920 as amended by Act 11 of 1930), S. 67—Resolution sanctioned by Board without being initiated by President—Resolution is illegal.

A resolution reducing establishment charges fixed in the budget sanctioned by the Local Board without the proposal being initiated by the President is illegal. [P 322 C 1]

(b) Madras Local Boards Act (14 of 1920 as amended by Act 11 of 1930), S. 67 (1) and Proviso—Validity of resolution under S. 67 Proviso does not depend upon validity of resolution under S. 67 (1)—Resolution reducing establishment charges — Question of validity of subsequent resolution reducing salary of officer over five years standing and drawing not less than fifty rupees in pursuance of former resolution does not depend upon former resolution.

Section 67 (1) is general. The validity of a resolution passed under the proviso to S. 67 is not dependent upon the validity or the invalidity of a resolution passed under S. 67 (1). A resolution for reduction in the establishment charges would naturally result in a revision or alteration of the salaries of all or some of the officers concerned, but it does not follow that such a resolution necessarily involves the reduction of the salary of any particular officer. It may be open to the Board to say that only the salaries of particular officers should be reduced but not the salaries of the others. Therefore, the question of validity of a resolution by which the salary of an officer of five years' standing and drawing not less than fifty rupees per mensem is reduced would not necessarily depend upon any general resolution passed by the Local Board for reducing establishment charges by which it resolves to reduce the salaries of its officers in general. [P 322 C 1, 2]

(c) Madras Local Boards Act (14 of 1920 as amended by Act 11 of 1930), S. 67 — Suit for declaration that Board's resolution is illegal — Onus is on plaintiff to give prima facie evidence of illegality or irregularity — Plaintiff alleging special meeting convened under S. 67 Proviso to be illegal as notice of purpose specified in S. 67 Proviso was not given to members—Plaintiff serving defendant Board with notice to produce notice calling for special meeting — No adverse inference can be drawn against Board from non-production of notice—Special meeting held validly convened.

It is incumbent on the plaintiff who has come to Court for a declaration that a particular resolution of the Local Board is illegal, to give prima facie evidence of the specific irregularity or illegality which he complains of. That onus is not discharged by merely filing the resolution. [P 322 C 2]

Where the plaintiff alleges that a special meeting of the Local Board held under S. 67 Proviso was illegal on the ground that no notice was served on the members that it was convened for the purpose mentioned in S. 67 Proviso and serves the defendant Board with a notice to produce the notice calling for the special meeting for the purpose mentioned in S. 67 Proviso, no adverse inference can be drawn against the Board from their non-production of the notice although it is the duty of a public body like the Local Board not to withhold any document in its possession and to place before the Court notices of the meeting and other documents connected with the passing of the resolution, and to show beyond all doubt that what they did was fair and regular and to assist the Court in arriving at a correct decision. [P 322 C 2; P 323 C 1]

At a special meeting, the Local Board unanimously passed a resolution by which the salaries of various officers including the plaintiff who was of more than five years standing and was drawing not less than Rs. 50 per mensem were reduced. The terms of the resolution indicated that there was a note of the President proposing a reduction of the clerical staff by adopting a certain percentage but it was not clear from the resolution that the special meeting was convened for the purpose of reducing the salaries :

Held that in view of the President's note the proposal before the Board must be taken to have emanated from the President as required by S. 67 (2), and the Board must be deemed to have complied with the prescribed procedure in passing the resolution in the absence of evidence by the plaintiff to show that such was not the case. [P 323 C 1]

(d) Madras Local Boards Act (14 of 1920 as amended by Act 11 of 1930), S. 67 Proviso — Resolution reducing officer's salary cannot be made retrospective — But if so made, it is not illegal in toto — Resolution cannot be given effect to from date anterior to date when it was passed.

The Local Board has no jurisdiction to give retrospective effect to a resolution under S. 67 Proviso reducing the salary of its servant or officer. But the fact that the Board seeks to give retrospective effect to it does not render the resolution illegal in toto. Only the Board cannot give effect to the resolution from a date anterior to the date of the passing of the resolution. [P 323 C 1]

(e) Madras Local Boards Act (14 of 1920), S. 199—Rules under, R. 19—Retrospective order reducing servant's salary being illegal does not amount to "statement to contrary" within R. 19.

An order of the Board giving retrospective effect to its resolution reducing an officer's salary being illegal does not amount to a "statement to the contrary" within R. 19 and cannot be availed of for the purpose of seeking the benefit of the exception contained in R. 19, unless the Board expresses in the resolution itself that the order would be given immediate operation, i. e., from the date of service of notice. The Board is not entitled to reduce the servant's salary until the expiry of three months from the date on which he was served with notice. [P 323 C 1, 2]

K. S. Sankara Ayyar — for Appellant.

K. V. Sesha Ayyangar — for Respondent.

JUDGMENT. — This second appeal arises out of a suit by the plaintiff for a declaration that the resolution of the Taluk Board of Musiri dated 15th February 1933 by which the establishment charges fixed by the Budget for 1933-1934 in the sum of Rs. 5130 were reduced to Rs. 3270 and the resolution dated 11th May 1933 reducing the plaintiff's salary from Rs. 70 to Rs. 47 a month are both illegal and that he is entitled to be reinstated in the

office and for the recovery of the difference between a Rs. 70 and Rs. 47 from 1st April 1933 upto 6th June 1934. The basis of the claim of the plaintiff is that both the said resolutions were passed in contravention of S. 67, Local Boards Act. Section 67 runs thus :

"(1) The sanction of the Local Board shall be obtained for all proposals for fixing or altering the number, designations and grades of its officers and servants and the salaries, fees and allowances payable to them.

(2) Such proposals shall be taken into consideration by the Local Board only at the instance of its president and the Local Board may sanction them with or without modifications :

Provided that no proposal adversely affecting any officer or servant of the Local Board who has been in the permanent service of the Local Board for b more than five years and is drawing a salary of not less than fifty rupees per mensem shall be considered, except at a special meeting convened for the purpose and no such proposal shall be given effect to, unless assented to by at least one-half of the members then on the board."

It will be seen from the provisions of this section that before a reduction of the salary of an officer of the board can be attempted, the proposal for such a reduction should be sanctioned by the Local Board and that such a proposal should have been initiated by the president of the board, and if that officer has been in service for more than five years and is drawing a salary of not less than Rs. 50, such a reduction can only be passed at a special meeting convened for the purpose and has to be assented to by at least one-half of the members of the board. The case for the plaintiff is that the resolution dated c 15th February 1933 was sanctioned by the board without the proposal having been initiated by the president. Both the lower Courts find this as a fact and it follows from this that the said resolution is illegal, being in contravention of S. 67 of the Act. So far as the resolution of 11th May 1933, is concerned, the case for the plaintiff is that it is illegal for more reasons than one. Firstly, the resolution was based on the resolution dated 15th February 1933, and as this was an illegal resolution, that resolution also must be declared to be illegal. Further, the meeting at which that resolution was adopted was not convened for the special purpose of reducing the salary of the plaintiff and moreover the resolution was not adopted on a proposal made by the president as required by cl. (2) of S. 67. The learned District Munsif was of opinion that the said special meeting was not convened for the said purpose and d also that the proposal for such a reduction was not initiated by the president. The learned Subordinate Judge has taken a different view and held that the resolution was a valid one and passed in compliance with the provisions of S. 67 of the Act. This finding is now canvassed by Mr. K. S. Sankara Ayyar, the learned counsel for the plaintiff. He contends that the resolution dated 11th May 1933 is illegal because it was dependent on the prior resolution dated 15th February 1933. There can be no doubt that it was in consequence of the resolution dated 15th February 1933 that a reduction of the salaries of various officers was made. But it does not follow from this that the resolution of 11th May 1933 is illegal.

On a fair interpretation of S. 67 of the Act it will be seen that the validity of a resolution passed under the proviso to the section is not dependent upon the validity or the invalidity of a resolution passed under cl. (1) of S. 67. Section 67 (1) is general. It may be that the Local Board may pass a resolution by which it may fix or alter the designation e and grade of its officers and servants or the salaries payable to them, and what in fact was sought to be done by the resolution dated 15th February 1933 was a reduction in the establishment charges which would naturally result in a revision or alteration of the salaries of all or some of the officers concerned, but it does not follow that such a resolution necessarily involves the reduction of the salary of any particular officer. It may be open to the board to say that only the salaries of particular officers should be reduced but not the salaries of the others. Therefore, the question of the validity of a resolution by which the salary of an officer of five years' standing and drawing not less than fifty rupees per mensem is reduced would not necessarily depend upon any general resolution passed by the Local Board by which it resolves to reduce the salaries of its officers in general. What happened in this case f is this. A special meeting was summoned on 11th May 1933 and held at 3 P. M. in the office of the Taluk Board, at which 22 members of the Local Board were present, and a unanimous resolution was passed by which the salaries of several officers including that of the plaintiff were reduced. The question therefore for decision is, is this resolution illegal as being in contravention of S. 67 of the Act.

On a reference to the resolution, it will be seen that it was passed at a special meeting. It is also clear from the terms of the resolution that there was a note of the President proposing a reduction of the clerical staff by adopting a certain percentage. The proposal therefore emanated from the President, but it does not appear from the resolution itself that the special meeting was convened for the purpose of reducing the salaries. What Mr. Sankara Ayyar contends is that two hours earlier there was a meeting of a special sub-committee which was appointed by the resolution dated 15th February 1933 to revise the budget. That committee considered the question of reduction and approved the note of the President, and it was the resolution of that sub-committee that was actually passed at the special meeting. Therefore, he contends that no notice could have been given to the members that a special meeting was being convened for the purpose of reducing the salaries of the plaintiff and other officers who were drawing more than Rs. 50 per month.

It is true that what was done was the approval of the resolution of the sub-committee, but what the sub-committee did approve was the note of the President and in fact the resolution passed on 11th May 1933 at 3 p.m. does refer to the note of the President. The special meeting itself must have been summoned some days earlier. There is absolutely no h evidence on the part of the plaintiff to show that the necessary notice was not given. It is incumbent on the plaintiff who has come to Court for a declaration that a particular resolution of the Local Board is illegal, to give prima facie evidence of the specific irregularity or illegality which he complains of ; but nothing has been done in this case beyond merely filing the resolution. The resolution of 11th May 1933 does not prima facie establish that no such notice was given. Mr. Sankara Ayyar strongly urged that his client gave notice to the Taluk Board to produce notice calling for the meeting of 11th May 1933 and that the Board did not produce it, and asked me to draw an adverse inference from its non-production. If the onus really vested on the Taluk Board to establish the legality of the resolution, I should certainly agree with the contention of Mr. Sankara Ayyar ; but the onus of establishing in

the first instance that the resolution was not in compliance with the statute was on the plaintiff, who has failed to adduce prima facie evidence. It seems to me that apart from any question of the onus of proof the Taluk Board should have produced the notice. It is the duty of a public body like the Taluk Board not to withhold any document in its possession and to place before the Court notices of the meeting and other documents connected with the passing of the resolution, and to show beyond all doubt that what they did was fair and regular and to assist the Court in arriving at a correct decision. But from the fact that the Taluk Board has not chosen to produce the notice I am not prepared to draw an adverse inference against it. It is not suggested that the Taluk Board was actuated by ill-will towards the plaintiff. I find that the Taluk Board took the precaution of summoning a special meeting because the proviso to S. 67 enacts that a special meeting should be convened for considering the question of the reduction of the salaries of the Board's officers who have put in a service of more than five years and whose salary is not less than rupees fifty a month. I am inclined to presume that the object of summoning that meeting was for that purpose. I have already found that the proposal has emanated from the President. The Taluk Board must be deemed to have complied with the prescribed procedure, in passing the resolution and in the absence of any evidence to show that this was not the case, I agree with the learned Subordinate Judge that the resolution passed by the Taluk Board was legal.

Mr. Sankara Ayyar next challenges the validity of the resolution on the ground that it seeks to give effect to the reduction from a date anterior to the date of the passing of the resolution i.e., from 1st April 1933. This contention is perfectly sound. There is no jurisdiction in the Taluk Board to give retrospective effect to the resolution. But the fact that the Board seeks to give retrospective effect to it does not render the resolution illegal in toto.; only the Board cannot give effect to the resolution from 1st April 1933. The next point urged by Mr. Sankara Ayyar is that notice of this reduction was given to his client on 22nd May 1933 and that his client's salary can only be reduced after the expiry of three months from the date of the said notice under R. 19 framed by the Local Government in this behalf. The said rule runs thus :

" Unless it contains an express statement to the contrary, an order for the abolition of an appointment or for the reduction of emoluments of an appointment shall not be brought into operation before the expiry of three months after notice has been given to the officer or servant whose services are to be dispensed with on such abolition or reduction."

The Taluk Board relies upon the words "unless it contains an express statement to the contrary" and contends that the fact that it chose to express in its resolution that the resolution should have effect from 1st April 1933 would amount to a "statement to the contrary" within the meaning of that rule. I am not inclined to agree with this contention. I have already expressed the opinion that the order of the Taluk Board giving retrospective effect to its resolution is illegal; such an illegal order cannot be availed of for the purpose of seeking the benefit of the exception contained in the rule. What the Board should have done is that it should have expressed in the resolution itself that the order would be given immediate operation, i.e., from the date of service of notice. It has not done so and the Board is not therefore entitled to reduce the plaintiff's salary until the expiry of three months from the date on which he was served with notice. The result is that the plaintiff will be entitled to draw his salary at Rs. 70 a month from 1st April 1933 until the expiry of three months from 22nd May 1933. I must therefore set aside the decree of the lower Court and give a decree in favour of the plaintiff for Rs. 27-1-2. In the circumstances of this case, I direct each party to bear his own costs throughout. Leave to appeal is refused.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 323

WADSWORTH AND PATANJALI SASTRI JJ.

Sunkarapalli Ranganayakulu and another — Petitioners

v.

Gona Gopayamma and another — Respondents.

Civil Revn. Petn. No. 1670 of 1939, Decided on 22nd September 1941, to revise order of District Munsif, Parvatipur, D/- 25th January 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 23—Property attached in execution of money decree — Property sold in disregard of attachment — Purchaser cannot be said to be liable to pay decree debt and is not judgment-debtor—He cannot apply under S. 23 even if he be agriculturist.

When property has been attached in execution of a money decree and is sold in disregard of that attachment, having regard to the terms of S. 64, Civil P. C., the transfer is void as against claims enforceable under the attachment, so that the transferee can be ignored by the decree-holder and the attachment can be worked out by proceedings in execution against the transferor as still being the owner of the property for the purpose of the execution of his decree. The attachment creates no charge and there is therefore no property liability to pay the decree in so far as the property which passed to the transferee pending the attachment is concerned. The transferee therefore cannot be said to be liable to pay the decree debt and is not a judgment-debtor and hence he cannot apply under S. 23, Madras Agriculturists Relief Act, even if he be an agriculturist. [P 324 C 1,2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 23—Words 'entitled to benefits of Act' in S. 23—Meaning of.

The words "entitled to the benefits of this Act" in S. 23 mean that the agriculturist must be entitled to the benefits of the Act with reference to the particular debt and not merely generally. [P 324 C 2]

(c) Madras Agriculturists Relief Act (4 of 1938), Ss. 23, 7 and 19—In view of Ss. 7 and 19, S. 23 cannot apply to decree fully satisfied before 22nd March 1938.

In view of the provisions of S. 7 any debts incurred after the commencement of the Act cannot come under the general provisions of the Act though they may be covered by S. 13 of the Act. Nor can any debts which have ceased to be payable when the Act came into force be affected in any way by any provision of the Act. [P 324 C 2]

Consequently, in view of S. 7 and S. 19 which contemplates decrees which are not yet satisfied, S. 23 cannot be construed to apply to a decree which has already been fully satisfied before the Act came into

force and in respect of which no debt subsists on 22nd March 1938: ('41) 28 A.I.R. 1941 Mad. 402 and ('41) 28 A.I.R. 1941 Mad. 74, *Rel. on.* [P 324 C 2]

V. Govindarajachari — for Petitioners.

B. Jagannadha Das — for Respondents.

WADSWORTH J.—This civil revision petition arises out of an application under S. 23 of Act 4 of 1938. The petitioners here are the decree-holder and the court auction purchaser in execution of the decree. The decree in question was passed in a small cause suit and is dated 30th October 1933. The present respondent 2 was the judgment-debtor. In June 1934 the decree-holder in execution attached a mortgage debt due to the judgment-debtor, respondent 2. The attachment was made under O. 21, R. 46, Civil P. C. On 9th October 1935, while the attachment was still pending, the judgment-debtor transferred her mortgage right to her daughter, respondent 1. In November 1937 the mortgage right was sold by the Court in execution of the small cause decree and it was purchased by petitioner 2 here. On 7th January 1938, as would appear from the execution records, full satisfaction of the small cause decree was recorded. On 15th June 1938, after Act 4 of 1938 had come into force, the judgment-debtor and her transferee both joined in an application under S. 23 to set aside the sale of the mortgage right. We will assume without deciding that a sale of a mortgage right, even though carried through under the procedure prescribed in O. 21 for the sale of debts and other moveable properties is, for the purpose of S. 23 of Act 4 of 1938, a sale of immovable properties. It is difficult to see, even assuming so much, how this application was entitled to succeed as it did in the lower Court. In the first place, the original judgment-debtor, respondent 2, has not been proved to have any saleable interest in agricultural lands. Her daughter, respondent 1, was at the relevant time an agriculturist. The actual judgment-debtor, not being shown to be an agriculturist, cannot apply under S. 23.

It is contended that the transferee who is an agriculturist can apply under S. 23 and for this purpose it is urged that she was under what has been described as a property liability to satisfy the decree. The contention is of course based on the case in I. L. R. (1939) Mad. 218[1] and also on a decision of ours in (1940) 2 M.L.J. 887[2] where, following I.L.R. (1939) Mad. 218,[1] we held that a purchaser of the equity of redemption who is bound by a mortgage decree, being a debtor, could also be deemed to be a judgment-debtor, though not actually a party to the suit. It does not seem to us, however, that either of these cases is an authority for the view that, when property has been attached in execution of a money decree and is sold in disregard of that attachment, the purchaser is liable to pay the decree debt. The true way of looking at the matter having regard to the terms of S. 64, Civil P. C., is that the transfer is void as against claims enforceable under the attachment, so that the transferee can be ignored by the decree-holder and the attachment can be worked out by proceedings in execution against the transferor as still being the owner of the property for the purpose of the execution of his decree. The attachment creates no charge and there is, therefore, no property liability to pay the decree in so far as the property which passed to the transferee pending the attachment is concerned. If this reasoning is correct it follows that respondent 1, who is the only agriculturist, is not a judgment-debtor.

There is another difficulty in the way of the applicants. The decree in this case was satisfied on 7th January 1938. Section 7 which is the basic section for most of the provisions of Act 4 declares that "all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of this chapter." It does not appear that any debts incurred after the commencement of the Act will come under the general provisions though they may be covered by S. 13. Nor does it appear that any debts which have ceased to be payable when the Act came into force can be affected in any way by any provision of the Act. Section 19, which is the provision relating to decrees, contemplates decrees which are not yet satisfied. Section 23 permits a sale to be set aside on the application of an agriculturist judgment-debtor, who is "entitled to the benefits of this Act;" and we have held that he must be entitled to the benefits of the Act with reference to the particular debt and not merely generally. It does not appear to have been the intention of the Legislature in framing this section to allow an agriculturist to get a court sale set aside merely in order to force the decree-holder to execute over again a decree which has already been satisfied before the Act came into force and in respect of which no debt subsists on 22nd March 1938. No doubt this view involves the consequence that when a sale held between 1st October 1937 and 22nd March 1938 has resulted in the full satisfaction of the decree against an agriculturist, it would not be susceptible to attack under the Act, whereas, if the sale results in a small amount being still due under the decree, the agriculturist, who owes that amount, would be entitled to have the sale set aside and the whole decree re-opened. But we are not convinced that this apparent anomaly is a sufficient ground for reading into this Act a provision which it does not contain, for extending the benefits of the Act to debts which have been fully discharged before 22nd March 1938. The view set forth here has been taken by two decisions of Single Judges reported in (1941) 1 M. L. J. 106[3] and (1940) 2 M. L. J. 417.[4] It follows therefore that this civil revision petition is entitled to succeed and the order of the lower Court is set aside. Respondents 1 and 2 will pay the costs of the petitioners in both the Courts—one advocate's fee.

C.R.K./G.N. *Petition allowed.*

1. ('39) 26 A. I. R. 1939 Mad. 186 : 182 I. C. 879 : I. L. R. (1939) Mad. 218 : (1938) 2 M. L. J. 1068, Perianna v. Sellappa.
2. ('41) 28 A. I. R. 1941 Mad. 158: (1940) 2 M.L.J. 887, Palani Goundan v. Peria Goundan.
3. ('41) 28 A.I.R. 1941 Mad. 402: (1941) 1 M. L. J. 106, Gopala Menon v. Meenakshi Amma.
4. ('41) 28 A. I. R. 1941 Mad. 74: (1940) 2 M. L. J. 417, Thiravai Nadar v. Pulraj Chelliah Nadar.

C. P. C.—
(a) ('40) Chitaley, S. 64, N. 2 Pts. 1-5; N. 5 Pt. 1 and N. 12 Pt. 1.
('41) Mulla, Page 256 Pt. (e) and Page 261 Pt. (k).

A. I. R. (29) 1942 Madras 324

VENKATARAMANA RAO J.

S. K. T. Soundararajalu — Appellant

v.

Minor Shanmugham and another — Respondents.

Second Appeal No. 642 of 1938, Decided on 6th August 1941, against decree of Sub-Judge, Tiruvarur, in A. S. No. 22 of 1937.

Hindu law — Joint family — Ancestral business — Test — *M* carrying on business in medicine in partnership with *C* dying in 1926 leaving three minor sons — In 1929 eldest son attaining majority and starting business in medicine — Business carried by *M* with *C* not wound up till 1935 — All assets of *M's* business continuing to remain with *C* till 1935 when by compromise eldest son obtaining Rs. 2500 in full satisfaction of his father's share—Business started by eldest son in 1929 held new and not ancestral.

Where a father carrying on business in partnership with a stranger dies without effecting a dissolution and the son continues the business with the same partner, the business which the father carried on during his life-time becomes on his death ancestral in spite of the fact that it was a partnership business. If the joint family acquires the business as an asset by settlement of accounts with the stranger partner the business must be deemed to be ancestral and it can be continued by the managing member in the exercise of his discretion : ('22) 9 A. I. R. 1922 P.C. 237 and ('31) 18 A. I. R. 1931 P.C. 136, *Expl., and Rel. on* ; ('35) 22 A. I. R. 1935 Mad. 314 : *Held not good law.* [P 326 C 1]

But in order that the business should not be considered to be new, it must be a continuation or revival of the old business. Where another business was started by a manager which had absolutely no connexion with the old business, the fact that the business started was of the same nature as the old business cannot be considered to be an ancestral business at all. [P 326 C 1,2]

M during his life carried on business in medicine in partnership with one *V* and after the death of *V* with his son *C*. On the date of the death of *M* in 1926 all his three sons were minors. The eldest son attained majority in 1929 and started a business in medicine. The business which was carried on by *M* in partnership with *C* was not wound up until 1935 and all the assets of the said business continued to remain with *C* upto that date when as a result of a compromise between the eldest son of *M* who had attained majority in 1929 and *C*, the eldest son obtained a sum of Rs. 2500 in full satisfaction of his father's share :

Held that the business started by the eldest son of *M* in 1929 on attaining majority was a new business and not an ancestral one. [P 326 C 2]

R. Sundaralingam and S. Seshadri — for Appellant.

K. S. Desikan — for Respondents.

JUDGMENT.—This second appeal arises out of a suit to recover a sum of money due under a promissory note executed by defendant 1 on his own behalf and as guardian of defendants 2 and 3. The defendants are brothers, defendant 1 being the eldest and are the sons of one Manicka Samayar who died in or about 1926. Manicka Samayar during his life carried on business in medicine in partnership with one Vythilinga Pillai and after the death of Vythilinga Pillai with his son Chandrasekharan Pillai. On the date of the death of Manicka Samayar all his three sons were minors. Defendant 1 attained majority in 1929 and he started a business in medicine and the money borrowed under the promissory note was in respect of this business. Defendants 2 and 3 deny their liability for the said debt on the ground that the business started by defendant 1 was not ancestral business but a new business and therefore they are not liable for the debts incurred in respect thereof. The contention of the plaintiff is that the business was not a new business but a continuation or a revival of the business carried on by Manicka Samayar during his life in partnership with Vythialingam and thereafter with Chandrasekharan and therefore defendants 2 and 3 ought to be held liable. Both the lower Courts came to the conclusion that the business started in 1929 by defendant 1 was a new business and therefore dismissed the suit against defendants 2 and 3.

This appeal is by the plaintiff and on his behalf his learned counsel, Mr. Sundaralingam, contends that the view taken by both the lower Courts is wrong. Before dealing with this contention it may be necessary to state that after the death of the father Manicka Samayar in 1926 the business which was carried on by him in partnership with Chandrasekharan was not wound up until 1935 and all the assets of the said business continued to remain with the said Chandrasekharan upto that date. Defendant 1 after attaining majority instituted O. S. No. 28 of 1932 on the file of the Sub-Court of Tiruvarur against Chandrasekharan for recovery of the share of assets due to his father in the said business and the said litigation was finally compromised in 1935 by which defendant 1 obtained a sum of Rs. 2500 in full satisfaction of his father's share. It is thus clear that no portion of the business assets came into the hands of defendant 1. The contention of Mr. Sundaralingam is that the business carried on by Manicka Samayar with Chandrasekharan must be deemed to be ancestral business, that as on the date of the death of Manicka Samayar all the defendants were minors they could not continue it immediately and no sooner defendant 1 attained majority than he started the same business in medicine and it must therefore be deemed to be a revival or reconstruction of the old business and cannot therefore be considered to be a new business. He relied very strongly on the decision of the Privy Council reported in 53 All. 190[1] and contended that both the lower Courts relied on the decision in 68 M. L. J. 251[2] which according to him must be deemed to have been overruled by the said Privy Council decision. What is an ancestral business and what is a new business were considered by the Privy Council in 49 Cal. 560.[3] In that case one Bhuban Mohan Mandal carried on a business in rice during his lifetime at Kali Bazar and that business devolved on his sons and was continued by the eldest son Nilrathan as the kartha of the family. Sometime after the father's death Nilrathan started a business in rice in another place Orphanging and the question arose whether two minor brothers of his could be held to be liable on a debt incurred in respect thereof. Their Lordships of the Privy Council held that the business was neither ancestral nor an extension of the ancestral business though it was a rice business. Their Lordships point out that in the case of a business carried on by the father upto the date of his death it devolves on the sons as ancestral business just like any other property owned by the father would devolve upon them as ancestral property, but that could not be said of a similar

1. ('31) 18 A.I.R. 1931 P.C. 136 : 132 I.C. 613 : 53 All. 190: 58 I.A. 173 (P.C)., Ramakrishna Morarji v. Ratanchand.
2. ('35) 22 A.I.R. 1935 Mad. 314: 156 I.C. 418: 68 M.L.J. 251, Krishnaswami Iyer v. Ramanathan.
3. ('22) 9 A.I.R. 1922 P. C. 237 : 67 I. C. 124 : 49 Cal. 560 : 49 I. A. 108 (P.C.), Sanyasi Charan Mandal v. Krishna Dhan Banerji.

business started by a managing member of his own initiative which had no connexion at all with the business which they inherited. If the principle of this decision were to be applied to this case, there can be no doubt that the business started by defendant 1 was a new business.

But Mr. Sundarlingam contends that the Privy Council decision in 53 All. 190[1] laid down that where a father carried on business in partnership with a stranger down to the date of his death the said business was ancestral business and therefore the business started in 1929 must be considered to be ancestral business because on the father's death the old business became dissolved and there was a temporary suspension of the business of the family on account of the minority of the defendants. A close examination of the decision in 53 All. 190[1] does not support the contention of Mr. Sundarlingam. The facts of that case were as follows: One Hardeo Das carried on business in partnership with Kalyan Mal under the name and style of Hardeo Das Kalyan Mal. He died in 1917 leaving his adopted son Gulab Chand and two sons born to him subsequent to the adoption, namely, Ratan Chand and Madan Gopal. After the death of Hardeo Das, Gulab Chand carried on business with Kalyan Mal until th October 1919 when Kalyan Mal retired from the business and the partnership was dissolved and the assets and liabilities were divided and apportioned. On the same date, namely, 9th October 1919, Gulab Chand opened new books and began to carry on a similar business under the name and style of Hardeo Das Gulab Chand. It was in respect of this business debts were incurred and the question arose whether the brothers of Gulab Chand were liable for them. The High Court took the view that it was a new business and they could not be made liable. But their Lordships of the Privy Council reversed this decision.

On the facts of that case, their Lordships were of the opinion that the business carried on under the name of the old partnership did not come to an end but on the other hand the business was carried on under a new name without break of continuity or interval, that when Kalyan Mal retired from the business, it had on the dissolution accrued to the joint family and that Gulab Chand as the manager was entitled to carry it on for the benefit of the joint family. This case is an authority for the proposition that where a father carried on business in partnership with a stranger and dies without effecting a dissolution and the son continues the business with the same partner, the business which the father carried on during his life time becomes on his death ancestral in spite of the fact that it was a partnership business. In effect their Lordships came to the conclusion that the father's interest in the business must be considered to be ancestral so that if the joint family acquires the business as an asset by settlement of accounts with the stranger partner the business must be deemed to be ancestral and it can be continued by the managing member in the exercise of his discretion. Mr. Sundarlingam is right in contending that the view taken in 68 M.L.J. 251,[2] namely, that where a father started a business in partnership with a stranger and on his death his elder son continued the partnership with the stranger the business was a new business can be held to be no longer law in view of the decision of the Privy Council. But, in order that the business should not be considered to be new, it must be a continuation or revival of the old business. Where another business was started by a manager which had absolutely no connexion with the old business, the fact that the business started was of the same nature as the old business cannot be considered to be an ancestral business at all. In this case the old business was not wound up till 1935 and the business which was dissolved on the death of the father was not continued or revived by the defendants. It seems to me that the conclusion reached by the lower Courts that the business is a new business is correct. I therefore dismiss the second appeal with costs. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

Hindu Law—

('40) Mulla, Page 257 Pt. (v), Page 259 S. 234 sub-s. (2), Page 261 Pt. (x) and Page 262 Pts. (h) and (i).

('38) Gour, Page 483, N. 1250, Page 486, No. 1257 and Page 488 N. 1260.

A. I. R. (29) 1942 Madras 326

HORWILL J.

In re C. P. Jagannathachar—Petitioner.

Criminal Revn. Case No. 821 of 1941 (Criminal Revn. Petn. No. 772 of 1941), Decided on 1st December 1941, to revise judgment of Chief Presidency Magistrate, Madras, in C. C. No. 2009 of 1941.

(a) Presidency Small Cause Courts Act (1882), S. 97—Filing of false affidavit—S. 97 does not apply.

The filing of a false affidavit is not something purporting to be done under the Act and hence S. 97 is inapplicable to such a case. [P 327 C 1]

(b) Criminal P. C. (1898), S. 195 (1) (b) — Offence under S. 193, Penal Code — Filing of complaint by proper person is essential for taking cognizance— Court ordering return of costs to accused—Proceedings before Registrar —Accused filing false affidavit—Registrar held not Court but ministerial Officer—Complaint by Registrar held incompetent.

The filing of a complaint by a proper person is a condition necessary to the taking cognizance of an offence punishable under S. 193, Penal Code; so that unless there is a proper complaint the Court has no jurisdiction to inquire into the case at all. [P 327 C 2]

The Court ordered the return of half costs to the accused in certain suit. In the proceedings before the Registrar necessary for the return of costs the accused filed a false affidavit whereupon the Registrar filed a complaint against the accused under S. 195 (1) (b).

Held that the proceedings before the Registrar were judicial proceedings and though for certain purposes the Registrar was a Court, e.g., when trying a suit for a sum of Rs. 20 or less, he was not acting as Court in the proceedings before him but as a ministerial officer and hence the complaint filed by him was incompetent. [P 327 C 2]

C. Narasimhachari — for Petitioner.

K. V. Ramaseshan for the Crown Prosecutor — for the Crown.

ORDER.—The petitioner was convicted by the Chief Presidency Magistrate, Egmore, Madras, of an offence punishable under S. 193, Penal Code, in that he gave false evidence in a judicial proceeding. The petitioner was sentenced to imprisonment till the rising of the Court and to pay a fine of Rs. 50. The case against the petitioner which the Chief Presidency

Magistrate found to have been proved was that the Judge ordered the return of half costs to him in a certain suit. In order to carry out that order, the Registrar called upon the petitioner to return the receipt given to him at the time when the court-fee was paid. The petitioner falsely replied that he had lost the receipt In fact, he had pledged the receipt with a Marwadi. The Registrar then told the petitioner that he could return the money to him only if he filed an affidavit that he had lost the receipt ; so that he might assure himself that the money was returned to the proper person. The petitioner thereupon filed a false affidavit in which he repeated his earlier statement that he had lost the receipt. Acting on that false affidavit, the Registrar returned the half costs to the petitioner. Subsequently, the creditor who had advanced money on the pledge of the receipt filed an application before the Chief Judge, Court of Small Causes, praying that the Court might take action against the petitioner, an advocate of this Court, under the Bar Councils Act. The Chief Judge thereupon passed an order saying that the incident required further investigation and said :

" I order that these papers be sent to the Registrar for an inquiry ; so that if there are grounds for starting proceedings against the respondent, the Registrar may take necessary action. The question as to whether any complaint should be presented under S. 10 (2), Bar Councils Act, will be considered by this Court after this matter is disposed of by the Registrar."

The Registrar made inquiries and soon satisfied himself that the statement of the petitioner contained in the affidavit was false. He thereupon filed a complaint in the Court of the Chief Presidency Magistrate. The Chief Presidency Magistrate took cognizance of this offence on that complaint and the petitioner was subsequently convicted and sentenced as above.

In revision, two contentions are put forward by the learned advocate for the petitioner. The first is that this prosecution was not instituted within the period of limitation set out in S. 97, Presidency Small Cause Courts Act. Section 97 runs thus :

" All prosecutions for anything purporting to be done under this Act must be commenced within three months after the offence was committed."

It seems clear that the petitioner was not prosecuted for something purporting to be done under the Act. The filing of a false affidavit is certainly not something purporting to be done under the Act. An illustration of a case to which S. 97 would apply would be where a bailiff distraining property is alleged to have committed trespass, caused injuries to some property, or committed a tort. If he was purporting to act as a bailiff in doing the duty that was cast upon him then S. 97 would apply. There are many acts mentioned from S. 79 onwards in the doing of which a person might do something that would afford a ground for prosecution. If so, the prosecution must be brought within three months. The other technical objection raised is that the complaint was not one by the Court of Small Causes. The false affidavit was, I think, filed in a judicial proceeding. The Court ordered the return of half costs; and it was in proceedings necessary for the return of these half costs that this false affidavit was filed. Section 195 (1) (b), Criminal P. C., says that the "Court shall not take cognizance of an offence. . . punishable under S. 193, Penal Code, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court . . . . ."

Although the Registrar is a "Court" for certain purposes, e.g., when trying a suit for a sum of Rs. 20 or less, the Registrar was not acting as a Court in this case. He was acting as a ministerial officer and a complaint by the Registrar was not therefore a complaint by the Court. It is clear that no injustice resulted to the petitioner from the complaint having been filed by the Registrar instead of by the Court ; because the Registrar appears to have been ordered to make inquiries and take necessary action. However, the filing of a complaint by a proper person is a condition necessary to the taking cognizance of an offence punishable under S. 193, Penal Code ; so that unless there is a proper complaint the Court has no jurisdiction to inquire into the case at all. Although, therefore, the ground taken by the petitioner is a technical one, his contention must prevail and the proceedings, which are illegal, have to be set aside. The petition is therefore allowed, the conviction and sentence set aside, and the complaint ordered to be returned to the Registrar. The setting aside of the conviction and sentence does not of course preclude the Court of Small Causes from filing a proper complaint. The fine, which I understand has been paid, should be refunded.

C.R.K./G.N. *Petition allowed.*

Cr. P. C. —

(b) ('41) Chitaley, S. 195, N. 3 Pt. 4, N. 9a and N. 16 Pt. 4.

('41) Mitra, Page 628, N. 613 "Cognizance." Page 654, N. 622 "What are not Courts." Page 657 N. 623 "Court acting in different capacity."

Penal Code —

('36) Ratanlal, Page 483 Pt. (11).

('36) Gour, Page 670 N. 2022.

A. I. R. (29) 1942 Madras 327

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Thadi Murali Mohan Reddi, minor by guardian Sabbella Rami Reddi — Appellant

v.

Chinta Brahmayya and others — Respondents.

Appeals Nos. 321 etc., of 1937 and 12 etc., of 1939 and Civil Misc. Petns. Nos. 5519 etc., of 1940 and 4029 etc., of 1939, Decided on 20th August 1941, against decree of Sub-Judge, Coconada, in O. S. No. 24 of 1936 etc.

(a) Limitation Act (1908), S. 19 — Composition deed signed by insolvent filed in insolvency Court held amounted to acknowledgment.

A deed of composition filed in the insolvency Court signed by the insolvent and his creditors held amounted to acknowledgment of debts specified in the deed. [P 328 C 2 ; P 329 C 1]

(b) Provincial Insolvency Act (1920), S. 28 (2) —Joint Hindu family—Father—Insolvency of—Son's share does not vest in Official Receiver but father's power to dispose of son's interest does — That power ceases after severance of interest between father and son — Hence son's share is not "property of insolvent" within S. 28 (2)— Words "suit or any other legal proceedings" in S. 28 (2)—Meaning of—Severance of interest between father and son after father's adjudication—Suit against son—Leave of insolvency Court is not necessary.

On the insolvency of a Hindu father, the share of the undivided son does not vest in the Official Receiver and it will not be the property of the insolvent within the meaning of S. 28 (2). Though the share of the son does not vest, the power of the father to sell the son's interest vests in the Official Receiver. But that power ceases the moment the severance of interest between the father and the son takes place and therefore the son's interest after the severance cannot be said to be the "property of the insolvent" within S. 28 (2). Moreover, the words "commence any suit or other legal proceedings" in S. 28 (2) must be construed as referring to a suit or other proceeding against an insolvent. A creditor is not prohibited from filing a suit as against a person who is jointly indebted with the insolvent and whose property could not have vested in the Official Receiver. Hence where after the adjudication of the father there is a severance of status between the father and the son, leave of the insolvency Court under S. 28 (2) is not necessary for a suit against the son.

[P 329 C 1]

(c) Hindu law—Joint family—Decree against father alone creates debt of contract — Suit against son on decree after father's death is maintainable—This dictum how far applies in cases of division between father and son and also where insolvency supervenes *(Quære).*

The dictum that in the case of undivided father and son, a decree obtained against the father alone during his lifetime creates a debt of contract or record and therefore a suit is maintainable thereon against the son after the father's death how far applies to cases where there was a division between the father and the son and also where insolvency supervenes. [P 329 C 2]

(d) Hindu law—Joint family — Father—Debt contracted by father for family necessity or benefit — Partition between father and sons — Sons continue liable to pay debt out of property in their hands.

Where a debt is incurred by the father for family benefit or family necessity and there is a subsequent partition between the father and the sons, the sons continue to be liable to pay the father's debt from and out of the property in their hands : ('31) 18 A.I.R. 1931 All. 512 (F.B.), *Rel. on.* [P 329 C 2]

(e) Hindu law—Joint family—Father — Debt contracted by father for joint family business—Insolvency proceedings against father — Before adjudication, son filing partition suit against father — Creditor advancing debt for family business proving debt before Official Receiver and as no dividend was paid filing suit against son without impleading Official Receiver—Suit against son held competent—Official Receiver's failure to secure son's share for father's creditors in partition suit held did not prevent creditor from realising amount due to him from son's share.

The father and son were members of Hindu joint family. The debt was contracted by the father as managing member of the family in the course of the family business. The father was adjudicated insolvent on 13th November 1931 on a petition filed by his creditors. Before the order of adjudication the son filed a partition suit against the father impleading the Official Receiver and on 16th November 1931 a preliminary decree for partition was passed. The creditor who had advanced the money for the joint family business proved his debt before the Official Receiver and as no dividend was paid to him he filed a suit against the son without impleading the Official Receiver :

Held that the suit against the son was competent especially because necessary steps to enforce the relief against the father had been taken in proceedings in insolvency. [P 330 C 1]

Held further that it was undoubtedly open to the Official Receiver to have secured the son's share for the payment of the debts due to the father's creditors in the suit for partition by asking for a provision being made by setting apart sufficient property for their discharge. But the fact that the Official Receiver failed to do so would not deprive the creditor of his right to realise the amount due to him from the son's share. [P 329 C 2]

(f) Hindu law—Joint family—Manager incurring debt for family necessity and adjudicated insolvent after partition — Suit against divided member whether maintainable without impleading manager or Official Receiver *(Quære).*

Where the manager of a joint Hindu family contracts debts for family necessity and after partition is adjudicated insolvent, whether a suit against the divided members of the family is maintainable without impleading the manager or the Official Receiver. [P 330 C 1]

Ch. Raghava Rao—for Appellant.

C. Rama Rao, A. Satyanarayana, M. S. Ramachandra Rao and K. Mangachari —

for Respondents.

VENKATARAMANA RAO J. — This appeal arises out of a suit brought to recover the amount due under two promissory notes dated 12th November 1930 and 5th December 1930 executed by one Bulli Gangireddi the deceased father of the defendant in favour of the plaintiff. At the date of the execution of the suit promissory notes the defendant and his father were members of a joint family and undivided. The father was carrying on a family business and the suit debts were incurred in the course of that business. The father was adjudicated insolvent on 13th November 1931 on a petition filed by his creditors. Before the order of adjudication, the defendant represented by his next friend filed a suit for partition against his father and on 16th November 1931 a preliminary decree for partition was passed and it has since been brought to our notice that a final decree was passed on 6th April 1935. The plaintiff proved his debt before the Official Receiver but no dividend was paid to him on the date of the suit or even upto the date of the decree in the lower Court. The learned Subordinate Judge gave a decree in favour of the plaintiff and this appeal has been preferred by the defendant. Several defences were raised by the defendant in the lower Court but Mr. Raghava Rao his learned counsel has confined himself to two main defences, (1) the suit is barred by limitation; and (2) the suit is incompetent by reason of (a) the leave of the insolvency Court was not obtained before the institution of the suit under S. 28 (2), Provincial Insolvency Act, and (b) the Official Receiver not having been made a party to the suit, the suit against the defendant alone on a debt contracted by the father is not maintainable. In regard to the first contention the lower Court relied upon a deed of composition (Ex. D) dated 22nd March 1933 filed in the insolvency Court as an acknowledgment of the debt by the father. The main contention of Mr. Raghava Rao is that the composition deed would not operate as an acknowledgment. He has taken us through the terms of the composition deed but was not able

to convince us that the view of the lower Court was wrong. Exhibit D is signed by the insolvent and the creditors including the plaintiff. This contention must therefore be overruled. The next contention relates to the maintainability of the suit. The first branch of his contention is in regard to the necessity of the leave of the insolvency Court as a condition precedent to the institution of the suit. Section 28 (2), Provincial Insolvency Act, runs thus :

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

In view of the recent decisions of the Privy Council and of this Court, on the insolvency of the father the share of the son will not vest in the Official Receiver and it will not be the property of the insolvent within the meaning of the said clause. Though the share of the son does not vest, the decisions have laid down that the power of the father to sell the son's interest will vest in the Official Receiver. But that power ceases the moment the severance of interest between the father and the son takes place and in this case the severance has taken place. Mr. Raghava Rao was not therefore able to sustain the argument with reference to S. 28 (2) of the Act based on the expression "the property of the insolvent." He next contended that S. 28 (2) prohibits the commencement of any suit or legal proceeding in respect of a debt and therefore even a suit against the son without the leave of the Court is prohibited by that section. The words "commence any suit or other legal proceedings" must be construed as referring to a suit or other proceeding against an insolvent having regard to the context. No doubt, the words are general but if the wide interpretation as contended by Mr. Raghava Rao is given, it would mean that a creditor is prohibited from filing a suit even as against a person who is jointly indebted with the insolvent and whose property could not have vested in the Official Receiver. We do not think, it was the intention of the Legislature to prohibit all suits in respect of the debt even as against persons over whom or whose assets the insolvency Court would have no control. We are therefore of the opinion that this contention also is not tenable.

The next contention of Mr. Raghava Rao is that the Official Receiver must be a party to the suit as the legal representative of the father on the ground that it being a debt contracted by the father, no relief could be given against the son unless the person who entered into the contract or his legal representative is a party to the suit. In support of his contention he relied upon the following passage in Mulla : "Where a debt has been contracted by the father for his personal benefit he is primarily to discharge it. Such being the case the son alone cannot be sued during the father's lifetime." It will be seen that this proposition was based by Mulla on an observation by Bhashyam Ayyangar J., in 27 Mad. 243[1] at p. 247. In that case the learned Judge was dealing with a case where the father and son were undivided and the exact point for decision was whether a suit could be filed against the son after the father's death on a decree obtained by a creditor against the father alone during his lifetime. It was held that the decree creates a debt which is a debt of contract or record and a suit was maintainable. No doubt this dictum was approved in later cases : *vide* 40 Mad. 581[2] at p. 585 and 47 Mad. 621[3] at p. 626. From the observations of the learned Judges in those cases it will be seen that they were confining the dictum to cases where the son and the father were undivided. But how far this is applicable to cases where there was division between the father and son and also where insolvency supervenes is not free from difficulty. We think it unnecessary to discuss the scope of this principle as the facts in this case are different. The debt here was contracted by the father as the managing member of the joint family in the course of the joint family business. The debt was therefore a joint family debt and as much a debt of the son as that of the father. The father is dead and further the father and son became divided before the suit was instituted. In 53 All. 868[4] at p. 872 Sulaiman C. J., explained the nature and extent of the liability of a junior member of a family for a debt contracted by the manager for family necessity or for family benefit thus :

"As regards debts which had been incurred by the father before the partition took place and had been for family necessity or benefit, the liability continues on all the members even after the separation. The reason is obvious. These debts had been incurred by the manager for the benefit of all and his capacity was analogous to that of an agent. All the other members were therefore principal debtors, but their liability was not personal and was confined to the joint property that might be available."

Therefore when division takes place the sons continue to be liable to pay the said debt from and out of the property in their hands. In this case, the creditor has proved his debt against the father in insolvency. No doubt it was open to the Official Receiver to have secured the son's share for the payment of the debts due to the father's creditors in the suit for partition by asking for a provision being made by setting apart sufficient property for their discharge. In this case though the Official Receiver was made a party to the suit, he has not availed himself of that remedy which was open to him and which he was bound to have sought as one administering the property in insolvency for the benefit of the creditors. But the fact that the Official Receiver failed to do so would not deprive the creditor of his right to realise the amount due to him from the son's share. Whether the creditor would be entitled to appropriate the whole of the sale proceeds of the son's share and what remedy will be open to the other creditors or even to the Official Receiver in regard to the said sale proceeds are matters on which we refrain from expressing any opinion. The only question is whether in the circumstances of this case the creditor is not entitled to maintain the suit against the defendant. As the defendant is liable to pay the debt which was contracted on his behalf by the father who was also the manager from and out

1. ('04) 27 Mad. 243 : 14 M.L.J. 84 (F. B.), Periaswami Mudaliar v. Seetharame Chettiar.

2. ('17) 4 A.I.R. 1917 Mad. 989 : 35 I. C. 918 : 40 Mad. 581 : 31 M.L.J. 386, Narayan v. Veerappa.

3. ('24) 11 A. I. R. 1924 Mad. 682 : 80 I. C. 228 : 47 Mad. 621 : 46 M.L.J. 590, Jagannatha Rao v. Viswesam.

4. ('31) 18 A.I.R. 1931 All. 512 : 135 I.C. 139 : 53 All. 868 : 1931 A.L.J. 917 (F. B.), Bankey Lal v. Durgaprasad.

of the share of the joint family property in his possession, a suit against him by the creditor would be competent especially where necessary steps to enforce the relief against the father have been taken in proceedings in insolvency. We think it unnecessary to express any opinion on the question whether, if the family is undivided, it would be open to a creditor to maintain the suit against the other members without impleading the manager or the Official Receiver. Mr. Raghava Rao next submitted that if we were not inclined to agree with him in his contention he would suggest the addition of the Official Receiver as a party to the suit relying on certain observations of the Privy Council in 49 Cal. 560[5] at p. 571 in order that his client may not be harassed by a multiplicity of proceedings from various creditors and Mr. Rama Rao had no objection to add him as a party. But it seems to us that there is no use at this stage in adding him as a party apart from the question whether that course would be feasible or not. We find that the property has been sold and the sale proceeds have been rateably distributed among all the creditors among whom the said sale proceeds would have been distributed by the Official Receiver if he himself had realised them. There is therefore nothing which the Official Receiver can do at present. We are therefore of the opinion that the suit as laid was competent. The appeal fails and is dismissed with costs. Advocate's fee Rs. 150.

Appeals Nos. 322 and 323 of 1937 and 12 to 18 of 1939 are dismissed following our decision in Appeal No. 321 of 1937. So far as the costs are concerned, the respondents will get the printing charges in each of these appeals. So far as the advocate's fees are concerned we give Mr. A. Satyanarayana Rs. 100 in Appeal No. 12 of 1939 and Mr. Mangachary Rs. 100 in Appeal No. 14 of 1939. Mr. Ch. Raghava Rao has put in applications in all the appeals to scale down the debt (C. M. Ps. Nos. 4029 to 4035 of 1939 and 5519 to 5521 of 1940) and they will be forwarded to the lower Court and the decree in the said appeals will be subject to the reliefs the applicants will get in these petitions. The respondents will have leave to file their counter affidavits in these petitions. The appellants will pay the court fee to the Government on the memorandum of appeals.

C.R.K./G.N. *Appeals dismissed.*

5. ('22) 9 A.I.R. 1922 P. C. 237 : 67 I. C. 124 : 49 Cal. 560 : 49 I. A. 108 (P. C.), Sanyasicharan Mandal v. Krishnadhan Banerji.

Limitation Act —
(a) ('41) Chitaley, S. 19, N. 47 Pt. 1.
Hindu Law —
(b) ('40) Mulla, Page 307 Pt. (w); Page 309 Pt. (c) and Page 312 Pt. (l).
('38) Gour, Page 546 Pt. 10.
(d) ('40) Mulla, Page 268 Pt. (z) and Page 337 Pt. (b).
('38) Gour, Page 552 Pt. 1.
(e) ('40) Mulla, Page 309 S. 265 (4) (d).
('38) Gour, Page 546, N. 1381.

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* A. I. R. (29) 1942 Madras 330

VENKATARAMANA RAO AND SOMAYYA JJ.

Swarupchand Rayanji and others

v.

Majeti Janakiramayya and others.

Appeals Nos. 427 and 428 of 1938, Decided on 18th April 1941, against decrees of Sub-Judge, Bezwada, D/- 18th July 1938.

(a) Civil P. C. (1908), O. 21, R. 58—Whether judgment-debtor is bound by order on claim petition is question of fact—Decree-holder and judgment-debtor both made parties to claim petition—No notice served on judgment-debtor when order passed — Judgment-debtor is not bound by order.

Whether a judgment-debtor is a party to an order on a claim petition so that he could be rendered bound thereby is a question of fact in each case. [P 331 C 2]

Where the decree-holder and the judgment-debtor both were made parties to the claim petition, but the judgment-debtor was not served at the time when the order on the petition was made, the judgment-debtor cannot be considered to be a party to the order on the claim petition. Consequently the claimant is not precluded from raising the questions, raised in the claim petition, subsequently as against the judgment-debtor: 13 Mad. 366 ; 13 M.L.J. 367 and ('15) 2 A.I.R. 1915 Mad. 463, *Rel. on.* [P 332 C 1]

(b) Hindu law — Joint family—Father—Adjudication of — Father's share alone vests in Official Receiver — Father's power to alienate son's share for his debts vests in Official Receiver and is subject to same qualifications as in father's hands—Son's share attached by his creditor in execution of decree—Share not sold — Father's power to alienate share is not destroyed—Hence Official Receiver can sell son's share—Sale binds son though it does not prevail against attaching creditor by reason of S. 64, Civil P. C.: ('31) 18 A.I.R. 1931 Mad. 118=130 I.C. 479 ; 42 M.L.W. 295=('35) 22 A.I.R. 1935 Mad. 427=156 I.C. 205 and 71 M.L.J. 294=('36) 23 A. I. R. 1936 Mad. 698=164 I. C. 853, *OVERRULED.

Where a father in a joint Hindu family is adjudicated an insolvent, his share alone in the joint family property vests in the Official Receiver and not the share of the sons. But the power of the father to alienate his son's share for his debts which are neither illegal nor immoral would however vest in the Official Receiver but the power is subject to the same qualifications as it is in the father's hands: ('28) 15 A.I.R. 1928 Mad. 479 and ('25) 12 A. I. R. 1925 P.C. 18, *Rel. on.* [P 332 C 1]

The father's power to sell would continue to subsist until division. The father's insolvency does not per se affect the undivided status and till the status is severed, the power would vest in the Official Assignee: ('36) 23 A I.R. 1936 P.C. 277, *Rel. on.* [P 332 C 1]

Section 64, Civil P. C., does not put an end to the power of sale but only provides that a transfer of the attached property shall not prejudice the rights of the attaching creditor. An attachment of the son's share before the adjudication of the undivided father as insolvent does not deprive the father of the power to alienate his sons interest in satisfaction of his own debt. The father's power is deprived to the extent that it would not prevail against the claim under the attachment. Where therefore before the father is adjudicated insolvent the undivided son's share in the property is attached in execution of a decree by a creditor of the son and the said decree-holder does not bring the property to sale, the Official Receiver in whom the father's power to sell the son's share vests can sell the property and the son at any rate will be bound by the sale effected by the Official Receiver. The disability of the Official Receiver to effect a sale is limited to a case where the question is between the Official Receiver and the attaching decree-holder or a person claiming under the attach-

ment and does not extend to a case where the question is between the Official Receiver and the undivided son of the insolvent : ('39) 26 A.I.R. 1939 Mad. 702, *Rel. on* ; 33 Bom. 264 ; ('34) 21 A. I. R. 1934 Mad. 217 ; ('36) 23 A. I. R. 1936 Mad. 193 ; ('28) 15 A.I.R. 1928 Mad. 479 and ('39) 26 A. I. R. 1939 Mad. 572, *Not approved* ; ('31) 18 A.I.R. 1931 Mad. 118=130 I. C. 479; 42 M.L.W. 295=('35) 22 A.I.R. 1935 Mad. 427=156 I. C. 205 and 71 M.L.J. 294=('36) 23 A.I.R. 1936 Mad. 698=164 I. C. 853, *OVERRULED.* [P 332 C 2; P 333 C 1, 2; P 334 C 1]

(c) Civil P. C. (1908), S. 64—Scope.

All that S. 64 provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read S. 64 as putting an end to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. The only effect of S. 64 is that such transfer shall not prejudice the rights of the attaching creditor: ('39) 26 A.I.R. 1939 Mad. 702, *Rel. on.* [P 332 C 2]

P. Satyanarayana Rao and S. Srinivasachari — for Appellants.

M. S. Ramachandra Rao, King & Patridge and M. Appa Rao — for Respondents.

VENKATARAMANA RAO J. — These two appeals arise out of a suit for partition filed by the plaintiff against his father defendant 1 and his uncle defendant 2, whose estates were on the date of the suit vested in the Official Receiver, Kistna, who was impleaded as defendant 21. The plaintiff claimed a fourth share in all the properties comprised in the plaint and incidentally prayed for a declaration that certain alienations effected by the Official Receiver, Kistna, were not binding on his share. Defendants 3 to 20 are the various alienees but these appeals are confined to the alienations in favour of defendants 4, 11, 12 and 13. Appeal No. 427 of 1938 is by defendants 12 and 13 while Appeal No. 428 of 1938 is by defendants 4 and 11. The properties which are the subject-matter of Appeal No. 427 of 1938 are items 4 and 5 of B schedule and items 2 and 3 of C schedule and the properties which are the subject-matter of Appeal No. 428 of 1938 are items 8 of A schedule and 10 of B schedule and item 1 of C schedule. The various dates of sale to the said defendants are as follows :

Defendant 12.	... 19th September 1932.	(Ex. 7).
Defendant 13.	... 29th November 1932	23.
Defendant 11.	... 9th October 1932.	2.
Defendant 4.	... 7th December 1932.	(Ex. 1).

Defendant 2 was adjudicated insolvent on 12th September 1931 and defendant 1 on 11th January 1932. Defendant 1 and the father of defendant 2 are the sons of one Janamsetty and they were on the date of the insolvency of defendant 2 admittedly members of an undivided Hindu family and upto the date of suit no division took place between defendant 1 and his son the plaintiff and defendant 2 or between defendant 1 and the plaintiff. It is not disputed that the plaintiff is entitled to a fourth share but his claim is resisted on the ground that the said properties constitute the self-acquired property of defendants 1 and 2, and the plaintiff has no title thereto and assuming they are joint family properties, they were validly sold by the Official Receiver in pursuance of the power to sell the share of the plaintiff for the debts of defendant 1. The plaintiff's case is that so far as the question of self-acquisition is concerned, it was concluded in his favour by reason of the orders on two claim petitions filed by the Official Receiver in the course of the execution of the decree in O. S. No. 28 of 1931 which was obtained by defendant 16 against the plaintiff and defendants 1 and 2 and that in any event the properties which were sold were the subject-matter of attachment in the said suit long before defendant 1 was adjudicated insolvent and the power of defendant 1 to sell the plaintiff's share in the joint family property did not vest in the Official Receiver. It is admitted that the properties were attached before judgment on 18th March 1931 and they were again attached after the decree on 29th February 1932. Subsequent to the decree in April 1932, the Official Receiver put in a claim petition stating that all the properties that were attached were the self-acquired properties of defendants 1 and 2 and the plaintiff had no share therein (Ex. C). That petition was dismissed on 26th April 1932 on the ground of unnecessary delay.

There was an appeal preferred to the High Court and it was dismissed on 18th September 1932 on the ground that the appeal was incompetent and the remedy of the Official Receiver was to file a suit under O. 21, R. 63 : *vide* 58 Mad. 403.[1] It is unnecessary to deal with the correctness of this decision as both the Official Receiver and defendant 16 would be governed by it. While the appeal was pending in the High Court, the Official Receiver preferred another claim petition on 4th August 1932 which was also dismissed on the ground of delay. Admittedly, no suit was filed within one year from the date of either of the orders on the claim petitions. The learned Judge in the Court below has taken the view that it would not be open to the defendants to contend that the plaintiff has no right in the suit properties. By reason of this view, he did not go into the question of fact as to whether the properties were self-acquired or not. On the footing that the property was the joint family property, the learned Judge negatived the defence of the defendants on the ground that inasmuch as the sale by the Official Receiver in favour of the various defendants was subsequent to the attachment he was not competent to sell the plaintiffs share in the suit property.

In these appeals Mr. Satyanarayana Rao on behalf of the appellants canvasses the soundness of the view taken by the lower Court on both the points. His contention is that the orders on the claim petitions cannot bar the Official Receiver and therefore the alienees who claim under him. His next contention is that though it is true that the pendency of an attachment of the joint family property would prevent the Official Receiver from selling the son's share, it would not prevent the vesting of the right of defendant 1 to sell the plaintiff's share on the ground that the attachment only prohibits alienation so as not to defeat claims under that attachment. Taking the first contention it seems to me that it is well founded. Whether a judgment-debtor is a party to an order on a claim petition so that he could be rendered bound thereby is a question of fact in each case. In this case, no doubt from the cause title in the claim petition it would appear that the Official Receiver made not only the decree-holder a party but also the plaintiff and defendants 1 and 2 party respondents 2 to 4. But from the order on the claim petitions it would appear that no notice was

1. ('35) 22 A.I.R. 1935 Mad. 151 : 154 I. C. 934 : 58 Mad. 403 : 68 M. L. J. 78, Official Receiver, Kistna v. Imperial Bank of India, Bezwada.

served on respondents 2 to 4, and the decree-holder alone was served and that the dismissal was on the ground of delay. Though the plaintiff was intended to be made a party to the petition, no notice having been served on him at the time when the order was made, he could not be considered to be a party to the order on the claim petition. This was the view taken in 13 Mad. 366[2] where the learned Judges remarked as follows :

"A judgment-debtor may be the party against whom an order upon a claim in execution proceeding is made so as to be bound by the special rule of limitation prescribed for suits by such a party. Whether he is such a party or not must depend upon the facts of each case. It is obvious that in some cases he could not be the party against whom an order on a claim is made, for the order may be made without notice to him."

This view in 13 Mad. 366[2] has been followed in 13 M. L. J. 367,[3] (*cf.*, 1 M.L.W. 772.[4]) The orders on the claim petitions do not therefore preclude the Official Receiver from raising the question of self-acquisition against the plaintiff. The second contention raises a question of some difficulty. It is no doubt settled law that where a father in a joint Hindu family is adjudicated an insolvent, his share alone in the joint family property vests in the Official Receiver but not the share of the sons. It is also well settled that the power of a father to alienate his son's share for his debts which are neither illegal nor immoral would however vest in the Official Receiver, but the power is subject to the same qualifications as it is in the father's hands : 51 Mad. 342[5] at p. 343 citing 6 Lah. 1.[6] The power of a father to dispose of his son's share only subsits so long as the family continues joint but the power ceases when the family becomes divided. In 17 Lah. 644[7] at page 656, Lord Thankerton remarked as follows :

"The father's power of sale for his debts exists only so long as the joint family property is undivided and the capacity of the Official Assignee must be similarly limited."

It therefore follows that the father's power to sell would continue to subsist until division. The father's insolvency does not per se affect the undivided status and till the status is severed, the power would vest in the Official Asignee. Therefore, while that status lasts, if an attachment of the son's share takes place, the question is, what is the effect of that attachment on the vesting of the said power in the Official Assignee. Before adjudication the attachment may be of the entire joint family property in execution of the decree against the father alone, 66 M. L. J. 412,[8] or in execution of a decree against the father and sons, 59 Mad. 296[9] and 71 M. L. J. 294,[10] or of the son's share in execution of a decree against the son or after adjudication the attachment may be of the son's share alone : (1939) 1 M.L.J. 889.[11] In all these cases the view has been expressed that by reason of the attachment, the father's power of disposal of the son's share ceases and therefore there can be no vesting of his power in the Official Assignee or if there was vesting, he would be divested of it. The proposition is thus stated in Mayne's Hindu Law, at page 455 based on those cases :

"When the son's interest in the family property has been attached in execution of any decree against him the power of the Official Assignee or Receiver to sell it for the payment of the debts of the insolvent father is gone."

The question is to what extent this proposition can be said to be sound in principle. Section 64, Civil P. C., provides that where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein contrary to such attachment shall be void as against all claims enforceable under the attachment. If for any reason the attachment is withdrawn or released, the sale during the pendency of that attachment of the said property or interest would be valid. Therefore, during the pendency of the attachment of the joint family property or the son's interest therein, should the father sell the son's share, as between the alienee and the father and the son, it would be perfectly valid though such an alienation would not avail against the attaching creditor. In I.L.R.(1939) Mad. 853,[12] Varadachariar J., thus explained the true scope of S. 64, Civil P. C., at page 863 :

"All that S. 64 of the Code provides is that any private transfer by the judgment-debtor of the property attached shall be void as against all claims enforceable under the attachment. It will not be accurate to read S.64 as putting an end to the power of sale, because as between the transferor and the transferee, the alienation will undoubtedly be operative. If the attaching creditor is paid off or for any reason the attachment ceases to subsist, the alienee's title will be unassailable. The only effect of S. 64 is that such transfer shall not prejudice the rights of the attaching creditor."

In the course of the judgment he dissented from the observations of Chandavarkar J. in 33 Bom. 264[13] who took the view that the effect of the attachment was to deprive the father of the power of alienation of the son's interest in satisfaction of of his own debt. I share the same view with Varadachariar J. that Chandavarkar J. has stated the proposition too broadly. The proposition would be correct if he had stated that the power of the father was deprived to the extent that it would not prevail against the claim under the attachment. The cases on which the proposition in Mayne is based are all

2. ('90) 13 Mad. 366, Guruva v. Subbarayadu.
3. ('03) 13 M. L. J. 367, Muthuswami Mudali v. Ayyalu Bathadu.
4. ('15) 2 A. I. R. 1915 Mad. 463 : 25 I. C. 700 : 1 M.L.W. 772, Appanna v. Appanna.
5. ('28) 15 A. I. R. 1928 Mad. 479 : 111 I. C. 505 : 51 Mad. 342 : 54 M. L. J. 674, Gopalakrishnayya v. Gopalan.
6. ('25) 12 A.I.R. 1925 P. C. 18 : 84 I. C. 883 : 52 I.A. 22 : 6 Lah. 1 (P.C.), Sat Narain v. Beharilal.
7. ('36) 23 A.I.R. 1936 P. C. 277 : 164 I. C. 6 : 63 I. A. 384 : 17 Lah. 644 (P. C.), Sat Narain v. Sri Kishen Das.
8. ('34) 21 A.I.R. 1934 Mad. 217 : 148 I. C. 787 : 66 M. L. J. 412, Official Receiver, Coimbatore v. Arunachalam Chettiar.
9. ('36) 23 A. I. R. 1936 Mad. 193 : 161 I.C. 726 : 59 Mad. 296 : 69 M. L. J. 898, Official Receiver, East Godavari v. Imperial Bank of India.
10. ('36) 23 A.I.R. 1936 Mad. 698 : 164 I. C. 853 : 71 M. L. J. 294, Kanyakaparameswaramma v. Venkataramayya.
11. ('39) 26 A.I.R. 1939 Mad. 572 : 185 I. C. 159 : I. L. R. (1939) Mad. 585 : (1939) 1 M. L. J. 889, Arunachalam Chettiar v. Sabaratnam Chettiar.
12. ('39) 26 A.I.R. 1939 Mad. 702 : 185 I. C. 562 : I. L. R. (1939) Mad. 853 : (1939) 2 M. L. J. 822, Diravyam v. Veeranan.
13. ('09) 33 Bom. 264 : 2 I.C. 268 : 10 Bom. L. R. 1206, Subraya v. Nagappa.

cases where the question arose between the attaching creditor and the Official Receiver : *vide* the observations of Varadachariar J. in I. L. R. (1939) Mad. 853.[12] As against the attaching creditor, certainly the father's power would not prevail. But to say that once the attachment takes place the father's power is destroyed as stated by Madhavan Nair J. in A. I. R. 1931 Mad. 118,[14] will be stating the proposition too broadly. I may also point out that the view taken by Madhavan Nair J. was affirmed in 66 M. L. J. 412.[8] The same view was also taken in 59 Mad. 296[9] and Pandrang Row J. sitting alone in 42 M. L. W. 295[15] and by Venkatasubba Rao J. in 71 M. L. J. 294.[10] It seems to me that so long as the family is undivided the power of the father to sell the son's share is not lost. The attachment of the son's interest may prevent the alienation taking effect as against the claims under the said attachment, and when a sale of that share is effected the power may be destroyed, but the power does not cease till the sale takes place. It would be open to the father to exercise the power of sale but the alienee would get a defeasible title as the alienation under the attachment would prevail. Therefore, if the power of disposal subsisted, I do not see any reason why it could not vest in the Official Receiver subject to the same disabilities it was subject to in the father's hands at the date of vesting. During the pendency of the attachment, if the Official Receiver chooses to exercise the right of sale, the alienees will get a title which will prevail against the son though it may not prevail against the claims enforceable under the attachment, that is, if a sale takes place in pursuance of the attachment the purchaser under that sale will get an indefeasible title and the purchaser from the Official Receiver will not get any.

In this case it will not be open to the alienee from the Official Receiver to resist the claim of defendant 16 to bring the property to sale nor to contest the right of the purchaser under that sale, but the son would have no right against the alienee as his interest must be held to have been validly sold. This would be the correct legal position having regard to the rights of the father and the son in an undivided Hindu family taken in conjunction with S. 64, Civil P. C. The earliest case in our Court is 51 Mad. 342[5] where the question arose between an attaching creditor and the Official Receiver and what was decided in that case was that, as the son's share was attached by the creditor, the Official Receiver could not exercise the power of sale. In 66 M. L. J. 412[8] which affirmed the decision of Madhavan Nair J. the proposition was stated as enunciated in Mayne's book. In doing so, they purported to follow 33 Bom. 264.[13] The effect of that decision was stated in 59 Mad. 296[9] at p. 300 thus :

"Once a decree has been followed by an attachment of the son's interest in the joint family property, the normal power of the manager of that property to alienate it for payment of debts from the moment of attachment ceases to be his right. Therefore the right in him having ceased, it cannot be transferred on his insolvency to the Official Receiver."

As I have already pointed out these observations, if I may say so with respect, would not be correct in view of the true scope of S. 64, Civil P. C. as explained by Varadachariar J. in I. L. R. (1939) Mad 853.[12] In (1939) 1 M. L. J. 889[11] to which my learned brother was a party the proposition was thus put at page 892 :

"The right to sell the son's interest only exists so long as the interest in the joint family property exists. If the interest had been sold or if there had been a lawful attachment, which has the same effect, there exists no property over which the power can be exercised."

There can be no exception to the first part of the proposition that the right to sell the son's interest exists so long as the son's interest in the joint family property exists and it would cease the moment that interest had been sold; but the same effect would not follow from the attachment. Until the share is sold, the interest will subsist over which the power can be exercised subject to the disability imposed by S. 64, Civil P. C., though it will be prudent on the part of the Official Receiver not to exercise the power while the attachment subsists but to file a suit for partition and make the son's share available for the debts of the father after providing for the claims under the attachment. The decision in 71 M. L. J. 541[16] was relied on. But the question there was as to the right of a creditor to attach and sell the son's share without the leave of the insolvency Court and I held that it was open to the creditor to do so. I had not to consider in that case the precise question in issue in this case. It seems to me that the Official Receiver in spite of the attachment effected by defendant 16 was competent to sell the plaintiff's interest and the plaintiff has no right to ask for any partition in view of the fact that his interests had been sold. The result is that the appeals are allowed and the plaintiff's suit for partition so far as the items comprised in the said two appeals are concerned, is dismissed. This dismissal will in no way affect the rights of respondents 4 and 5 under their attachment if they are subsisting. We allow costs in one appeal only, i. e., in Application No. 427 of 1938. The plaintiff-respondent will pay the costs to the appellant.

SOMAYYA J. — I agree with my learned brother. As pointed out by him in all the decisions on the point the contest was between the attaching decree-holder or persons claiming under the attachment on the one hand and the Official Receiver on the other hand. In such a case, the right of the former undoubtedly prevails. But if as in the case before us, the attaching decree-holder does not bring the property to sale in pursuance of the attachment, why should the Official Receiver not exercise the power of the father for the benefit of the creditors, subject, of course, to any right arising under the attachment. The attachment may leave a substantial surplus; property worth ten thousand may be attached for a decree for a thousand. In such a case, so long as the son has not become divided from the father, I do not see any reason why the Official Receiver standing in the place of the father should not sell the property. The son at any rate should, I think, be bound by the sale effected by the Official Receiver. The disability of the Official Receiver should be limited to a case where the question is between the Official Receiver and the attaching

14. ('31) 18 A.I.R. 1931 Mad. 118 : 130 I. C. 479, Official Receiver, Coimbatore v. Arunachalam Chettiar.

15. ('35) 22 A.I.R. 1935 Mad. 427 : 156 I.C. 205 : 42 M. L. W. 295, Subbarao v. Official Receiver, Guntur.

16. ('36) 23 A. I. R. 1936 Mad. 948: 165 I. C. 664: 71 M. L. J. 541, Palaniappa Chettiar v. Palani Goundan.

a decree-holder or a person claiming under the attachment.

C.R.K./G.N. *Appeals allowed.*

C. P. C. —
(a) ('40) Chitaley, O. 21 R. 58, N. 23.
(c) ('40) Chitaley, S. 64, N. 2 Pt. 5 and N. 12 Pts. 1 and 10.
('41) Mulla, Page 254 Pt. (j) and Page 256 Pts. (d) and (g).
Hindu law —
(b) ('40) Mulla, Page 307 S. 265 (2) (a), (b) and (d), Page 308 Pt. (a), Page 309 Pt. (c) and Page 311 Pt. (j).
('38) Gour, Page 546, N. 1381.

A. I. R. (29) 1942 Madras 334

PATANJALI SASTRI J.

b *Rao Bahadur V. Ranganatham Chettiar and others — Appellants*

v.

Mariappa Mudali and others — Respondents.

City Civil Court Appeal No. 22 of 1940, Decided on 24th October 1941, against decree of City Civil Court, Madras, D/- 19th December 1939.

(a) Civil P. C. (1908), O. 1, R. 3 — Applicability — Lease of temple land by trustees in favour of four brothers under separate muchilikas for one year—Even after expiry of lease lessees continuing in possession as tenants from year to year and after them their descendants — Tenancies terminated by notice—Suit for ejecting c **all tenants from possession held not bad for multifariousness.**

Order 1, R. 3 applies not only to joinder of parties but also to joinder of causes of action: ('26) 13 A.I.R. 1926 Mad. 911 (F.B.), *Rel. on.* [P 335 C 2]

Both the conditions referred to in O. 1, R. 3 must be fulfilled in order to justify the joinder provided for therein. As a general rule, where substantial common questions of fact are involved in different claims against different parties, their joinder in one suit will not be regarded as multifarious: (1921) 2 K. B. 1, *Rel. on.* [P 335 C 2; P 336 C 1]

In 1882 the trustees of a temple demised the suit land in four equal parcels to four brothers who were the ancestors of the defendants under four separate muchilikas on the same terms for a term of one year. The lessees, however, continued in possession of the lands respectively let to them even after the d expiry of the term of the lease as tenants from year to year paying the same rent, and after their death, their descendants, the defendants, were also allowed to hold the lands on the same terms. The defendants had been dividing the lands among themselves and changing the allotments from time to time according to their convenience. Notices to quit were issued to the defendants demanding vacant possession of the lands in their respective possession on 30th June 1936 and the defendants not having surrendered the lands, the suit was filed in September 1936 for ejecting them from possession. It was contended that the suit was bad for multifariousness:

Held that the suit was not bad for multifariousness as excepting the question of improvements by the different defendants, the other questions arising for determination would all be the same even if different suits were brought and as the cause of action against all the defendants was the same namely their wrongful possession of the land belonging to the temple: 29 Cal. 871, *Rel. on.* [P 335 C 2; P 336 C 1] e

(b) Madras City Tenants Protection Act (3 of 1922), S. 1 (2)—Act is not confined to area comprised in City of Madras at time of its commencement — Expression "city of Madras" includes Thayagarayanagar.

There is nothing in the Act to confine its application to the area comprised in the city of Madras at the time of its commencement. Section 3 (5), Madras General Clauses Act, makes it clear that a declaration made under any Act relating to the municipal affairs of the city will determine the meaning of the expression "city of Madras" not merely for the purposes of that Act but for every Act made by the Governor of Fort St. George in Council after the commencement of the General Clauses Act. [P 336 C 1,2] f

Consequently, under S. 3 (5), Madras General Clauses Act, by reason of the notification No. 59 dated 18th January 1924 of the Local Government under S. 3 (9), Madras City Municipal Act, declaring the Mambalam extension area (since called Thayagarayanagar) to be part of the city of Madras, the area known as Thayagarayanagar must be taken to be part of the city of Madras for purposes of Madras City Tenants Protection Act as well: 27 Cal. 202 and ('16) 3 A.I.R. 1916 Cal. 861, *Disting.* [P 336 C 2]

(c) Madras City Tenants Protection Act (3 of 1922), S. 11—S. 11 is mandatory — Absence of offer of compensation in notice is fatal to suit—Non-service of copies of notice on Commissioners may be disregarded as mere irregularity.

Section 11 is mandatory and imposes an unqualified obligation upon the Court not to entertain a suit g in ejectment in the absence of compliance with its provisions. The non-service of the copies of the notices on the Commissioner may, however, be disregarded as a mere irregularity as it is not made a condition precedent to the institution of the suit, but the absence of compliance as regards the offer to pay compensation stands on a different footing and would be fatal to the suit: ('27) 14 A.I.R. 1927 P. C. 176, *Ref.* [P 337 C 1]

(d) Madras City Tenants Protection Act (3 of 1922), S. 11—Plaintiff in notice under S. 11 making no distinction of suit land as let for building purposes and for cultivation—Plaintiff in suit claiming whole block of land as single item of property—S. 11 must be applied to suit land as whole.

Where the plaintiff himself makes no distinction with regard to the suit land as having been let for h building purposes and for cultivation in the notices issued by him to the defendants and it is his case that the whole block of land should be treated as a single item of property which he is entitled to recover from all the defendants in one suit without being affected by any question of misjoinder, S. 11 must be applied to the suit land as a whole and when its requirements have not been complied with the suit is bound to fail. [P 337 C 1,2]

(e) Civil P. C. (1908), O. 41, R. 22 — Decree one of dismissal — Cross-objections cannot be preferred against mere findings — Respondent can sustain trial Court's decree even on grounds decided against him by that Court.

A memorandum of cross-objections cannot be preferred against mere findings when the decree appealed against is one of dismissal. But it is open to the respondent in such circumstances to sustain the

decree of the Court below even on any ground which
a has been decided against him by that Court.

[P 337 C 2]

S. Panchapagesa Sastri for M. E. Rajagopalachariar — for Appellants.

N. Gopala Menon — for Respondents.

JUDGMENT. — This is an appeal brought by the plaintiffs who are the present trustees of Sri Parthasarathiswami Temple, Triplicane, against a decree of the City Civil Court dismissing their suit to evict the respondents from certain lands belonging to the temple after terminating their tenancy. Various defences were raised by the respondents which were all decided against them by the lower Court except the plea of multifariousness which was upheld. It would appear that the learned Judge gave the appellants an opportunity to amend the plaint (if so advised) so as to cure the defect in the frame of the suit, but as the appellants failed to do so, he
b dismissed the suit. The facts may be briefly stated. In 1882, the then trustees demised the suit land measuring 8 cawnies 9 grounds and 2160 square feet in four equal parcels to four brothers who were the ancestors of the respondents, under four separate muchilikas on the same terms. Each lease comprised 2 grounds and 90 square feet of house site and 2 cawnies and 1050 square feet of cultivable land, and each lessee agreed to pay a rent of Rs. 2-8-0 for the house site, Rs. 7-8-3 for the cultivable land and Rs. 1-12-0 for the usufruct of the trees or a total rent of Rupees 11-12-3 and to surrender possession at the end of the term which was one year, Fasli 1292. The lessees however continued in possession of the lands respectively let to them even after the expiry of the Fasli as tenants from year to year paying the same rent,
c and after their death, their descendants, the respondents, were also allowed to hold the lands on the same terms. Notices to quit dated 21st December 1935 were issued to the respondents demanding vacant possession of the lands in their respective possession at the expiry of Fasli 1345, that is, on 30th June 1936 and the respondents not having surrendered the lands, the suit was filed in September 1936 for ejecting them from possession.

The defendants put in a joint written statement alleging that they and their ancestors had been in possession of the lands for over a hundred and fifty years and that they were entitled to permanent rights of occupancy. They also alleged that they were in separate possession and enjoyment of different portions of the lands without any community of interest, paying the annual rent to the temple separately, and that the suit was bad for misjoinder of parties and causes of action. They further pleaded
d that they were entitled to the benefits of the Madras City Tenants Protection Act as the lands are in the Mambalam Town Extension area and that the notices to quit alleged to have been given by the appellants were bad in law. They also claimed compensation for improvements alleged to have been effected by them in case they were to be evicted.

Mr. Panchapagesa Sastri, who appeared for the appellants, attacked the finding of the Court below that the suit was bad for misjoinder of parties and causes of action. He explained that the appellants had no means of ascertaining which defendant or defendants were in possession of the lands respectively leased to the four brothers in 1882 as the defendants have been dividing the lands among themselves and changing the allotments from time to time according to their convenience and that the appellants were, therefore, unable to bring separate suits for recovery of different portions of the land. He urged that the frame of the suit was warranted by the provisions of O. 1, R. 3, Civil P. C., as the e appellants' right to relief arose out of the same act or transaction, viz., the unlawful detention by the respondents of the suit property belonging to the temple after the tenancies were duly terminated, and common questions of law and fact would arise if separate suits were brought against them. Various decisions—some of them not easy to reconcile—were cited on either side but it seems to me that no useful purpose would be served by a detailed examination of these decisions as the question whether the joinder is proper or not has to be decided with reference to the facts of this case. It is now well settled that O. 1, R. 3 applies not only to joinder of parties but also to joinder of causes of action (*see* 49 Mad. 836,[1]) and it is also plain that both the conditions referred to in that provision must be fulfilled in order to justify the joinder provided for therein. There is no doubt here as to the existence of common questions, for f excepting the question relating to the alleged improvements, the other questions arising for determination would all be the same even if separate suits had been brought. The only question, therefore, is whether it can be said on the facts and circumstances of this case that the appellants' right to relief arose out of the same act or transaction or series of acts or transactions.

Learned counsel for the appellants argued that the detention of the temple property without right was the cause of action on which the suit was based and that it was immaterial that the property was originally leased in four distinct parcels to the defendants' ancestors under separate muchilikas. After the tenancies were terminated, the position simply was that the temple land was in the unlawful occupation of the defendants who were bound to deliver up possession. Stress was laid on the fact that the g property claimed is a single block of land comprised within the boundaries specified in the plaint schedule and had been leased to the respondents' ancestors under a single lease till 1882, and that the defendants' occupation does not correspond with the portions demised under the leases of 1882 as there have been partitions and alienations from time to time since then. It was submitted therefore that the appellants were entitled to sue for the recovery of the land as a whole and not in parts from the several defendants in separate suits. Reliance was placed principally upon the decision in 29 Cal. 871,[2] in support of this contention. The plaintiff in that case brought a suit for ejectment against his landlord and certain other persons to whom the land was let in different portions under different demises, on the allegation that he had previously obtained a lease of the same land but was forcibly dispossessed by the h tenant defendants in collusion with the landlord. Though conspiracy among the defendants to dispossess the plaintiff was put forward, the plea of multifariousness was dealt with on the basis that no such conspiracy on the part of the defendants was established. In overruling the plea the learned Judges observed :

"What concerns the plaintiff is that another is wrongfully in possession of what belongs to him, and that fact gives him his cause of action. If this is so, where there is but one person in possession, can there be a difference when the land is in the posses-

1. ('26) 13 A.I.R. 1926 Mad. 911 : 97 I.C. 212 : 49 Mad. 836 : 51 M. L. J. 194 (F. B.), Govindaraju Mudaliar v. Alagappa Thambiran.
2. ('02) 29 Cal. 871, Nunde Kumar v. Banomali Gayan.

sion of more than one? We think not. It appears to us, so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim is the recovery of possession of his land as a whole and not in fragments, and we think that all persons, who oppose him in the enforcement of that right, are concerned in his cause of action and ought accordingly to be made parties to a suit in which he seeks to give effect to it."

In another place they say :

"What gives the plaintiff his cause of action is, we think, the wrongful detention of the land which is his—not the taking of it. Just as in detenue the gist of the action is the wrongful detention and not the original taking or obtaining of the goods; and as in that action it is immaterial whether the goods were originally obtained by lawful means, as by a bailment, or by a wrongful act, such as a trespass, so we think it is with respect to a suit for the recovery of land."

These observations are, in my opinion, applicable to the facts of this case. It is no doubt true that the decision was under the old Civil Procedure Code where the test was whether the right to relief arose out of "the same matter" but as pointed out by Ramesam J., in 49 Mad. 836[1] at p. 847, the object underlying the change in the language of the corresponding provision in the new Code was to widen the scope of the rule permitting joinder. The tendency of the later decisons both in England and in this country based on more or less similar provisions is to construe them liberally, and I think it may safely be stated, as a general rule, that where substantial common questions of fact are involved in different claims against different parties, their joinder in one suit will not be regarded as multifarious—*see* per Scrutton L. J., in (1921) 2 K. B. 1[3] at p. 16. In the present case as already observed, almost all the questions would be common if different suits were brought against the defendants for recovering portions of the land in their respective occupation. I hold therefore that the suit as framed is not vitiated by misjoinder of parties and causes of action.

The next objection raised by the respondents to the maintainability of the suit is more formidable and is based on the Madras City Tenants Protection Act, 1921. The suit land is situated in that part of the city which is now known as Thayagarayanagar and the first question for determination is whether the Act extends to this area. It is argued for the appellants that the Act extends only to the city of Madras as it existed at the commencement of the Act, and as this area was outside the limits of the city when the Act came into force in 1922, it does not apply to the case and the respondents are not entitled to protection under it. There is, however, nothing in the Act to confine its application to the area comprised in the city of Madras at the time of its commencement. Section 1 (2) merely says that it extends to the "city of Madras." The expression "city of Madras" is not defined in the Act but S. 3 (5), Madras General Clauses Act, defines it as meaning "such local area as is declared from time to time to be the city of Madras under any Act for the time being in force relating to the municipal affairs of such city." The local Government acting under S. 3 (9), Madras City Municipal Act, has by notification No. 59 dated 18th January 1924 and published at p. 24 of part 1 (a) of the Fort St. George Gazette of 1924 declared the Mambalam extension area (since called Thayagarayanagar) to be part of the city of Madras.

There is nothing in this Notification to indicate that the said declaration is solely for the purpose of the Madras City Municipal Act. It was suggested that the notification having been issued under that Act must be understood as including the new area in the city solely for purposes of municipal administration, but it is clear from Sec. 3 (5), General Clauses Act, referred to above that a declaration made under any Act relating to the municipal affairs of the city will determine the meaning of the expression "city of Madras" not merely for the purposes of that Act but for every Act made by the Governor of Fort St. George in Council after the commencement of the General Clauses Act. Reliance was placed for the appellants upon the decision in 27 Cal. 202,[4] where it was held that the term "Town of Calcutta" used in the Bengal Tenancy Act could only relate to the Town as it existed at the time of the passing of the Act and could not be understood as including the area brought within its limits by the Bengal Act, 2 of 1888. The decision however was based on the special terms of the latter Act which was considered to extend the boundary of Calcutta only for municipal purposes and not for all purposes and has therefore no application here. Reference was also made to 33 I. C. 54,[5] where the question was whether the Bengal Tenancy Amendment Act, 1907, giving an extended definition of the expression "Town of Calcutta" for the purposes of the Bengal Tenancy Act which had no operation within the town, retrospectively affected persons who before its commencement had acquired rights in land outside the town under the provisions of the main Act, and it was held that it did not, as it was not merely of a declaratory character but effected a material alteration of the law. In the present case, however, no question arises of the retrospective operation of any new statute. The City Tenant's Protection Act clearly purports to affect all tenancies of land within the City of Madras created before the commencement of the Act and the only question is whether an additional area included in the City by an authority duly empowered in that behalf also falls within the scope of the Act. If the Act affected, as it was obviously intended to do, the pre-existing rights of landlords within a certain area before the notification of 1924, it affects similar rights within a larger area after the notification by virtue of the definition of the term "City of Madras" in the General Clauses Act, and I can see nothing in this which contravenes any principle. I hold therefore that the City Tenants' Protection Act is applicable to the land in suit and that the respondents are entitled to the benefits of that Act. It accordingly becomes necessary to consider whether the notices issued to the respondents did not comply with the requirements of S. 11 of the Act and the suit could be dismissed on that ground. This question has not been dealt with in the judgment under appeal presumably because it did not arise in the view taken by the learned Judge regarding the applicability of the Act. Section 11 says :

"No suits in ejectment or applications under S. 41, Presidency Small Cause Courts Act, 1882, shall be

3. (1921) 2 K. B. 1 : 90 L. J. K. B. 445 : 124 L. T. 719 : 37 T. L. R. 295, Payne v. British Time Records Co.

4. (1900) 27 Cal. 202, Biraj Mohini Dasi v. Gopeswar Mullick.

5. ('16) 3 A. I. R. 1916 Cal. 861 : 33 I. C. 54 : 20 C.W.N. 258, Jotiram Khan v. Janaki Nath Ghose.

instituted or presented against a tenant until the a expiration of three months next after notice in writing has been given to him requiring him to surrender possession of the land and building, and offering to pay compensation for the building and trees, if any, and stating the amount thereof. A copy of such notice shall at the same time be sent to the Commissioner of the Corporation of Madras."

It will be seen that as regards the period prescribed, the notices issued by the appellants fulfil the requirement of the section, for, the suit was instituted more than nine months after the notices were given. But they admittedly did not offer to pay compensation for the buildings and trees, nor were copies of the notices sent to the Commissioner of the Corporation of Madras. The non-service of the copies of the notices on the Commissioner may however be disregarded as a mere irregularity as it is not made a condition precedent to the institution b of the suit, but the absence of compliance as regards the offer to pay compensation stands on a different footing. It was said that the appellants could not make such an offer as they were disputing the applicability of the Act to the case and denying the respondents' right to claim protection under it and it was suggested that the section should not be read as requiring compliance with a condition which would necessarily involve the abandonment by a person who proposed to file a suit in ejectment of one of his main contentions, unless he was prepared to risk the dismissal of his suit. Such considerations, however, can have little weight in the face of the clear language of S. 11, which imposes an unqualified obligation upon the Court not to entertain a suit in ejectment in the absence of compliance with its provisions. As the Privy Council remarked in 51 Bom. 725,[6] with reference to the similar language c of prohibition used in S. 80, Civil P. C., the section is "express, explicit and mandatory and it admits of no implications or exceptions."

Even so, it was urged, the section could not affect the appellants' suit in so far as it related to the cultivable lands in the possession of the respondents as the notice required to be given to the tenant is one calling upon him "to surrender possession of the land and building" thus showing that the section was applicable only to lands with buildings thereon. It was pointed out that under the muchilikas of 1882 only a comparatively small portion was let as building land and the rest was let for cultivation, as regards which the notices issued to the respondents were sufficient under the general law to terminate their tenancy. In the first place, it is not clearly established that the buildings now existing on the land have all been put up only on the por- d tions let for building purposes. On the other hand, it would appear from Ex. 11 that the area now occupied by the buildings is 3 cawnies and 1962 sq. ft. which is far in excess of the total extent of 3 grounds and 360 sq. ft. which was let as building land under all the muchilikas of 1882. It is therefore impossible now to differentiate between the portions let for building and the portions let for cultivation and to treat them as standing on a separate footing for purposes of S. 11. The appellants themselves made no such distinction in the notices issued by them to the respondents and it is indeed their case, as already observed, that the whole block of land should be treated as a single item of property which they are entitled to recover from all the defendants in one suit without being affected by any question of misjoinder. I am therefore of opinion that S. 11 must be applied to the suit land as a whole and its requirements not having been complied with, the suit is bound to fail. In this view, it becomes unnecessary to consider the other questions arising in the case. In the result the appeal is dismissed with costs.

As regards the memorandum of cross-objections, it is directed against the findings recorded by the lower Court on the other pleas of the respondents which were all decided against them. A preliminary objection was taken by the appellants that a memorandum of cross-objections could not be preferred against mere findings when the decree was one of dismissal. This objection is no doubt well founded. But as it was open to the respondents in such circumstances to sustain the decree of the Court below even on any ground which has been decided against them by that Court, the memorandum of objections was really unnecessary in this case and it is accordingly dismissed without costs.

C.R.K./G.N. *Appeal dismissed.*

6. ('27) 14 A. I. R. 1927 P. C. 176: 104 I. C. 257: 51 Bom. 725: 54 I. A. 338 (P.C.), Bhagchand Dagadusa v. Secy. of State for India.

C. P. C. —

(a) ('40) Chitaley, O. 1 R. 3, N. 2 Pts. 5, 6 and O. 1 R. 3, N 6 Pt. 6.
('41) Mulla, Page 497 Pt. (m) and Page 500, Note "Jointly" Illustration (2).

(e) ('40) Chitaley, O. 41 R. 22, N. 2 Pt. 11 and O. 41 R. 22, N. 3 Pt. 3.
('41) Mulla, Page 1178 Pts. (w) and (x).

A. I. R. (29) 1942 Madras 337

LAKSHMANA RAO J.

Travancore National Bank Subsidiary Co., Ltd., in liquidation through Official Liquidator, R. Narasimhachari — Plaintiff — Petitioner

v.

M. S. Venkataraman and others — Defendants — Respondents.

Civil Revn. Petn. No. 99 of 1941, Decided on 8th September 1941, to revise decree of Sub-Judge, Madura, D/- 18th November 1940.

Contract Act (1872), S. 50 — Performance — Company conducting chit fund — Subscriber depositing money towards future instalments in bank as required by company — Performance is good even though such bank subsequently goes into liquidation.

Where a subscriber of a chit fund conducted by a company deposits money towards the future instal- h ments he has to make in a bank as directed by the rules of the company, the performance of the promise by him is good. And if the bank goes into liquidation, the promisee company has to take the risk.

[P 338 C 1]

S. Parthasarathy and V. K. Thiruvenkatachari — for Petitioner.

R. Gopalaswamy Ayyangar and K. Vaidhyanatha Ayyar — for Respondents.

ORDER. — The amount in dispute was payable to the Travancore National Bank Subsidiary Co., Ltd., towards future instalments in respect of chits held by respondent 1 the prize winner, and it was deposited in a chit savings bank account in the name of respondent 1 in the Travancore National Bank, Ltd., in accordance with R. 18 (B) of the Chit Fund Rules. Rule 4 of the Rules of the Chit Savings Bank

account provides that the amount deposited shall not be available for withdrawal for purposes other than for payment of chit instalments till the termination of the particular chit in respect of which the account is opened and under Rule 5 the chit fund subscriptions due every month are to be appropriated and adjusted from the Chit Savings Bank account as and when they fall due. Rule 6 provides that the Chit Savings Bank account is to be treated as an ordinary savings bank account only after the termination of the chit, and there was in effect an assignment to the petitioner of the moneys standing to the credit of the account. The amount was deposited in the manner sanctioned by the petitioner, the promisee, for the performance of the promise and under S. 50, Contract Act, the performance is good. In the circumstances the promisee has to take the risk and the decision of the lower Court is correct. The revision therefore fails and is dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

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* A. I. R. (29) 1942 Madras 338

VENKATARAMANA RAO J.

K. R. Sankaralingam Pillai — *Appellant*

v.

Veluchami Pillai (minor) and others — *Respondents.*

Second Appeal No. 1113 of 1938, Decided on 10th November 1941, against decree of Dist. Court, Madura, in A. S. No. 31 of 1938.

(a) Hindu law—Adoption—Adoption by widow of deceased coparcener after partition between remaining coparceners is valid.

An adoption by a widow of a deceased coparcener subsequent to the partition between the remaining coparceners of her deceased husband is valid : ('32) 19 A.I.R. 1932 Mad. 227, *Foll.* [P 338 C 2]

***(b) Hindu law—Adoption—Rights of adopted son—Adoption by widow of deceased coparcener after partition between remaining coparceners — Adopted son is entitled to re-open partition and recover his share — Only limit to his right of succession explained.**

An adopted son must be deemed to be a posthumous son for the purpose of inheritance as if he existed on the date of the death of the adoptive father, and a partition made by the coparceners of his father before adoption can be re-opened. Though the title of the adopted son dates back to the death of the adoptive father for inheriting or taking his adoptive father's estate, the only limit to his right of succession is that he takes the estate subject to the dispositions made within the competency of the person who was entitled to hold the said estate until his adoption. Therefore, the adopted son can only take the property which stood undisposed of at the date of the adoption but so long as the property was held by the members of the family and remained in the family, the fact that they chose to hold in severalty would not affect the right of the adopted son to claim his legitimate share as appertaining to his adoptive father in the property which was held by them and not validly disposed of : 9 Mad. 64 (F.B.), *Approved*; ('37) 24 A.I.R. 1937 Bom. 279 (F.B.); ('39) 26 A.I.R. 1939 Bom. 377 and ('40) 27 A.I.R. 1940 Bom. 118, *Dissent.*; *Case law discussed.* [P 340 C 2; P 342 C 2; P 343 C 1]

(c) Hindu law — Partition—Whether alienation stated.

Partition may no doubt in a sense be a transfer but it is in substance an adjustment of the ownership of many persons in the joint family property by assigning particular portions of it to a several ownership. It cannot strictly be called an alienation of joint family property. Though a partition is effected, it is always liable to be reopened at the instance of a posthumous son. [P 342 C 2; P 343 C 1]

K. Rajah Ayyar — for Appellant.

B. Sitarama Rao, R. Ramasubba Iyer, M. V. Ganapathi, S. K. Sundaram and N. R. Govindachari — for Respondents.

JUDGMENT. — This second appeal raises a question of some difficulty and importance in the Hindu law of adoption. The facts are undisputed and may be briefly stated. One K. Ramaswami Pillai had four sons namely, defendants 1 and 2, K. R. Karuppanna Pillai the deceased husband of defendant 6 and K. R. Ramaswami Pillai the deceased husband of the next friend of the minor plaintiff. They formed members of an undivided family. K. R. Ramaswami died in November 1924 issueless leaving his widow Chellathayi. Karuppanna died in 1924 leaving his widow Parvathi, defendant 6. Ramaswami Pillai the father died in 1929. In the middle of 1936, defendants 1 and 2 effected a partition and divided the joint family properties between themselves. Subsequent to the partition Chellathayi adopted the plaintiff on 25th January 1937 and defendant 6 adopted defendant 3 on 31st July 1937. This suit is by K. R. Ramaswami Pillai's adopted son the plaintiff by his adoptive mother Chellathayi for recovery of one-fourth share of the property. The main defence is that the adoption, having taken place subsequent to the partition, it was invalid and in any event the estate to which the defendants became entitled by virtue of the said partition could not be divested by the adoption. Both the lower Courts found in favour of the factum and validity of the adoption. In regard to the validity of adoption Mr. Rajah Iyer has stated that in view of the decision in 55 Mad. 581[1] by which I am bound he does not propose to contest its validity before me. Both the lower Courts have also held that the fact that the adoption took place subsequent to the date of partition is no bar for recovery of the share which the plaintiff is entitled to as the adopted son of Ramaswami Pillai.

The question for decision is whether this view is sound. The arguments for and against the said view have been very ably presented both by Mr. Sitarama Rao on behalf of the plaintiff and Mr. Rajah Iyer on behalf of defendant 1, who is resisting the claim of the plaintiff. I may at the outset state that there is no direct decision of this Court on this question. There is an obiter dictum in 9 Mad. 64[2] which is exactly in point in favour of the view that the plaintiff is entitled to claim a share. As against this view there are decisions of the Bombay High Court : *vide* I. L. R. (1940) Bom. 42,[3] I. L. R. (1939) Bom. 512[4]

1. ('32) 19 A.I.R. 1932 Mad. 227 : 138 I.C. 170 : 55 Mad. 581 : 62 M. L. J. 187, Panyam v. Ramalakshmamma.
2. ('86) 9 Mad. 64 (F.B.), Krishna v. Sami.
3. ('40) 27 A. I. R. 1940 Bom. 118 : 187 I. C. 504 : I.L.R. (1940) Bom. 42 : 41 Bom.L.R. 1300, Irappa Lokappa v. Rachayya Madivallayya.
4. ('39) 26 A. I. R. 1939 Bom. 377 : 184 I. C. 876 : I.L.R. (1939) Bom. 512 : 41 Bom.L.R. 760, Hirachand Gangji v. Rowji Sojpal.

and I.L.R. (1937) Bom. 508.[5] The question is which view is in accord with the principles of Hindu law as established by judicial decisions particularly of the Privy Council. In this case at the date of the death of the brothers, Karuppanna and Ramaswami, the family was undivided and it continued to be undivided until 1936. It is undisputed that if the adoption of the plaintiff was made before that date the adopted son would be entitled to recover the share of his father. The question is whether the fact of partition prevents him from claiming it. The recent decisions of the Privy Council, particularly *Amarendra Mansing's case* in 12 Pat. 642[6] have laid down that the power of a Hindu widow to adopt a son to her deceased husband is not dependent on the question of her husband's estate vesting in her or on the fact of the adopted son divesting the said estate vested in any person other than the adopting widow. In the course of the judgment in 12 Pat. 642,[6] Sir George Lowndes observed at p. 657 thus :

"Their Lordships think, ... that the vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption."

He further added that the true principle must be found upon the religious side of the Hindu doctrine and that her power would not be exhausted or become extinct until it was shown that the deceased husband had left a son who was capable of continuing the line either by giving birth to a natural son or by his leaving a widow who could continue the line by means of an adoption. The facts in that particular case are instructive. One Brajendra was the owner of an impartible estate and he died in 1903 leaving his son Bibhudendra and his widow Indumati. Bibhudendra died unmarried and thereupon the property vested in one Banamali a distant sapinda by inheritance. Indumati adopted Amarendra two years after the property vested in Banamali. The Court of Wards took possession of the estate on behalf of the adopted son. Banamali filed a suit for recovery of the estate challenging the validity of the adoption. Their Lordships held the adoption to be valid and dismissed the suit of Banamali. The case was decided on the assumption that Banamali was a separated sapinda claiming strictly by inheritance and when the property on the death of Bibhudendra vested in Banamali, it did not vest in him as a surviving coparcener. The principle of this decision was followed by their Lordships in 59 Bom. 360.[7] That was also a case relating to an impartible estate. One Himatsangji died leaving two sons Chandrasingji and Bhimsangji. Chandrasingji succeeded to the estate as the elder son and died in 1899 leaving him surviving his son Chatrasingji and his widow Kesarba. In 1915 Chatrasingji was adopted by the widow of one Kunwarsahib Bapusahib the proprietor of an impartible estate. Thereupon Kesarba adopted Mansangji as a son to her deceased husband Chandrasingji. In 1918 Bhimsangji filed a suit claiming the impartible estate called the Ahima estate on the ground that Chatrasangji by reason of his adoption in another family had forfeited his right in the Ahima estate which then devolved upon him according to the rule of primogeniture.

The High Court took the view that the adoption was invalid and that Bhimsangji was entitled to the properties which constituted Ahima estate. They also negatived the claim set up by Chatrasingji that though he was adopted to another family he still retained his estate in the original family. Their Lordships of the Privy Council did not decide this question but reversed the decision of the High Court on the ground that the adoption was valid following 12 Pat. 642.[6] As a necessary consequence, their Lordships held that in the presence of the adopted son, Bhimsangji could not inherit the estate. In order to understand the scope of this decision, it must be noted that Bhimsangji claimed to succeed to the property by right of inheritance and not as a member of a joint family and the whole case proceeded on the assumption that Bhimsangji was a separated member of the family of Chatrasingji : *vide* the observations of the learned Judges of the Bombay High Court in 56 Bom. 619[8] at pp. 628 and 629. In both these cases the adoption was not to the last male owner but to the latter's father by his widow and the adopted son was entitled to divest the estate which vested in the heir of the son. This can only be justified on the ground that the adopted son as the father's son of the last male owner must be deemed to have been in existence on the date of the father's death and, therefore, on the son's death, would have succeeded as the coparcener of the son in preference to a collateral heir of the son. Both these decisions therefore proceed on the principle that an adopted son for purposes of inheritance to property in the family of his adoptive father occupies the same position as a posthumous son. Their Lordships were not enunciating any new principle but were only re-affirming what they gave expression to in some of the earlier cases. As early as 9 Beng.L.R. 377[9] at p. 397, Willes J. in dealing with the rights of an adopted son observed thus :

"In contemplation of law, such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognises as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him."

This fiction of posthumous son is very clearly brought out by their Lordships of the Privy Council in 43 Bom. 778.[10] In that case, a jivai grant was carved out of an impartible estate and given to a junior member of the family for maintenance to be held and enjoyed as long as the grantee's male line lasted. The last male holder died in October 1903 leaving a widow but no male issue. On 12th March 1904, she purported to adopt a boy as heir to her husband. Thereupon the then holder of the imparti-

5. ('37) 24 A. I. R. 1937 Bom. 279 : 170 I. C. 393 : I.L.R. (1937) Bom. 508 : 39 Bom.L.R. 382 (F.B.), Balu Sakharam v. Lahoo Sambhaji.

6. ('33) 20 A.I.R. 1933 P. C. 155 : 143 I. C. 441 : 12 Pat. 642 : 60 I. A. 242 (P.C.), Amarendra Mansingh v. Sanatan Sing.

7. ('35) 22 A. I. R. 1935 P. C. 95 : 155 I. C. 493 : 59 Bom. 360 : 62 I. A. 161 (P. C.), Vijaysingji v. Shivsanji.

8. ('32) 19 A.I.R. 1932 Bom. 654 : 142 I. C. 253 : 56 Bom. 619 : 34 Bom. L. R. 1332, Bai Kesharba v. Shivsangji.

9. ('72) I. A. Sup. Vol. 47 : 9 Beng. L. R. 377 : 18 W. R. 359 : 3 Sar. 82 (P. C.), Jatindra Mohan Tagore v. Ganendra Mohan Tagore.

10. ('18) 5 A.I.R. 1918 P. C. 192 : 50 I. C. 457 : 43 Bom. 778 : 46 I. A. 97 (P. C.), Pratap Singh Shiv Sing v. Agarsinghji Raisinghji.

ble estate instituted a suit to recover the property a from the adopted son on the ground that the property having reverted to him the adoption was invalid. The High Court gave a decree in his favour but it was reversed by their Lordships of the Privy Council who held that it did not revert to the holder of the impartible estate but was inherited by the adopted son. In the course of the judgment Ameer Ali J. made the following observations at page 794:

"It was contended with considerable force and some degree of plausibility that in the case of a jivai grant on the death of the holder thereof there is no property left for the adopted son to take, as it reverts to the grantor's estate immediately the jivaidar dies. But it was admitted that a posthumous son would prevent the reversion. If the widow happened to be enceinte, the reversion naturally would remain in suspense until the birth of the child, to b see whether it was a male or a female. It is futile therefore to say that the property reverts to the grantor's estate immediately the breath leaves the body of the jivaidar. Here the adoption was made within the period of natural gestation, and the property was at the time of the adoption in the possession of the widow and still is in the possession of the adopted son."

The use of the language "within the period of the natural gestation" is very significant as suggesting that the adopted son would be in the position of a posthumous son. The expression "natural period of gestation" was used in that case because the adoption was made within five months after the death of the last male holder. No doubt, in that particular case, it was within that period but there can be no doubt as to what his Lordship meant, viz., that the adopted c son is for the purpose of inheritance in the adoptive family in the same position as a posthumous son to whom reference was made earlier. As a logical consequence of this principle, the adopted son has been held to divest the estate of his adoptive mother if the property devolved on her on the death of her husband or the estate of a collateral heir of his father in whom the latter's estate vested on the death of his father or the interest of his father which has on his death lapsed to his surviving coparcener whoever he be, a brother or a father or a grandfather. That the Privy Council limited the fiction of a posthumous son only to the case of an adopted son inheriting or taking the father's estate is clear from another principle they laid down in 12 Cal. 18,[11] that is, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral, i. e. as an heir to the property d which was not his father's property. In regard to the property inherited or interest taken, the Privy Council also imposed a limit to the operation of this fiction. In 50 Mad. 508,[12] Viscount Dunedin laid down the following principle at page 525 :

"When a disposition is made inter vivos by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt."

11. ('86) 12 Cal. 18 : 12 I.A. 137 : 4 Sar 651 (P.C.), Bhubaneswari Devi v. Nilcomul Lahiri.

12. ('27) 14 A.I.R. 1927 P. C. 139 : 101 I. C. 779 : 50 Mad. 508 : 54 I. A. 248 (P.C.), Krishnamurthi Iyer v. Krishnamurthi Iyer.

No doubt in that case the disposition was by the adoptive father himself. The said principle would e apply to the case of every disposition made by a male holder of the estate who in the absence of an adopted son was entitled to it. This is clear from an early decision of the Privy Council in 1 Mad. 69[13] where on the death of an elder brother in an undivided family the estate which was impartible devolved on the younger brother but two years later the widow of the elder brother made an adoption which had the effect of defeating the younger brother to the estate, the Privy Council held that until the adoption the younger brother was entitled to the estate and that no claim for profits could be made against him until the adoption. It is by the application of this principle, our High Court held that where a father and son constituted members of an undivided family and the son died leaving a widow giving power to adopt but before the adoption could be made, f the father settled all the property on his daughter the settlement was held to be valid : *vide* 52 Mad. 398.[14] So far as the husband's estate vested in his widow is concerned, it was laid down so early as in 7 M.I.A. 169[15] at p. 180 that the property is in the widow from the death of her husband till the power of adoption is exercised and that any alienation made by her would be binding on the adopted son if it was for strict necessity. The principle deducible from these decisions is that though the title of the adopted son dates back to the death of the adoptive father for inheriting or taking his adoptive father's estate, he takes the estate subject to the dispositions made within the competency of the person who was entitled to hold the said estate until his adoption. In the light of these principles, the question in issue has to be approached. If the true position of the adopted son is that he must be deemed to be a posthumous son for the purpose of inheritance as if g he existed on the date of the death of the adoptive father, a partition made by the coparceners of his father before adoption should have to be reopened, and that was the view expressed in the decision in 9 Mad. 64.[2] In the course of the judgmeut in that case, Turner C. J. made the following observations at page 78:

"Let *C* have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by *B*, *D* and *E*. When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father."

The reason given is thus stated towards the end of the judgment: "The existence of a valid power h creates a potentiality of inheritance, which may be likened to that of a son in the womb." No doubt the observation is obiter, and not necessary for the decision of that case but nevertheless being the opinion expressed by five learned Judges, it is entitled to the greatest weight. But the Bombay High Court has dissented from this view in more than one of their decisions. In I.L.R. 1940 Bom. 42,[3] the father and son who were the only members of a Hindu coparcenary divided the family property between

13. ('76-78) 1 Mad. 69 : 3 I.A. 154 : 25 W.R. 291 : 3 Sar. 583 (P.C.), Sri Virada Pratapa Deo v. Sri Brozo Kishoro Datta Deo.

14. ('29) 16 A.I.R. 1929 Mad. 296 : 118 I.C. 821 : 52 Mad. 398 : 56 M.L.J. 401, Veeranna v. Sayamma.

15. (1857-59) 7 M. I. A. 169 : 1 Sar. 616 (P.C.), Bamundoss Mookerjee v. Mt. Tarinee.

themselves and thereafter the widow of a predeceased undivided brother of the father adopted the plaintiff. It was held that though the adoption might be valid he could not recover any share of the property which had already been partitioned before his adoption. Wadia J. after citing the observations made in I. L. R. (1937) Bom. 508,[5] namely, "where a coparcenary exists at the date of the adoption, the adopted son becomes a member of the coparcenary, and takes his share in the joint property accordingly . . . But . . . . where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a deceased coparcener has not the effect of reviving the coparcenary, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her," observed thus at page 46 :

"In principle I am unable to see any distinction between the extinction of a coparcenary by the death of the last surviving coparcener and its extinction by partition, so far as the rights of an adopted son adopted after the extinction of the coparcenary are concerned. The effect of a partition is to dissolve a coparcenary, with the result that the separating members hold their respective shares as their separate property after the partition. In I. L. R. (1939) Bom. 512,[4] it was held by Rangnekar, J. sitting singly that 'under Hindu law, on the extinction of a coparcenary by a partition, the widow of a coparcener, who had died long before the partition, cannot make a valid adoption'."

In I. L. R. (1937) Bom. 508,[5] the question arose thus : After the death of the last surviving coparcener, the property possessed by him vested in his sister. Then the widow of a predeceased coparcener made an adoption. The question was whether the adoption would be valid and whether the adopted son would be entitled to claim the estate from the sister. Beaumont C. J. and Wadia J. took the view that the adoption was valid but the adopted son would not be entitled to divest the property vested in the sister of the last surviving coparcener. Rangnekar J. took the view that the adoption was invalid but he observed that if the adoption was valid, it would be valid for all purposes and the adopted son would have all the rights of a posthumous son in which case the adopted son would be entitled to divest the estate. The majority view purported to follow the decision in 14 Bom. 463,[16] on the ground that that decision was unaffected by the recent decisions of the Privy Council : 12 Pat. 642[6] and 59 Bom. 360.[7] Rangnekar J. also took the same view in regard to the decision in 14 Bom. 463.[16] The facts in that case were as follows : "Krishnaji and his two sons Bahu and Nana were members of an undivided family. Bahu died first leaving a widow. Then Krishnaji died. On his death Nana succeeded to the family property. Nana afterwards died leaving him surviving his widow Gojarabai who got possession of all his property. After Nana's death, however, Bhau's widow adopted the plaintiff as son to her husband and he brought the suit against Gojarabai to recover the property from her. It was held that he could not recover. Telang J. gave his reason thus at page 471 :

"When the inheritance devolved from Nana upon his widow Gojarabai, it devolved, not by succession, as in an undivided family, but strictly by inheritance, as if Nana had been a separated householder. Strictly speaking, according to the view taken by our Courts, there was at Nana's death no undivided family remaining into which an adopted son could be admitted by virtue of his adoption."

He rested this conclusion on the following principle which he laid down earlier :

"The rule deduced from *Bhoobunmoyee's case*,[17] and the other cases in the Privy Council above referred to must then be supplemented by this addition, that the adoption, though authorized by the husband cannot divest the estate which has already vested in a collateral relation of the husband in succession to some other person who had himself become owner in the meantime."

It will be seen that this principle is directly in conflict with that laid down by the Privy Council in 12 Pat. 642.[6] In the Patna case, an adoption made by the widow under the authority of her husband divested the estate of the son which was vested in a collateral of the son. Similarly, in 59 Bom. 360[7] on Chatrasingh being adopted into another family the adoption made by his mother was held to divest the estate which would vest in a collateral of the son. The learned Judges of the Bombay High Court distinguished the Privy Council cases on the ground that a coparcenary was in existence at the time of the adoption. With great respect to the learned Judges, no such coparcenary was in existence at all. In 12 Pat. 642[6] there was no coparcenary between Bibhudendra and Banamali and Banamali rested his case as a separated sapinda claiming strictly by inheritance. Similarly, in 59 Bom. 360[7] there was no coparcenary between Chatrasingh and Bhimsingh and the case proceeded on the footing that there was no joint family subsisting between Chatrasingh and Bhimsingh and Chatrasingh was in possession during his lifetime as the sole surviving member of the joint family consisting of himself and his father and Bhimsingh claimed to succeed to the property only as heir to Chatrasingh. As the parties were governed by Mitakshara law according to the ratio decidendi of the decision in 12 Pat. 642[6] the title of the adopted son of Bhau in 14 Bom. 463[16] is superior to the title of the widow Gojarabai and he would be entitled to succeed as a coparcener as if he were in existence on the date of the death of Nana. In 14 Bom. 463[16] Telang J. took the view that at Nana's death there was no undivided family remaining into which the adopted son could be admitted by virtue of his adoption, that is, when Nana died, the coparcenary became extinct and the adopted son of a deceased coparcener could not take the property as a coparcener. That was also the view taken in I. L. R. (1937) Bom. 508.[5] This view is again, if I may say so with respect, in direct variance with the decisions of the Privy Council in 12 Pat. 642[6] and 59 Bom. 360.[7] In both those cases, Bibhudendra and Chatrasingh were the last surviving coparceners of the coparcenary which consisted of themselves and their fathers, i.e., in one case Bibhudendra and Brajendra during the lifetime of Brajendra were coparceners and in the other Chatrasingh and his father were during the lifetime of Chatrasingh's father coparceners so that the coparcenary must be deemed to have become extinct on the death of Bibhudendra and Chatrasingh according to the view taken in 14 Bom. 463[16] and I. L. R. (1937) Bom. 508.[5] But in both the cases the Privy Council held that the adopted son would be entitled to succeed to the property held by the last male owner. The ratio decidendi of these decisions is that either the coparcenary did not become extinct by

16. ('90) 14 Bom. 463, Chandra v. Gojarabai.

17. (1863-66) 10 M.I.A. 279 : 3 W.R. 15 : 1 Suther 574 : 2 Sar. 111 (P. C.), Mt. Bhooban Moyee Debia v. Ram Kishore Achraj.

the death of the last surviving coparcener and must
a be deemed to subsist until the adoption by the widows of deceased coparceners is rendered impossible by death or any other supervening circumstances or the termination of the coparcenary does not affect the adopted son's right to take the share of his adoptive father just as a posthumous son would. Both the decisions in 12 Pat. 642[6] and 59 Bom. 360[7] clearly imply that if the adoption is valid, the devolution of property on the adopted son would follow as a necessary consequence. In I. L. R. (1939) Nag. 88,[18] Niyogi J. after a full discussion of the question took the view that " the effect of 12 Pat. 642[6] and 59 Bom. 360[7] is to denude 14 Bom. 463,[16]" and upheld an adoption on facts similar to those in 14 Bom. 463.[16] After pointing out that the Bombay cases proceeded on a misconception of the coparcenary being in existence between the last male holder and the heir who succeeded him in
b those cases, the learned Judge observed (at p. 102) that the effect of those decisions is :

"That a person in whom the property is vested after the death of the sole surviving member of a joint family takes it subject to defeasance in the event of an adoption by the widow of a predeceased member of the quandom joint family."

He finally concluded by saying that :

" it is the right of the adopted son and not the existence of the coparcenary that is the true criterion for determining the judicial effect of the adoption."

Mr. Rajah Ayyar contended that the decision of Sir Dinsha Mulla in 57 Bom. 157[19] at p. 174 would seem to imply that the adoption after the extinction of the coparcenary may not be valid or at least would not divest an estate vested in the members of
c the family after the partition. The passage relied on is this :

" The adoption of appellant No. 2 was not made after the extinction of the coparcenary, but during its subsistence, the last surviving coparcener being Dattatraya."

The learned Judge was only repelling an argument based on 14 Bom. 463[16] and distinguishing it by pointing out that in the particular case he was dealing with, there was no extinction of the coparcenary at all because the last surviving coparcener was alive and he was not enunciating any principle that on the extinction of the coparcenary the adopted son's power to take the share of the adoptive father is taken away. On the other hand, the decision seems to imply that a coparcenary must be deemed to be subsisting even if there was one coparcener. Mr. Rajah Ayyar laid considerable stress on a
d passage in West and Buhler and the observations of Mukherjee J., in 2 C. L. J. 87[20] at p. 93. The passage in West and Buhler on which he relied runs thus :

" Partition is an inherent right and if that right is exercised it will not be open to the adopted son to divest an estate created by severance."

The passage in the Calcutta Law Journal case is to this effect :

" The application of the fiction cannot be extended for the purpose of entitling the adopted son to take the property as it stood at the moment of the death
e of the person to whom he is adopted ; he cannot dispute the previous acts of his adoptive mother unless they were in excess of her legal powers as widow in possession, nor can he question the acts of a previous male holder in whom as a member of a joint Mitakshara family, the property had vested as full owner."

The contention of Mr. Rajah Ayyar is that it is the inherent right of every coparcener to effect a partition, and once the partition is effected, a new status is created by resolving joint rights into several rights and each member of the family becomes separated householder constituting a separate coparcenary consisting of himself and his sons and grandsons and the adopted son must take the property as it stood at the date of the adoption and there would be no coparcenary property which he could take on the date of adoption. That was exactly the reasoning
f of the learned Judges of the Bombay High Court and the question is whether it is sound in principle. As I have already indicated, the effect of the Privy Council decisions is to treat the adopted son as a posthumous son and clothe him with all the rights of an aurasa son for the purpose of succession in the adoptive family whether by inheritance or survivorship. The following passage in Mayne's Hindu Law gives an accurate summary of the result of the Privy Council decisions thus :

"The principle therefore appears to be that either the heir or coparcener who takes in the absence of the adopted son takes only a defeasible estate, that the male line is not regarded as extinct until the continuation of the line by adoption is impossible and that the adopted son succeeds as if he were the aurasa son and ousts every one whose right to enter was only temporary, operating merely to prevent the
g ownership from being in abeyance pending any such succession as the adoption brings about."

As the Privy Council put it in 41 Mad. 855[21] the interest of the deceased coparcener lapsing by survivorship was only provisional and subject to defeasance by the emergence of a male heir to the deceased coparcener which the adoption may bring about. As already pointed out by me, the only limit which the Privy Council imposed in regard to the application of the fiction of the posthumous son was that the adopted son would be bound by all the dispositions of the provisional holders of the estate within their competence the result of which is that the family property is carried away from the family : *vide* 50 Mad. 508.[12] The adopted son therefore can only take the property which stood undisposed of at the date of the adoption but so long as the property was
h held by the members of the family and remained in the family the fact that they chose to hold in severalty would not affect the right of the adopted son to claim his legitimate share as appertaining to his adoptive father in the property which was held by them and not validly disposed of. Mr. Rajah Ayyar contends that the partition must be put on the same footing as a valid alienation, but I am not able to agree with his contention. Partition may no doubt in a sense be a transfer but it is in substance an adjustment of the ownership of many persons in the joint family property by assigning particular portions of it to a several ownership. It cannot strictly be called an alienation of joint family property. Though a partition is effected it is always liable to be re-opened at the instance of a posthu-

18. ('38) 25 A.I.R. 1938 Nag. 423 : 179 I. C. 82 : I.L.R. (1939) Nag. 88, Mt. Draupadi v. Vikram.

19. ('33) 20 A.I.R. 1933 P. C. 1 : 141 I. C. 9 : 57 Bom. 157 : 60 I. A. 25 (P.C.), Bhimabai v. Gurunath Gowda.

20. ('05) 2 C. L. J. 87 : 9 C. W. N. 795, Harekchand Babu v. Bijoy Chand Mahatab.

21. ('18) 5 A. I. R. 1918 P. C. 74 : 46 I. C. 481 : 41 Mad. 855 : 45 I. A. 156 (P. C.), Madana Mohana Bheema Deo v. Purushothama Ranga Bheema Deo.

mous son. Therefore, if the adoption is to be held valid, there is no escape from the position that the adopted son is entitled to re-open the partition made by the surviving coparceners of the deceased adoptive father. I would refer in this connexion to the observations of Rangnekar J. in I.L.R. (1937) Bom. 508[5] at p. 583 : "There is no authority, as far as I know, for the view that an adoption would be valid, and yet the adopted son would not be entitled to succeed to the property, to which if there was a natural son of the adoptive father, the latter would have succeeded, and logically it seems to me the position is inconsistent." That is also the view of Wallis J. (as he then was) in 33 Mad. 228.[22] The learned Judge referring to 14 Bom. 463[16] observes thus at p. 231 : "In the last case it was held that such an adoption if made after the death of the surviving coparcener and the vesting of the estate in his widow could not divest the estate, *as of course it would if valid*." (The italics are mine). The learned Judge was inclined to the view that if the adoption was held to be valid, the adopted son must divest the estate which vested in the widow of a surviving coparcener and the principle would equally apply to the case of a partition effected by the surviving coparceners of his father. With great respect to the learned Judges, of the Bombay High Court, I am unable to follow their view : *vide* I. L. R. (1937) Bom. 508,[5] I.L.R. (1939) Bom. 512[4] and I. L. R. (1940) Bom. 42.[3]

Mr. Rajah Ayyar again contended that the decisions in 12 Cal. 18[11] and 12 Pat. 642[6] cannot co-exist and the decision in 12 Cal. 18[11] must be said to have laid down that the rights of an adopted son date only from the date he was adopted. As already pointed out, 12 Cal. 18[11] was dealing with collateral succession and their Lordships of the Privy Council only confined the title of the adopted son to date back to the death of the adoptive father only in regard to his inheriting or taking the share of the adoptive father in the adoptive family. Niyogi J. also seems to suggest a reason for this view by pointing out that 12 Cal. 18[11] deals with a case of an obstructed heritage whereas in the case of an adopted son taking the property of his adoptive father it would be an unobstructed heritage : *vide* the observations in I.L.R.(1939) Nag. 88[18] at pp. 99 and 100. Whether this is the ground on which the Privy Council sought to impose such a limitation or not, it is not necessary to consider. But as the Privy Council has introduced that limitation we are bound to follow it and, therefore, 12 Cal. 18[11] cannot be relied on as an authority for curtailing the rights of an adopted son in the adoptive family.

In support of his argument, Mr. Sitarama Rao relied on certain texts of the Hindu law relating to an after-born son begotten after partition and any son of disqualified heir being entitled to take a share of their father after partition has been effected in the family. But as pointed out by Rangnekar J. (*vide* I.L.R. (1939) Bom. 512[4] at page 529) they are governed by different considerations and special texts of Hindu law and the analogy furnished by them would be of no assistance in the solution of the question in issue as the adopted son is likened to a posthumous son and his rights have to be determined on that footing. Mr. Rajah Ayyar has pointed out the several anomalies and inconveniences which would follow from adopting this view. True, there are anomalies in adopting either view. But having regard to the Privy Council decisions, the only logical conclusion is that the plaintiff in this case is entitled to claim a share. The view taken by both the lower Courts is correct and I, therefore, dismiss the second appeal with costs. Leave to appeal granted.

C.R.K./K.S. *Appeal dismissed*

22. ('10) 33 Mad. 228 : 4 I. C. 386 : 7 M.L.T. 236, Suryaprakasa Rao v. Nilamarti Gangaraju.

Hindu Law —

(a) ('40) Mulla, Pages 535, 536 S. 472 and Page 538 Pt. (h).
('38) Gour, Page 208 Pt. (3).

(b) ('40) Mulla, Page 411 S. 336; Page 547 S. 494; Page 552 S. 499 and Page 558 S. 507.
('38) Gour, Page 253, N. 701 ; Page 256, N. 709 ; Page 257, N. 711; Page 258, N. 715 and Page 602 Pt. (4).

(c) ('40) Mulla, Page 391, S. 322.
('38) Gour, Page 588 N. 1464.

A. I. R. (29) 1942 Madras 343

BURN J.

Sedimbi Hanumantharow and others — Appellants

v.

Nidumolu Seetharamayya — Respondent.

Second Appeals Nos. 116 and 203 of 1939, Decided on 19th November 1941, against decrees of Sub-Judge, Masulipatam, in A. S. No. 335 of 1938.

(a) Civil P. C. (1908), S. 100 — Defamation case — Findings that allegations were not true and were malicious are of fact.

In a defamation case the findings that the allegations alleged to be defamatory were not true and that they were meant maliciously are findings of fact and hence no second appeal lies therefrom.

[P 344 C 1]

(b) Civil P. C. (1908), O. 7, R. 11 — Teacher filing suit for damages for wrongful dismissal against President of managing committee of High School—President filing some extracts in support of his defence — Subsequent suit for defamation against President by teacher on ground that extracts filed in previous suit were defamatory—Secretary of managing committee and Headmaster also impleaded without allegation that they were concerned in publication of extracts—Plaint basing cause of action entirely on publication of extracts in Court by President in previous suit—Plaint held disclosed no cause of action against Secretary and Headmaster.

The teacher of a High School instituted a suit for damages for wrongful dismissal against the President of the Managing Committee of the High School and subsequently brought an action for defamation against the President, impleading the Secretary of the Managing Committee and the Headmaster of the High School, on the ground that certain extracts filed by the President in the previous suit in support of his defence were defamatory of the teacher. The plaint based the cause of action entirely upon the publication of the typed extracts in Court by the President in the previous suit. There was no allegation in the plaint that the secretary and the Headmaster were concerned in the publication of the extracts :

Held that the plaint disclosed no cause of action against the Secretary and the Headmaster and therefore the suit was rightly dismissed as against them.

[P 344 C 2]

(c) Tort—Defamation — Doctrine of absolute privilege — Documents filed by defendant in

course of and for purpose of his defence in suit are absolutely privileged even if defamatory of plaintiff.

No action of libel or slander lies, whether against Judges, Counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, even though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal illwill and anger against the person defamed. [P 345 C 1]

Whether a statement in writing filed into Court is privileged or not depends entirely on the nature of the statements in writing that are filed and the purpose for which they are filed. If they are documents considered by a party as being essential for his defence, they are covered by the doctrine of privilege. [P 345 C 1]

The extracts filed by a defendant in the course of and for the purpose of his defence in a suit against him by the plaintiff for damages for wrongful dismissal are absolutely privileged even if they are defamatory of the plaintiff and no action for defamation can be maintained in respect of them : (1892) 1 Q.B. 431, *Rel. on* ; (1859) 1 L.T. 78, *Ref.*; ('38) 25 A.I.R. 1938 Mad. 164, *Disting.* [P 345 C 1]

Ch. Raghava Rao and V. Govindarajachari — for Appellants.

P. Satyanarayana Rao — for Respondent.

JUDGMENT.—These appeals are by the defendants in O. S. No. 194 of 1934 on the file of the District Munsif of Masulipatam. The appellants in S. A. No. 116 were defendants 1 and 2; the appellant in S. A. No. 203 was defendant 3. The suit was filed against them by the respondent for damages for defamation. The respondent was an assistant teacher from 1919 to 1932 in the Hindu College High School at Masulipatam. Defendant 1 was the President and defendant 2 the Secretary of the managing committee of the High School. Defendant 3 was the Headmaster. In 1932 the respondent was dismissed by the managing committee and he filed a suit for damages for wrongful dismissal, O. S. No. 5 of 1933 in the Court of the District Munsif of Masulipatam. To that suit defendant 1 as President of the managing committee was the only defendant. Defendants 2 and 3 were not impleaded. During the trial of the suit on 29th March 1933 defendant 1 filed into Court extracts (Ex. A) from a report which had been sent by defendant 3 to the managing committee in June 1931. The report, according to the respondent, contained allegations against him which were defamatory, and the extracts filed by defendant 1 were extracts from the report referring to the respondent. Both the lower Courts have found that the allegations in these extracts were defamatory, and the lower appellate Court has confirmed the decree given by the trial Court against all the defendants for Rs. 300 damages and costs. Both the Courts below have found that the allegations against the respondent in the report of the Headmaster to the Managing Committee were not true, and they have also found that they were meant maliciously. No appeal lies with regard to these findings of fact. The main questions argued on behalf of the appellants have been, firstly, that there was no cause of action disclosed in the plaint against defendants 2 and 3 and secondly, that the publication by defendant 1 was made on a privileged occasion.

With regard to the first contention it is undoubtedly well founded. As already stated, it was only defendant 1 against whom the suit O. S. No. 5 of 1933 was filed. He alone was responsible for producing into Court in the course of his evidence the extracts marked Ex. A on 29th March 1933. Defendants 2 and 3 cannot, in any way, be held liable for the actions of defendant 1. Some attempt has been made to show that defendants 2 and 3 were concerned in the publication of these libels because the extracts were prepared by some typist. It is sufficient to say that no allegation of that kind was made in the plaint. The plaint bases the cause of action entirely upon the publication of these typed extracts in the Court on 29th March 1933. Paragraph 9 of the plaint says "the cause of action for the suit arose on and from 29th March 1933, the date on which copy of the report complained of was filed into this Court in O. S. No. 5 of 1933." Both the lower Courts have been misled into discussing the question whether the Headmaster published these allegations when he submittted his report to the Committee in 1931, and whether the Secretary or the Headmaster or both published these allegations when they handed to a typist the full report with instructions to make extracts from it. It is sufficient to say that these occasions of publication are not set out in the plaint as giving rise to any cause of action. The reason is clear. The plaint was filed on 27th March 1934. The period of limitation for such a suit is twelve months, and therefore, any publication made before 27th March 1933 would have given a cause of action for a suit which on 27th March 1934 would have been barred by limitation. The lower Courts ought not to have allowed themselves to be led into a discussion of the submission of the report by the Headmaster to the Committee, or of publishing it before some typist whose identity is not known. The appeal of defendants 2 and 3 must, therefore, succeed on the ground that the plaint disclosed no cause of action against them.

Defendant 1's case rests upon the plea of privilege. It is contended for the respondent that this plea of absolute privilege was not raised in the trial Court. I am unable to verify this allegation because the written statement of defendant 1 has not been printed. It is true that no issue on the plea of absolute privilege was framed by the learned District Munsif. But it is also clear from the judgment of the learned District Munsif that this question of privilege was in issue between the parties and was discussed by him and found by him in favour of the plaintiff. It was also discussed in the lower appellate Court, and it is not possible now to say that defendant 1 cannot be heard on the question of privilege. The extracts were filed by defendant 1 in the course of his defence in O. S. No. 5 of 1933. The defendant having been sued for damages for wrongful dismissal thought it necessary for the purpose of his defence to show the grounds upon which the managing committee had taken the step of dismissing the plaintiff. The contention of defendant 1 is that these extracts having been filed in such circumstances and for such a purpose, the occasion was one of absolute privilege. That is I think correct. The authorities are not doubtful. In (1892) 1 Q. B. 431[1] at p. 451, Lopes L. J. has stated :

"The authorities establish beyond all question this, that neither party, witness, counsel, jury, nor Judge, can be put to answer civilly or criminally for

1. (1892) 1 Q. B. 431 : 61 L.J.Q.B. 409 : 66 L. T. 513 : 56 J.P. 404 : 40 W.R. 450, Royal Acquarium and Summer and Winter Garden Society v. Parkinson.

words spoken in office; that no action of libel or slander lies, whether against Judges, counsel, witnesses, or parties, for words written or spoken in the course of any proceeding before any Court recognized by law, and this though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal illwill and anger against the person defamed."

The learned counsel for the appellants has also relied upon the case in (1859) 1 L. T. 78.[2] These extracts, Ex. A, were undoubtedly filed by defendant 1 in the course of and for the purpose of his defence against a suit for damages for wrongful dismissal. The learned counsel for the respondent has drawn my attention to several decisions in which it was held that writs, pleadings, and affidavits are governed by the law of absolute privilege and has attempted to say that not every statement in writing filed into Court is privileged. The answer is that it depends entirely on the nature of the statements in writing that are filed and the purpose for which they are filed. If they are documents considered by a party as being essential for his defence, they are covered by the doctrine of privilege. Learned counsel has cited the case in (1938) 2 M.L.J. 340.[3] But that is quite irrelevant to this case. That was not a case of statements made in Court but a case of defamatory information given out of Court to a vakil. Defendant 1 also must succeed in this appeal since he is protected by the doctrine of absolute privilege. Both these appeals are accordingly allowed and the plaintiff's suit dismissed with costs throughout. Leave to appeal refused.

C.R.K./G.N. *Appeals allowed.*

2. (1859) 1 L. T. 78, Kennedy v. Hilliard.
3. ('38) 25 A.I.R. 1938 Mad. 164 : 176 I. C. 574 : (1938) 2 M.L.J. 340, Balammal v. Palandi Naidu.

C. P. C. —

(a) ('40) Chitaley, Ss. 100 & 101, N. 52 Pt. 1.
('41) Mulla, Page 367 N. : "No second appeal lies on the ground of an erroneous finding of fact."
(b) ('40) Chitaley, O. 7 R. 11, N. 3 Pt. 1.
('41) Mulla, Page 612 N. : " Clause (a) : where plaint does not disclose a cause of action."
(c) ('40) Chitaley, S. 9, N. 58 Pt. 4.
('41) Mulla, Page 32 Pt. (h).

A. I. R. (29) 1942 Madras 345

KING AND PATANJALI SASTRI JJ.

T. R. Paramasivam and another — *Appellants*

v.

Parvathareddy Chenchurami Reddy and others — *Respondents.*

Appeal No. 184 of 1938, Decided on 26th February 1941, against decree of District Court, Nellore, D/- 6th November 1937.

Provincial Insolvency Act (1920), Ss. 4 (2), 38 and 39 — Scope of S. 4 (2) — S. 4 (2) does not apply to case of debts due to one creditor by another — Composition scheme under S. 38 imposing obligation on one creditor to give up claim against another — Scheme cannot under S. 39 bind creditor who did not consent to it.

Section 4 (2) shows that a decision under that section is binding only as against the debtor and the debtor's estate on the one hand and all claimants against him or it on the other; S. 4 (2) cannot apply to a matter which arises between two creditors inter se and not between either of them and the insolvent and since S. 39 deals with the effect of a scheme which has been assented to by the requisite number and value of the creditors and states that such a scheme shall be binding on all the creditors, but only so far as relates to any debt due to them from the debtor and provable under the Act, S. 39 cannot possibly cover the case of debts due to one creditor by another. [P 346 C 1]

Consequently, a scheme of composition under S. 38 imposing an obligation upon one creditor to give up his claim against another creditor cannot under S. 39 be binding upon the creditor who did not consent to the scheme. [P 346 C 1]

V. Subramaniam — for Appellants.

D. R. Krishna Rao — for Respondents.

KING J. — The appellants here sued the defendants upon a promissory note executed jointly by defendant 1 and another by name Lakshminarasa Reddi. Lakshminarasa Reddi became insolvent in 1931 and included this debt in his schedule of debts. In 1936 a scheme was put forward by Lakshminarasa Reddi for the settlement of his debts. In that scheme, the present plaintiffs were included as creditor No. 11 and defendant 1 as creditor No. 9. Creditors Nos. 8 to 10 in the insolvency, as appears from the terms of the scheme, were in possession of certain mica over which they claimed a charge; and one of the terms of the scheme was that, in consideration of those creditors who had claims against creditors Nos. 8 to 10 as sureties for the insolvent giving up those claims, they would bring the mica into Court to be treated as part of the insolvent's estate. A further provision was made that those creditors who had claims against creditors Nos. 8, 9 and 10 should receive a larger dividend in pursuance of the settlement than the ordinary creditors as consideration for their giving up their claims against the sureties. It is contended by the appellants here that they did not consent to this scheme and that therefore the scheme does not bind them under S. 39, Provincial Insolvency Act. A number of issues were framed in the suit including the following preliminary issue—Is the suit liable to be dismissed by virtue of the provisions of the scheme in I. P. No. 54 of 1931? The learned District Judge has examined the terms of the scheme and has held that the scheme recites that the present plaintiffs had in fact agreed to give up their claim against the present respondents. He accordingly holds that the provisions of the scheme, proving in this way that the plaintiffs had actually agreed to give up their claim against the defendants, rendered this suit liable to be dismissed. There is no doubt that, if this finding were correct, the dismissal of the suit can be upheld; but, we are of opinion upon an examination of the terms of the scheme that the learned District Judge has misunderstood them. The scheme does not narrate any statement of fact. It is quite clear from the language used that it is proposed by the insolvent that, in consideration for the receipt of enhanced dividends, the plaintiffs and other creditors in a similar situation should give up their claims against the surety. We can find no justification for the view that before the insolvent presented the scheme to the Court he had already in fact obtained the promise of the creditors to abide by these terms of the scheme. The reason therefore upon which the dismissal of the suit has been based by the learned District Judge fails and the dismissal, unless it can be otherwise supported, must be set aside.

It is argued on behalf of the respondents here that, even though the appellants had not agreed beforehand to the terms of the scheme, the fact that the majority of the creditors in number and three-fourth in value had approved of the composition as a whole renders that composition binding upon the appellants, whether or not they accepted it at any time. It is argued that, under S. 4, the powers of the insolvency Court are very wide, that the rights of the appellants as against the respondents in this matter were intimately connected with the proposed administration of the insolvency and that the only remedy of the plaintiffs, if they were dissatisfied with the order passed approving of the scheme, was to have appealed against it. The terms of the Act itself furnish a complete answer to this argument. It is clear from the analysis which we have given of the proposed terms of the compromise that the Court is here imposing an obligation upon one creditor to give up his claim against another creditor. This is therefore essentially a matter which arises between two creditors inter se and not between either of them and the insolvent. Sub-section (2) of S. 4 shows that a decision under that section is binding only as against the debtor and the debtor's estate on the one hand and all claimants against him or it on the other; and S. 39 which deals with the effect of a scheme which has been assented to by the requisite number and value of the creditors, states that such a scheme shall be binding on all the creditors, but only so far as relates to any debt due to them from the debtor and provable under this Act. Section 39 therefore cannot possibly cover the case of debts due to one creditor by another, and therefore if, in fact, the appellants here have not consented to the proposed scheme for composition under S. 38, it cannot under Sec. 39 be binding upon them. The appeal is accordingly allowed and the suit remanded to the learned District Judge for disposal accordjng to law. Costs will abide the result. Court-fee will be refunded to the appellants.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 346

BURN J.

Pachai Ammal — Appellant

v.

Corporation of Madras — Respondent.

City Civil Court Appeal No. 61 of 1940, Decided on 7th October 1941, against decree of Addl. Judge, City Civil Court, Madras, D/- 4th October 1940.

Madras City Municipal Act (4 of 1919), S. 100 —Building owned by one and same person — Different portions of building cannot be assessed in different names because they are occupied by different persons.

Section 100 simply says that every building shall be assessed, and it provides that every single building must be assessed together with its site and appurtenant buildings unless the building and appurtenant buildings belong to a different person. S. 100 is precisely that provision of law which prevents the Commissioner from dividing the assessment of a building owned by one and the same person by assessing the different portions of the same building in different names because they have been occupied by different persons. [P 347 C 1]

N. S. Rangaswami Ayyangar — for Appellant.

A. Suryanarayaniah — for Respondent.

JUDGMENT.—This is an appeal by the defendant in O. S. No. 441 of 1940 tried by the learned Additional Judge of the city civil Court. The suit was filed by the Corporation of Madras for property tax for three years 1937-38, 1938-39, 1939-40 due on a building and site described as No. 88-A, Adam Sahib Street. The learned Judge of the Court below gave the Corporation a decree and the defendant has preferred this appeal. 88-A, Adam Sahib Street, as the learned Judge of the city civil Court, has said, is part of a large house which also has a door opening upon Mannarswami Koil Street. In Mannarswami Koil Street it is numbered 85. Now this house, the whole of it, belongs to the defendant. In the portion fronting upon Mannarswami Koil Street she and her husband lived ; in the other portion there are four rooms which are let out to separate tenants. This house, 85 Mannarswami Koil Street, has been shown in the Corporation's property registers as the property of the defendant and there is no doubt about her ownership of it. 88-A, Adam Sahib Street did not appear at all in the Corporation's property registers until 1936-37. In that year a general revision of property tax was made and the Commissioner of the Corporation, for some reason which has not been explained, entered 88-A Adam Sahib Street in the property tax register as a separate item. He also entered the name of Peddan Chetty (which is also the name of the defendant's husband) as the owner. The entry of 85 Mannarswami Koil Street in the register remained unchanged in the revision. The valuation remained unchanged and consequently, the property tax remained the same.

In these circumstances it is easy to understand and accept the defendant's plea that she knew nothing whatever about this revision of the property tax. As learned Counsel for the defendant-appellant points out, the general notification of a revision of assessment could not be sufficient to give the defendant any opportunity even of finding out that a change had been made in the assessment of her property. If she had gone to look at the new registers, she would have seen her house No. 85 Mannarswami Koil Street still in the new register under her own name with the same valuation and the same assessment. In the remarks column she would have found a slightly different description of it. But in the essentials regarding the amount of tax to be paid she would have found no change. If she had looked through the register, she could not, unless supernaturally inspired, have guessed that 88-A Adam Sahib Street assessed at Rs. 86 in the name of Peddan Chetty had anything whatever to do with her. It is not disputed that no special notice was given to the defendant, the case for the Corporation being that the general notification regarding the revision of assessment is sufficient. In these circumstances the question is whether the Commissioner of the Corporation had any authority to split up in the way he has done the property belonging to this defendant into two separate numbers and assess them separately to tax. Learned counsel for the Corporation can only refer me to S. 100, City Municipal Act. This says :

" Every building shall be assessed together with its site and other adjacent premises occupied as appurtenances thereto unless the owner of the building is a different person from the owner of such site or premises."

This, it appears to me, is precisely the provision of law which prevents the Commissioner from dividing the assessment in this case into two. There is no dispute about the fact that these two door num-

bers 85 Mannarswami Koil Street and 88-A Adam Sahib Street formed parts of a single building. The learned Judge of the Court below describes it as one entire house separately occupied in different portions. But it was built undoubtedly as one house. It belongs wholly to the defendant and under S. 100 there can only be one assessment on it. The learned Judge of the city civil Court appears to think that it was reasonable to divide the property into two and he says that S. 100 does not seem to prevent the creation of different units where different portions are in the occupation of different persons. I regret I cannot agree with this. Section 100 simply says that every building shall be assessed and it provides that every single building must be assessed together with its site and appurtenant building unless the building and appurtenant buildings belong to a different person. Section 100 says nothing whatever about assessing different portions of the same building owned by one and the same person in different names because they have been occupied by different persons. In these circumstances I am clear that the Corporation had no authority to assess No. 88-A separately, that the assessment was irregular and therefore it cannot be considered final. The result is that this appeal succeeds and the Corporation's suit is dismissed with costs throughout.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 347 (1)

HORWILL J.

Public Prosecutor — Appellant

v.

S. Papanna and others — Respondents.

Criminal Appeal No. 644 of 1941, Decided on 14th November 1941, against acquittal by Sub-Divisional Magistrate, Gooty, in C. C. No. 49 of 1941.

(a) Factories Act (1934), Ss. 60 and 2 (l) — Owner or occupier is not relieved of responsibility under Act by appointing manager—Owner or occupier when can escape liability — Fact that occupier is ignorant person may be reason for awarding him smaller punishment than manager but it is no ground for acquitting him.

The owners or occupiers of a factory cannot relieve themselves of their responsibilities for seeing that the requirements of the Factories Act are complied with by appointing a manager; they must also see that the manager carries out his duties. It is only when the manager has acted in express disobedience of their order and they have done their best to see that the provisions of the Act are complied with, that they can themselves escape liability. Section 60 makes it clear that both the manager and the occupier are liable. The fact that the occupiers are ignorant persons who trusted to the knowledge and good sense of their manager might be a reason for awarding them a smaller punishment than the manager but it is no reason for acquitting them. [P 347 C 2]

(b) Factories Act (1934), S. 2 (l), Proviso and S. 60 — Manager of factory is not managing agent within S. 2 (l).

The manager of a factory is not a managing agent within the proviso to S. 2 (l) and, therefore, cannot be deemed to be the occupier of the factory. [P 347 C 2]

Appellant in person.

Dr. V. V. Chowdhary — for Respondents.

JUDGMENT. — Four persons, who were numbered as accused 1 to 4, were charged under S. 60, Factories Act, as the occupiers of a factory, and accused 5 as the manager of that factory, with contravening the provisions of the Act by not fencing in a certain machine. The Sub-divisional Magistrate imposed a very inadequate fine of Rs. 10 on accused 5 and acquitted accused 1 to 4 altogether, on the ground that he believed their statements that they had left the affairs of the factory in the hands of accused 5. The Crown has appealed.

The owners or occupiers of a factory cannot relieve themselves of their responsibilities for seeing that the requirements of the Factories Act are complied with by appointing a manager; they must also see that the manager carries out his duties. It is only when the manager has acted in express disobedience of their order and they have done their best to see that the provisions of the Act are complied with, that they can themselves escape liability. Section 60 makes it clear that both the manager and the occupier are liable. Dr. Chowdhry has referred to the proviso to the definition of "occupier," that where the affairs of a factory are entrusted to a managing agent, such agent shall be deemed to be the occupier of the factory. A manager is not however a managing agent. The ultimate control of this factory was in the hands of accused 1 to 4; and if the requirements of the Act were not complied with, they were therefore liable to punishment. If, as is represented on their behalf, they are ignorant persons who trusted to the knowledge and good sense of their manager, that might be a reason for awarding them a smaller punishment than the manager, but it is no reason for acquitting them. The acquittal of accused 1 to 4 is therefore set aside. As the sentence on the manager was only a fine of Rs. 10, it would perhaps be unfair to sentence these accused to anything more. I therefore sentence each of them to pay a fine of Rs. 10.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 347 (2)

HORWILL J.

Public Prosecutor — Appellant

v.

Gopalakrishnan Pillai — Respondent.

Criminal Appeal No. 444 of 1941, Decided on 11th September 1941, against acquittal by Sub-Divisional Magistrate, Trichinopoly, in C. A. No. 4 of 1941.

Madras District Municipalities Act (5 of 1920), S. 347—Municipality making complaint on printed form in general use—Particulars of offence specified — Name of person to conduct prosecution filled in — Health officer recommending prosecution and Commissioner sanctioning it — S. 347 held complied with.

The complaint made by the municipality was on a printed form in general use. In column 7 the particulars of the offence committed were given and below was to be found the signature of the person who was to conduct the prosecution, namely, the Prosecuting Sanitary Inspector. In column 12 were to be found the recommendation of the Health Officer and the order of the Commissioner. The Health Officer recommended the prosecution and the Commissioner sanctioned it. The whole object of putting up the matter to the Commissioner was to obtain the special authorization required by S. 347. It was contended that S. 347 was not complied with :

Held that it was not necessary that the complaint should show on the face of it that there was any

express authorization, although the Magistrate must of course be satisfied on the matter before he made enquiry into the complaint. Although sanction implied a passive attitude whereas authorization implied an active attitude, in view of the act of the Commissioner rather than the actual word used, it could not be doubted that the special authorization required under S. 347 was in fact given. [P 348 C 1]

Appellant in person.

K. S. Jayarama Ayyar for T. V. Ramanatha Iyer — for Respondent.

JUDGMENT. — This is an appeal against the acquittal of the accused of a charge under S. 199, District Municipalities Act, of raising his wall without the permission of the executive authority of the Trichinopoly Municipality. The accused was first convicted by the Town Sub-Magistrate, Trichinopoly; but the conviction was set aside in appeal by the Sub-Divisional Magistrate on the technical ground that the provisions of S. 347 had not been properly complied with, in that the Commissioner merely sanctioned the prosecution and did not specifically authorise it. The complaint made by the Municipality was on a printed form in general use. In column 7 are written the particulars of the offence committed and below is to be found the signature of the person who is to conduct the prosecution — in this case the Prosecuting Sanitary Inspector. In column 12 are to be found the recommendation of the Health Officer and the order of the Commissioner. In this case the Health Officer recommended the prosecution and the Commissioner sanctioned it. It is true that sanction implies a passive attitude, whereas authorization implies an active attitude; but if we look at the act of the Commissioner rather than at the actual word used, I do not think there is much room for doubt that the special authorization required by S. 347 was in fact given. The form used in this case was that ordinarily used by the Municipality for prosecution and the whole object of putting up this matter to the Commissioner was to obtain the special authorization required by S. 347. Moreover, as the learned Public Prosecutor points out, it is not necessary that the complaint should show on the face of it that there was any express authorization although the Magistrate must of course be satisfied on that matter before he makes enquiry into the complaint. One would expect the Commissioner to be consulted about the desirability of launching a prosecution before the complaint is submitted to him for his signature. I do not consider that there was any justification for the conclusion of the Sub-Divisional Magistrate that the Commissioner had not specially authorized the prosecution.

Mr. Jayarama Iyer pleades that even though the Sub-Divisional Magistrate erred, there is no need to further harass the accused by fining him. This case is however in a sense a test case; and if the acquittal is not set aside, the municipality might be embarrassed in its proceedings against other persons who violate the District Municipalities Act. The trial Magistrate thought that Rs. 25 was a suitable fine; and I do not consider that this sentence can be said to be excessive. The order of acquittal is therefore set aside and the accused convicted under S. 199 and sentenced to a fine of Rs. 25.

C.R.K./G.N. *Order set aside.*

A. I. R. (29) 1942 Madras 348

LEACH C. J. AND HAPPELL J.

T. Sundara Rao Naidu — Appellant

v.

Commissioner, Corporation of Madras and another — Respondents.

Letters Patent Appeal No. 31 of 1941, Decided on 28th October 1941, against order of Somayya J., in C. M. P. No. 3378 of 1941, D/- 24th June 1941.

(a) Madras City Municipal Act (4 of 1919), S. 54—Elected person admitting vacancy by his non-attendance—Commissioner is not bound to take action under S. 54 and can proceed to take steps to fill vacancy.

Where an elected person admits the vacancy caused by his non-attendance there is no necessity for the Commissioner to make an application under S. 54. It is open to such person to apply himself but that does not mean that the Commissioner was disentitled to take action in the meantime for filling up the vacancy. [P 349 C 2]

(b) Certiorari — Writ of — It can be granted only when no other remedy is open.

A writ of certiorari can only be granted when there is no other suitable remedy available to the party aggrieved. [P 349 C 2]

Where by the time the certiorari proceedings are taken and orders are passed thereon a candidate seeking election to a vacant seat in City Municipal Council is declared duly elected and has taken the oath of office a writ of certiorari should not be issued. The proper procedure when the validity of such election is challenged is for the aggrieved party to file an election petition and have it adjudicated by the Court of Small Causes as provided in the rules : ('32) 19 A. I. R. 1932 Mad. 321, *Rel. on.* [P 349 C 2]

P. V. Rajamannar and K. Subba Rao — for Appellant.

A. Suryanarayaniah and S. A. Seshadri Ayyangar — for Respondents.

LEACH C. J.—This is an appeal under Cl. 15, Letters Patent, against an order passed by Somayya J. which had the effect of setting aside the election of a councillor to the Corporation of Madras for the 26th division of the City. We consider that the appeal is well founded. In 1936 respondent 2 was elected a councillor for this division. In the month of November 1940 she was convicted under the Defence of India Act, 1939, and sentenced to imprisonment for one year. The last meeting of the council which she attended was held on 20th November 1940. Section 53 (1) (i), Madras City Municipal Act, 1919, states that subject to the provisions of S. 54, a councillor or alderman shall cease to hold office if he fails to attend meetings of the council for a period of three consecutive months beginning from the date of the commencement of his term of office or of the last meeting he attended as the case may be. Respondent 2 underwent the full term of imprisonment and, therefore, was not able to attend any of the meetings of the council for a year. Sub-section (4) of S. 53 states that in the case of a person who has ceased to be a councillor or alderman in consequence of failure to attend meetings, the matter shall be reported by the Commissioner to the council which may restore the person to office. At the expiration of three months from 20th November 1940 the Commissioner reported to the council that respondent 2 had been absent from meetings for this period and

on the receipt of the report the council passed a resolution refusing to restore her to office.

Section 55A (2) provides that a casual vacancy in the office of a councillor shall be filled at a casual election which will be fixed by the Commissioner to take place as soon as may be after the occurrence of the vacancy except in certain circumstances which do not apply here. On 1st May 1941, the Commissioner issued a notice to respondent 2 calling upon her to state within ten days whether she admitted that she had ceased to hold the office of councillor by reason of S. 53 (1) (i). On 5th May respondent 2 replied admitting that she had ceased to hold the office by reason of the provisions of that section. It was then the duty of the Commissioner to take steps to fill the vacancy. On 20th May a notification was published intimating that election would take place on 23rd June and that nominations would be received on 23rd, 26th and 27th May. On 23rd May, that is, three days after the notification had appeared, respondent 2 wrote to the Commissioner stating that by her letter of 5th May she meant to imply that she had not attended meetings of the Corporation for three consecutive months but she did not intend to admit as the legal consequence of her non-attendance that her seat had become vacant. If, however, the letter was to be construed otherwise, she withdrew her admission, as the letter had been written under a misapprehension of the legal position. The Commissioner replied on 26th May stating that she had admitted in unequivocal terms that she had ceased to hold office and as the result of that admission he had taken steps to hold a bye-election which would be held as arranged. On 29th May respondent 2 made an application to the Chief Judge of the Court of Small Causes under S. 54. That section reads as follows :

"54. (1) Whenever it is alleged that any person who has been elected or appointed as a councillor (or elected as an alderman) is disqualified under S. 52 or S. 53 (or S. 53-A) and such person does not admit the allegation or whenever any councillor (or alderman) is himself in doubt whether or not he has become disqualified for office, such councillor (or alderman) or any other councillor (or alderman) may, and the Commissioner, at the request of the council, (or on a direction from the Provincial Government) shall apply to the Chief Judge of the Small Cause Court. (2) The said Chief Judge, after making such inquiry as he deems necessary, shall determine whether or not such person is disqualified under Sec. 52 or Sec. 53 (or S. 53-A) and his decision shall be final. (3) Until an application has been made under sub-s. (1) and a decision thereon has been obtained, such person shall be entitled to act as if he were not disqualified."

This application was determined by the Chief Judge on 22nd September and the decision was adverse to respondent 2. The Chief Judge held that she had ceased to hold the office of councillor in February 1941. In the meantime, the election was held and on 10th June 1941 the appellant was declared to be duly elected He was the only candidate nominated and this explains why he was declared duly elected before the notified date of poll, namely, 23rd June. On 17th June, respondent 2 applied to this Court for a writ of certiorari with the object of obtaining an order quashing the election proceedings. This application was heard during the vacation by Somayya J. The learned Judge was of the opinion that respondent 2 was entitled to withdraw her admission that there was a vacancy and that by virtue of S. 54 of the Act the Commissioner had no power to proceed with the bye-election until the decision of the Chief Judge of the Small Cause Court had been obtained on the application under S. 54. There was no necessity for the Commissioner to make an application under that section because respondent 2 had admitted the vacancy. It was open to her to apply herself, but that does not mean that the Commissioner was disentitled to take action in the meantime.

Great stress has been laid by the learned counsel for respondent 2 on sub-s. (3) of S. 54. That section entitles a person who is apparently subject to disqualification to sit and vote at meetings of the council until the application has been decided, but this provision has obviously been inserted to solve any question arising with regard to the validity of the proceedings should the Chief Judge of the Small Cause Court decide that the seat had been vacated. As already pointed out, the Chief Judge held that respondent 2 had ceased to be a member of the council in the month of February. That being the legal position, the Commissioner was entitled, in fact it was his duty, to take the steps which he did take. The order of Somayya J., quashed all proceedings which had taken place after 22nd May for the purpose of filling the vacancy. This means that in certiorari proceedings the election was set aside. The order of Somayya J., was passed on 24th June by which time the appellant had been declared to be duly elected and had taken the oath of office. A writ of certiorari should not have been issued in such circumstances. The proper procedure when the validity of such an election is challenged is for the aggrieved party to file an election petition. In 1936 the Government, acting under the powers conferred upon it by the Act, framed and notified rules for the adjudication by the Court of Small Causes, Madras, of disputes arising out of election of councillors or aldermen of the corporation. In 62 M. L. J. 644[1] a Bench of this Court in a matter arising out of an election to a District Council pointed out that the writ of certiorari can only be granted when there is no other suitable remedy available to the party aggrieved. There was another remedy open to respondent 2 as indicated; the writ should not have been issued in this case. The appeal will be allowed and the order of the learned Judge vacated. The appellant is entitled to his costs as against respondent 2.

C.R.K./K.S. *Appeal allowed.*

1. ('32) 19 A. I. R. 1932 Mad. 321 : 137 I. C. 868 : 62 M. L. J. 644, Govindasami Pillai v. Ramalingaswami Pillai.

A. I. R. (29) 1942 Madras 349

VENKATARAMANA RAO J.

T. R. Rajakumari — Applicant

v.

Motion Picture Producers Combine Ltd. (in liquidation) by Official Liquidators—Respondents.

Application No. 2197 of 1941 in O. P. No. 231 of 1940, Decided on 8th December 1941.

Companies Act (1913), S. 191 and Company Rules. Rr. 83, 91—Delay in filing proof of claim should be excused—Claimant may be paid dividend without disturbing previous dividends —Amendment of R. 91 suggested.

The only penalty for failure to come in within the time stated in the notice for proving the claim is that the claimant is excluded from the benefit of any distribution made before such debts are proved, that is, he can only claim a proportionate share in such assets as may remain undistributed at the time when

the proof is claimed and without disturbing any distribution made before such proof. [P 350C 2]

Therefore an application for excusing delay in filing proof of a claim should be allowed and so long as justice can be done to a creditor without disturbing the dividend already declared or paid, there is no reason why he should be prevented from getting his dividend : 27 Mad. 496 (F.B.) and (1872) 7 Ch. 646, *Rel. on.* [P 350 C 2 ; P 351 C 1]

(Amendment of R. 91 suggested as on a literal reading of the rule it would seem that unless a creditor satisfies that owing to ignorance or want of notice he did not file proof of his debt, his claim cannot be admitted.) [P 350 C 1 ; P 351 C 1]

Thiruvenkatachariar and K. Subramaniam — for Applicant.

A. K. Vepa — for Respondents.

ORDER.—This is an application by one Rajakumari, a creditor, for excusing the delay in filing her affidavit of proof of her claim and for directing the Official Liquidator to receive the same. The Official Liquidator in pursuance of R. 83 of the Indian Company Rules gave notice to all the creditors in accordance with Form No. 30 of the Appendix I to the Rules requiring them to prove their claim before 30th April 1941. The Official Liquidator contends that under R. 91 of the Rules the applicant is not entitled to have her claim admitted and unless the provisions of the said rule are satisfied, there is no provision by which her claim can be admitted. The said rule runs thus :

" If any creditor fails, either owing to ignorance or want of notice, to file proof of his debt with the liquidator within the time specified in the advertisement referred to in R. 83, such creditor may apply to the Judge or Registrar for relief and the Judge or Registrar, may, upon such terms as he thinks just, adjudicate upon such debt himself or direct the liquidator to do so and make such other orders as he shall think fit."

On a literal reading of the rule, it would seem that unless a creditor satisfies that owing to ignorance or want of notice he did not file proof of his debt, his claim cannot be admitted. Mr. Thiruvenkatachari on behalf of the applicant concedes that it appears to be so but contends that in this particular case it is due to ignorance that his client could not file proof of her claim in time. He further contends that the rule goes far beyond the provisions of the statute. The relevant provisions are Ss. 191 and 229 of the Indian Companies Act. Section 191 provides that " the Court may fix a time or times within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before those debts are proved."

The section does not say that if the proof of debt was not filed in time, the Court could not excuse the delay or excuse the delay only under certain circumstances as R. 91 which is framed in pursuance of S. 246 seems to provide. Under S. 229 :

" In the winding up of an insolvent company the same rules shall prevail . . . . as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company and make such claims against the company as they respectively are entitled to by virtue of this section."

The rule followed under the English Bankruptcy Act is that enacted in S. 65 which runs thus :

" Any creditor who has not proved his debt before the declaration of any dividend or dividends shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein." (*vide* p. 377 of Williams Bankruptcy Practice, Edn. 14.)

It is the same principle that is now being followed in the administration of insolvent's estates under the Presidency Towns Insolvency Act (*vide* S. 72, Presidency Towns Insolvency Act). So far as the English practice under the Company law is concerned, the principle observed is thus stated in Palmer's Winding up, Part 2 at p. 483 :

" As by the Act the assets are impressed with a trust in favour of all the creditors, the Court will make no difficulty in admitting proofs after the expiration of the time fixed. No mischief can be done to other creditors by reason of the delay or laches of any creditor, since, if he delays beyond the proper time, he must take his chance of what assets he can find for payment of his debt, not disturbing any former dividend."

Of course the difficulty will not occur under the English practice because the lists are settled from time to time. Under the Indian Companies Act of 1882 the principle enunciated in (1872) 7 Ch. 646,[1] was applied in our High Court in the case reported in 27 Mad. 496.[2] That decision was based on an interpretation of S. 156, Companies Act of 1862 but the language of which is almost similar to S. 191 of the present Act. The learned Judges observed thus :

" The only penalty for failure to come in within the time stated in the notice, is the penalty prescribed in the latter part of S. 156, viz., that the claimant is excluded from the benefit of any distribution made before such debts are proved, that is, he can only claim a proportionate share in such assets as may remain undistributed at the time when the proof is claimed and without disturbing any distribution made before such proof."

In (1872) 7 Ch. 646[1] at p. 649, Mellish L. J. explains thus the principle that should be observed in these cases :

" The Legislature intended us to follow the analogy of other cases where the assets of a debtor are to be divided amongst his creditors, whether in bankruptcy or insolvency, or under a trust for creditors or under a decree of the Court of Chancery in an administration suit. In those cases the rule is that everybody who had a subsisting claim at the time of the adjudication, the insolvency, the creation of the trust for creditors, or the administration decree, as the case may be, is entitled to participate in the assets and that the statute of limitation does not run against this claim, but as long as assets remain unadministered he is at liberty to come in and prove his claim, not disturbing any former dividend."

Therefore so long as justice can be done to a creditor without disturbing the dividend already declared or paid, there is no reason why he should be prevented from getting his dividend. In the present case, it would seem to me that the applicant would come within the meaning of R. 91 and I am therefore prepared to excuse the delay. I therefore direct the Official Liquidator to admit the applicant's claim without further proof and pay her the divi-

1. (1872) 7 Ch. 646 : 41 L. J. Ch. 732 : 27 L. T. 88 : 20 W. R. 762, In re General Rolling Stock Co.
2. ('04) 27 Mad. 496 (F.B.), Isack Jesudasen Pillay v. Ramasamy Chetty.

dend due to her if he can do so without disturbing the previous dividend and if he has funds enough in his hands. It seems to me desirable that R. 91 as framed should be amended on the lines of S. 65, English Bankruptcy Act, or S. 72, Presidency Towns Insolvency Act, as it would be in consonance with the principle laid down in the cases which I have referred to above.

C.R.K./K.S. *Application allowed.*

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* A. I. R. (29) 1942 Madras 351

VENKATARAMANA RAO J.

S. K. Panikar — Applicant

v.

Travancore National and Quilon Bank Ltd. by its Official Liquidators — Respondents.

Application No. 1326 of 1939, in O. P. No. 158 of 1938, Decided on 9th November 1939.

***Banker and Customer — Deposit by Hindu husband in name of himself and his wife — Deposit payable to either or survivor — Deposit must be presumed to belong to husband in absence of contrary contract — Deposit can be set off against amount due to bank from husband.**

Under the law of set off which is applicable in the winding up of a company which is the law prevailing in the bankruptcy of a debtor where there are two accounts, one in the account of *A* and the other in the account of *A* and *B*, if it is shown that the latter account though standing in the name of *A* and *B* was really in trust for *A*, the amount due under one account can be set off against the amount due under another account : (1879) 12 Ch. D. 491, *Rel. on.* [P 351 C 2]

Under the law prevailing in India a deposit by a husband in the name of himself and his wife payable to either or survivor in the absence of evidence to the contrary must be presumed to belong to the husband and therefore can be set off against the amount due to the bank from the husband : ('28) 15 A. I. R. 1928 P. C. 172, *Rel. on.* [P 351 C 2]

K. K. Sridharan — for Applicant.

ORDER. — This is an application for leave to set off the amount standing to the credit of the applicant in the current and savings bank, either or survivor account in the name of the applicant and his wife Gowrikutti Amma in the Calcutta Branch of the Travancore National and Quilon Bank Ltd., against the loan due and payable by the applicant to the bank. The amount due by him to the bank is a sum of Rs. 2000 and there is a sum of Rs. 1100 to his credit in the Current and Savings Bank account of the bank. In his affidavit the applicant alleges that he opened a Current and Savings Bank account about April 1937 in the Calcutta Branch of the bank in his name and in the name of his wife Gowri Amma on either or survivor account and deposited some amount, that the money deposited belonged to him, that under his instructions the Chief Auditor, B. N. Railway, Calcutta, was forwarding his salary every month to be credited to the said account and that the amount now standing to his credit in the said account represented the balance of his salary left after his withdrawals from the account. He further alleges that for convenience of operation of the account and to facilitate the drawing of the amount in the said account by his wife in the event of her surviving him, he joined her name also in the said account and made it an either or survivor account. It appears from the accounts of the bank that the applicant took a loan of Rs. 3000 in November 1937 and that he repaid towards that loan a sum of Rs. 1000 in February 1938 by setting off a sum of Rs. 1000 from his Current and Savings Bank account. The applicant had also given security of 200 shares of Hindustan Investment Trust Limited which are now with the bank. There is an affidavit by Gowri Amma the wife of the applicant that the money standing in the Current and Savings Bank account represents her husband's salary. These facts are not controverted by the Official Liquidators but the only ground taken by them is that the money sought to be set off is under a joint account whereas the money due and owing by the applicant is under a separate account, and therefore no set off should be allowed. It seems to me that this is a clear case of set off. Under the law prevailing in India a deposit by a husband in the name of himself and his wife payable to either or survivor in the absence of evidence to the contrary must be presumed to belong to the husband. In 55. Cal. 944[1] this question pointedly arose as to the ownership of such monies with reference to the similar deposit. One Teku Ram invested a sum of money in the name of himself and his wife payable to either or survivor. On the death of Teku Ram the question arose who was entitled to the money. Their Lordships of the Privy Council had no hesitation in holding that the money was the property of Teku Ram and remained at his disposal at the date of his death. During the course of the judgment their Lordships made the following observations at p. 950:

"The general principle of equity, applicable both in this country and in India, is that in the case of a voluntary conveyance of property by a grantor, without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. An exception has however been made in English Law, and a gift to a wife is presumed, where money belonging to the husband is deposited at a bank in the name of a wife, or, where a deposit is made, in the joint names of both husband and wife. This exception has not been admitted in Indian law under the different conditions which attached to family life, and where the social relationship are of an essentially different character."

Prima facie, therefore, the money in the Current and Savings Bank account is the property of the applicant. But we have got the undisputed fact in this case that the said sum represents the accumulation of the salary of the applicant. Under the law of set off which is applicable in the winding up of a company which is the law prevailing in the bankruptcy of a debtor where there are two accounts, one in the account of *A* and the other in the account of *A* and *B*, if it is shown that the latter account though standing in the name of *A* and *B* was really in the trust for *A*, the amount due under one account can be set off against the amount due under another account. James, L. J. in (1879) 12 Ch. D. 491[2] at p. 496, observed:

"Where the money is due in *autre droit* the only exception which equity has introduced into the principle of a legal set off is when the money is really and truly the property of one man in the name of another."

1. ('28) 15 A. I. R. 1928 P. C. 172 : 109 I. C. 723 : 55 I. A. 235 : 55 Cal. 944 (P.C.), Guran Ditta v. Ram Ditta.
2. (1879) 12 Ch. D. 491 : 49 L. J. Bk. 9 : 40 L. T. 792 : 28 W. R. 235, Ex parte Morier, In re Willis.

This exception clearly applies to this case. I therefore allow the set off claimed. The applicant will have the costs of the Judge's summons and Rs. 35 as and for his counsel's fee and the Official Liquidators will have Rs. 35 as and for their costs, the costs to come out of the assests of the bank. The applicant is given leave to pay the balance due after the set off and on receipt of the same the Official Liquidators are directed to deliver the 200 shares deposited as security to the applicant.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. (29) 1942 Madras 352

KRISHNASWAMI AYYANGAR J.

Vallabhaneni Venkayga — Appellant

v.

Sri Rajah Vijaya Apparao Savai Aswarao Bahadur Zamindar Garu and others — Respondents.

Second Appeal No. 1038 of 1937, Decided on 31st January 1941, against decree of Sub-Judge, Ellore, in A. S. No. 242 of 1936.

(a) Madras Estates Land Act (1 of 1908), S. 38 (1) (b)—Applicability—Permanent diminution of water supply.

Section 38 (1) (b) refers to a permanent failure of supply and not a mere diminution in the supply. [P 352 C 2]

*** (b) Landlord and tenant—Rights of landlord — Act of stranger resulting in permanent diminution of water supply to lands in possession of tenant—Landlord is entitled to sue.**

If strangers either trespass upon lands in the holding of a tenant or commit a tortious act which tends to cause an injury to the holding, it gives rise to a cause of action not only in favour of the tenant but also of the landlord as well. A permanent diminution in the accustomed supply of water to which lands in an estate are entitled is not merely an injury to the tenant but is also likely to affect the ultimate interests of the landlord as well. An injury of this kind which might not have yet affected the landlord but is likely in course of time to operate to his prejudice furnishes a sufficient cause of action for the landlord to sue. [P 352 C 2]

M. Appa Rao and Y. Gopalakrishnamurthy — for Appellant.

K. Subba Rao — for Respondents.

ORDER.—Before this second appeal can be disposed of it seems to me to be necessary to call for definite findings on the two following issues: (i) whether the village of Ramachandrapur abuts the Thammileru or appertains to an estate which abuts that river; (ii) whether the appellant's holding situate in Ramachandrapur is a riparian tenement in the sense in which the term has been explained in (1938) 2 M. L. J. 270.[1] Finding to be returned by the lower appellate Court on the evidence on record in four weeks. Objections one week thereafter.

[After receiving the findings from the lower appellate Court (issue (i) answered in the affirmative and issue (ii) answered in the negative against the appellant) the Court delivered the following judgment.]

The findings returned by the learned Subordinate Judge on the issue sent down to him are accepted. The result is that the appellant's property is not a riparian tenement in respect of which the appellant can claim any riparian right in the water flowing in the Thammileru. This disposes of the main contention in the second appeal. It is however argued that, before the plaintiff-respondent can claim any relief against the appellant on account of the diversion of the waters of Thammileru river through the channel newly dug, it is necessary for him to prove that the diversion has resulted in a material injury to him. The findings of the Courts below contained in paras. 13 and 14 of the District Munsif's judgment, confirmed by the Subordinate Judge in para. 12 of the appellate judgment make it clear that an injury has been sustained to enable the suit to be maintained. According to the Courts below, there has been a diminution in the supply of water leading to the diminution in the yield of the lands in the plaintiff's estate. It is urged that the loss is a loss sustained by the tenant and that on the evidence it is not made out that the landlord, namely the plaintiff, has suffered any loss in respect of the rents recoverable by him from his tenants. My attention has been called to the evidence of P.W. 7 and P.W. 14, both of whom, while asserting that there has been a diminution in the yield of the land caused by the diversion of the water, say that the zamindar has not sustained any loss of rent. The learned District Munsif has given reasons why the loss sustained by the tenants should be regarded as sufficient to enable the landlord to sue. He has referred to S. 38 (1) (b), Madras Estates Land Act, under which, he points out, that it is open to the ryots to sue for a reduction of rent on account of the failure of water supply caused by the diversion made by the defendants. Section 38 (1) (b) refers to a permanent failure of supply and not a mere diminution in the supply and, therefore, it is somewhat doubtful whether the reason given by the learned District Munsif is quite correct. But I am prepared to base my decision upon a wider ground. It appears to me that, if strangers either trespass upon lands in the holding of a tenant or commit a tortious act which tends to cause an injury to the holding, it gives rise to a cause of action not only in favour of the tenant but also of the landlord as well. A permanent diminution in the accustomed supply of water to which lands in an estate are entitled is not merely an injury to the tenant but is also likely to affect the ultimate interests of the landlord as well. I hold that an injury of this kind which might not have yet affected the landlord but is likely in course of time to operate to his prejudice furnishes a sufficient cause of action for the landlord to sue.

Lastly it is objected that there is no warrant for an injunction being granted against the appellant restraining him not only from opening the bunds of the stream or taking new channels therefrom and also diverting or otherwise taking the water of the stream into a newly excavated channel but against the taking of water "into any other water course." It is complained that there has been no allegation, much less proof, of the appellant or any other defendants in the suit attempting or threatening to bring into existence any other water course and that therefore there is no justification for the addition of the words "or any other water course" at the end of para. 1 of the decree. There is justification for the complaint because no sufficient ground has been established for justifying the addition of these words. These words will accordingly be omitted; but it is not to be understood that the rights declared by the decree and protected by the injunction granted in the decree as it will stand will enable the defendants or any of them to cause prejudice to the rights of the plaintiff ascertained and declared in this litigation. The appellant has substantially failed and must pay the costs of respondent 1. Leave refused.

C.R.K./K.S. *Order accordingly.*

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1. ('38) 25 A. I. R. 1938 Mad. 816 : 181 I. C. 950 : I. L. R. (1939) Mad. 45 : (1938) 2 M. L. J. 270, Venkatadri Apparao v. Seetharamayya.

* A.I.R. (29) 1942 Madras 353

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND BELL JJ.

Kannepalli Chinna Venkata Chelamiah Sastri — Appellant

v.

Meduru Annapoornamma and another — Respondents.

Appeal No. 28 of 1938, Decided on 26th January 1942, against decree of Sub-Judge, Chicacole, D/- 27th September 1937.

(a) Limitation Act (1908), S. 20—Payment by debtor without specification does not constitute acknowledgment of liability.

Where a payment is made without any specification and the debtor does not signify whether he is making the payment of interest as such or of part payment of the principal, there is really no admission on his part that any further sum is still due from him, and there is therefore no acknowledgment of liability on his part. Consequently, where on the back of a promissory note are written by the maker the words "paid Rs. 10," the endorsement cannot be construed as being anything more than a statement of the payment. The sum of Rs. 10 may constitute all which remains due in respect of the debt evidenced by the instrument: ('35) 22 A.I.R. 1935 All. 946 (F.B.), *Approved.* [P 353 C 2]

*** (b) Limitation Act (1908), S. 19—Acknowledgment—Test—Words used alone should be considered—Words at back of pronote "paid Rs. . . . . towards this promissory note and endorsed the payment hereon" constitute acknowledgment.**

Section 19 applies to an acknowledgment of liability in writing and in deciding whether the words used constitute an acknowledgment, the Court can only have regard to the words used. [P 353 C 2]

An endorsement on the back of a promissory note in the words, 'paid Rs. . . . towards this promissory note and endorsed the payment hereon' constitute an acknowledgment of liability within the meaning S. 19. The use of the word "towards" in itself implies that more remains to be paid; in other words, that the payment is made on account of a larger sum due under the instrument: ('42) 29 A.I.R. 1942 Mad. 146, *held correctly decided*; ('35) 22 A.I.R. 1935 All. 946 (F.B.); ('40) 27 A.I.R. 1940 P. C. 63 and 5 M. H. C. R. 90, *Expl.*; ('21) 8 A.I.R. 1921 Cal. 331; ('39) 26 A.I.R. 1939 Bom. 252; ('40) 27 A.I.R. 1940 Lah. 106 and ('38) 25 A.I.R. 1938 Rang. 84, *Approved.* [P 353 C 2; P 354 C 1]

Sir A. Krishnaswami Ayyar (Advocate-General) and K. Umamaheswaram—for Appellant.

K. V. Krishnaswami Ayyar and C. Rama Rao — for Respondents.

ORDER OF REFERENCE BY LEACH C. J. AND KUPPUSWAMI AYYAR J.

LEACH C. J.—In this case the endorsements on the promissory note in suit are relied on to save limitation. On 15th February 1931 an endorsement was made in these words: "Paid Rs. 23 (Rupees Twentythree) towards this promissory note and endorsed the payment hereon." On 10th January 1934 there was an endorsement expressed in the same words in respect of a sum of Rs. 350. In (1941) 2 M.L.J. 848,[1] a Bench of this Court (Wadsworth and Patanjali Sastri JJ.) held that an endorsement in the following words, "paid on 15th September 1938, towards this promissory note, Rs. 2," could be read as an acknowledgment under S. 19, Limitation Act, and that the decision of the Privy Council in I.L.R. (1940) Lah. 470[2] was confined merely to S. 20 of that Act. The learned advocate for the appellant says that this decision is wrong. He points out that the Privy Council in I.L.R. (1940) Lah. 470[2] considered and approved the decision of the Full Bench of the Allahabad High Court in 58 All. 261,[3] where the Allahabad High Court considered the question of the application of S. 19. Without entering upon a discussion of these cases it is obvious that a substantial question arises, namely, whether S. 19, Limitation Act, can be successfully pleaded in a suit on a promissory note where there are endorsements of the nature of those made in this case. In these circumstances we refer to a Full Bench this question:

"Whether an endorsement on a promissory note in these words, 'paid Rs. 350 towards this promissory note and endorsed the payment hereon,' can be read as an acknowledgment of liability within the meaning of S. 19, Limitation Act?"

OPINION OF FULL BENCH.

LEACH C. J.—When the judgment of the Full Bench of the Allahabad High Court in 58 All. 261[3] and the judgment of the Privy Council in I.L.R. (1940) Lah. 470[2] are examined, it is quite clear that there is nothing in the judgment of the Judicial Committee to throw doubt on the long line of decisions of this Court referred to in (1941) 2 M.L.J. 848.[1] The case in I. L. R. (1940) Lah. 470[2] had reference to S. 20, Limitation Act, and there is nothing in the judgment which can be deemed to be by way of interpretation of S. 19 beyond the statement that S. 19 is not to be read as based upon the theory of implied promise. Section 19 applies to an acknowledgment of liability in writing and in deciding whether the words used constitute an acknowledgment, the Court can only have regard to the words used. In the course of his judgment in 58 All. 261[3] Sulaiman C.J. observed:

"It is equally obvious that where a payment is made without any specification and the debtor does not signify whether he is making the payment of interest as such or of part payment of the principal, there is really no admission on his part that any further sum is still due from him, and there is, therefore, no acknowledgment of liability on his part."

We are in full agreement with this statement. If, for instance, on the back of a promissory note are written by the maker the words "paid Rs. 10," the endorsement cannot be construed as being anything more than a statement of the payment. The sum of Rs. 10 may constitute all which remains due in respect of the debt evidenced by the instrument. Where however the endorsement is, as it was in the present case, "paid Rs. 350 towards this promissory note and endorsed the payment hereon," the position is altogether different. The use of the word

1. ('42) 29 A.I.R. 1942 Mad. 146 : (1941) 2 M.L.J. 848, D. Ramayya v. P. Anjayya.
2. ('40) 27 A.I.R. 1940 P. C 63 : 187 I. C. 233 : I.L.R. (1940) Kar. P.C. 134 : 67 I. A. 160 : I.L.R. (1940) Lah. 470 (P.C.), Rama Shah v. Lal Chand.
3. ('35) 22 A.I.R. 1935 All. 946 : 159 I. C. 387 : 1935 A.L.J. 1029 : 58 All. 261 (F.B.), Udaypal Singh v. Lakshmi Chand.

"towards" in itself implies that more remains to be paid; in other words, that the payment is made on account of a larger sum due under the instrument. This amounts to an acknowledgment of liability within the meaning of S. 19, Limitation Act.

In the course of the judgment delivered by him in (1941) 2 M. L. J. 848[1] Wadsworth J. referred to the line of cases of this Court on the question and stated that the judgment in 5 M. H. C. R. 90[4] provided an exception. This is not in fact the case. There the endorsement consisted of these words "Rs. 50 paid," and the Court pointed out that the writing imported a simple payment of Rs. 50 and that oral evidence was not admissible to add to its meaning. The judgment in that case can only be regarded as being in conformity with the judgment in 58 All. 261[3] and as we have already indicated the judgment in the latter case does not affect the question now before the Court. It is interesting to learn that four months after Sulaiman C. J. had delivered the judgment in 58 All. 261[3] he had to consider whether an endorsement in these words "Having paid Rs. 10 towards the amount due on the document I have made this endorsement" was an acknowledgment of liability within S. 19 and the learned Chief Justice held that it was. There is no essential difference between that endorsement and the endorsement which we are now considering. The later judgment of Sulaiman C. J. was not reported but it is referred to in the judgment delivered by a Bench of the Allahabad High Court in I.L.R. (1939) All. 200.[5] It is not necessary to refer in detail to the other decisions of this Court on the question. Sufficient reference is made to them by Wadsworth J. in his judgment in (1941) 2 M.L.J. 848.[1] It may, however, be added that the opinion of this Court is shared by the High Courts of Calcutta, Bombay, Lahore and Rangoon: *see* 48 Cal. 1046,[6] A.I.R. 1939 Bom. 252,[7] A.I.R. 1940 Lah. 106[8] and I.L.R. (1937) Rang. 421.[9] In fact there does not appear to be any decision to the contrary. The learned Advocate-General has not been able to refer us to one. We consider that the decision in (1941) 2 M.L.J. 848[1] is correct and consequently we answer this reference in the affirmative. The costs of this reference will be made costs in the appeal.

C.R.K./G.N. *Answer accordingly.*

4. ('70) 5 M. H. C. R. 90, Latchumanan Chetti v. Mutha Iburaki Marakayar.
5. ('39) 26 A. I. R. 1939 All. 177 : 180 I. C. 535 : I. L. R. (1939) All. 200 : 1938 A. L. J. 1233, Isri Prasad v. Chandrabhan Prasad.
6. ('21) 8 A. I. R. 1921 Cal. 331 : 64 I. C. 988 : 48 Cal. 1046 : 33 C. L. J. 433 : 26 C.W.N. 213, Prasanna Kumar v. Niranjan Ray.
7. ('39) 26 A. I. R. 1939 Bom. 252 : 182 I. C. 965 : 41 Bom.L.R. 455, Tayarali Mahomedali v. Garabad Sadu.
8. ('40) 27 A.I.R. 1940 Lah. 106 : 189 I.C. 264: 42 P.L.R. 103, Bur Sing v. Sikri Brothers.
9. ('38) 25 A. I. R. 1938 Rang. 84 : 175 I. C. 550 : 1937 R. L. R. 421, Kasiviswanathan Chettiar v. L. Lakshmanan Chettiar.

Limitation Act —
(a) ('42) Chitaley, S. 19, N. 5 Pt. 3.
('38) Rustomji, S. 19, Page 317 Pt. 4.
(b) ('42) Chitaley, S. 19, N. 5 Pts. 2 and 4.
('38) Rustomji, S. 19 Page 318 Pts. 1 and 2.

A. I. R. (29) 1942 Madras 354

HORWILL J.

In re Ganapathi Sa and others
Accused — Appellants.

Criminal Appeals Nos. 367 and 374 of 1941, Decided on 12th September 1941, against order of 3rd Presidency Magistrate of Court of Presidency Magistrates, Egmore, Madras, D/- 26th May 1941.

(a) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), Ss. 37 (2), 45 and 43 — Accused and number of persons found in house taken on lease by accused—Betting slips and money connected with gaming found — Accused shown to have taken bets — Accused held guilty under Ss. 37 (2) and 45.

A number of persons along with the accused were found in a house which was taken by the accused on lease. Betting slips and money connected with gaming were found and it was proved that the accused took bets :

Held that the taking of bets by the accused and the statutory evidence under S. 43 was sufficient to establish the guilt of the accused under Ss. 37 (2) and 45. [P 355 C 2]

(b) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), Ss. 37 and 45 — Betting organisation conducted by accused 1 having no particular abode—Accused 1 employing agents to offer and accept bets — On night of raid accused 1 and 5 with others found in house assisting accused 1 in making calculations with regard to bets laid on recent horse race — House taken on lease by accused 5 — Accused 5 shown to have taken bets—Accused 1 held guilty not of running common gaming house but under S. 37 (3) read with S. 109, Penal Code—Calculators held could not be said to assist accused 1 or 5 in running common gaming house and hence committed no offence.

The betting organisation which was conducted by accused 1 had no fixed abode. Accused 1 employed a number of agents to offer and accept bets with regard to horse races. Each agent had a particular area within which he operated and brought the money—or a portion of it—and the betting slips to accused 1, who made himself responsible for the payment of the winners. He paid to the agents who accepted the bets from the winners the money to be handed over to them. On the night of the raid they had gathered together along with accused 5 in a house so that the agents could bring to accused 1 the money that they had taken and the betting slips; and a number of other persons had also gathered there to assist the agents and accused 1 in calculating what money had to be paid to what punter as a result of a race which had been run only a few hours before. The house was taken by accused 5 on lease and he was also shown to have taken bets. The betting organisation which was conducted by accused 1 had no fixed abode. There was no evidence to show whether or no the punters knew of the existence of accused 1. The punters dealt with the agents as principals :

Held that calculations or payments of winnings to the agents could not be regarded as part of betting. Nor could payment by the agents to accused 1 be regarded as part of the betting itself. Accused 1 therefore could not be said to be keeping a common gaming house and such persons as were calculators were in the house to assist accused 1 and not accused 5

and hence the calculators could not be said to be assisting the conducting of a common gaming house. If it had been proved that accused 1 had been keeping a common gaming house either at the house raided or at any other place, known or unknown, then the persons who were there making calculations would have been guilty of assisting accused 1 in conducting the business of that common gaming house. Nor could the calculators be said to be assisting accused 5 in conducting a common gaming house for it was no part of the purpose of a common gaming house to lease it to others for the purpose of conducting their business of organising betting, the purpose of a common gaming house being to afford a place where members of the public could come and lay bets with some persons who resorted there. The persons who worked in the house on the night of the raid were not betting with accused 5; nor were they assisting him in any way. They were there solely for the purposes of accused 1. The calculators therefore could not be said to have been assisting either accused 1 or accused 5 in the conducting of a common gaming house and therefore were not guilty of any offence: [P 356 C 1]

Held further that accused 1 abetted all the betting of his agents who were expected to make bets with members of the public and bring the money and the betting slips to him and therefore accused 1 was guilty under S. 37 (3), read with S. 109, Penal Code. [P 356 C 2]

(c) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), Ss. 37 (2) and (3) and 45—Accused convicted under Ss. 37 (2) and 45 — He need not be further convicted under S. 37 (3).

Where the accused is found guilty and convicted under Ss. 37 (2) and 45 he need not be further convicted under S. 37 (3). [P 356 C 1]

(d) Criminal trial—Summons case—Accused can be convicted of offence not specified in charge sheet laid by police provided he is not prejudiced by omission of charge.

In a summons case, it is not illegal to convict an accused of an offence not specified in the charge sheet laid by the police, provided of course the accused is not prejudiced by the consideration of some charge of which he knew nothing until the Magistrate came to write his judgment. [P 356 C 1, 2]

(e) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), Ss. 37 (3) and 47 —Money in accused's possession obtained as result of offences committed under S. 37 (3) can be confiscated.

The money in the possession of an accused which was obtained as a result of offences committed under S. 37 (3) can be confiscated. [P 356 C 2]

K. S. Jayarama Ayyar for V. T. Rangaswami Ayyangar, K. Ramaswami Ayyangar and N. Krishnamurthi — for Appellants.

C. D. Venkataraman for the Crown Prosecutor — for the Crown.

JUDGMENT. — At a raid conducted by P. W. 1 at 9-40 p. m. on 29th July 1939 at No. 33 Mint Street, on a warrant issued by the Assistant Commissioner, North Range, on information furnished that this house was being used as a common gaming house, twenty persons were found therein sitting at a table with paper and pencil and boards and betting slips before them, making calculations with regard to bets laid on a race that had been run that day at Calcutta; and before the accused was found a bag of money containing Rs. 1290-13-8. The betting slips were for a sum of money exceeding Rs. 5000. Two persons numbered as accused 2 and 10 were not tried because they could not be found. Accused 19 and 20 were acquitted. The remaining 16 persons, who are the appellants here, were all convicted. Accused 1 and 5 were found guilty under Ss. 37 (2) and 45, Madras City Police Act, and others under S. 45 of the same Act.

No. 33 Mint Street having been searched on a warrant properly issued under S. 42, Madras City Police Act, the finding of the betting slips and money obviously connected with gaming is itself evidence under S. 43 of the Act that that house was used as a common gaming house and that the persons found therein, the appellants and others were there present for the purpose of gaming. There is evidence that accused 5 had taken on lease the upstairs of that house—where all the appellants were found—from accused 19 and 20, who were acquitted. P. W. 2, one of those present, who was taken as an approver, deposed that accused 5 takes bets. P. W. 2's oral evidence and the statutory evidence under S. 43 was sufficient to establish the guilt of accused 5 under S. 37 (2) and S. 45, which are the two sections under which he has been convicted. So far as he is concerned, therefore, this appeal must be dismissed.

The really important question in this case is whether the other appellants were guilty under S. 45 of assisting in conducting the business of a common gaming house. The evidence of P. W. 2 discloses that accused 1 used to receive bets from punters of over Rs. 500; but he does not say that accused 1 received these bets in No. 33 Mint Street. He lived in the adjoining house, No. 32 Mint Street, and so it is quite probable that he received the bets there. P. W. 2 deposes that the top of No. 33 was not used permanently for any purpose by accused 1. He said that accused 1 is the organizer of what is known as the "New Sports Club" and P. W. 2 claims to be the manager of that club. From P. W. 2's evidence it is evident that that club has no fixed abode and is a mere organization. Accused 1 employs a number of agents—some of whom are appellants in this case—to go into the highways and by-ways to offer and accept bets with regard to races that are taking place in various parts of India. Each agent has a particular area within which he operates. He brings the money, or a portion of it, and the betting slips to accused 1, who makes himself responsible for the payment of the winners. He pays to the agents who accepted the bets from the winners the money to be handed over to them. On the night in question they had gathered together in the upper room of No. 33 Mint Street, so that the agents could bring to accused 1 the money that they had taken and the betting slips; and a number of other persons had also gathered there to assist the agents and accused 1 in calculating what money had to be paid to what punter as a result of a race which had been run only a few hours before.

Two questions arise from this evidence. One is whether accused 1 can be considered to have been running a common gaming house, and the other is whether the other accused can be found guilty of assisting in the conducting of this common gaming house either by accused 5 or by accused 1. There is no evidence to show whether or no the punters knew of the existence of accused 1 or whether they dealt with the agents as agents of either accused 1 or some undisclosed principal or looked upon them as principals. The view most favourable to the various accused is that the punters were dealing with the agents as principals. As I have pointed out above,

the agents, after they have accepted money from punters, bring it to accused 1 together with the slips, and after the race has been run and calculations made, accused 1 gives the winnings to the agent responsible for payment to the punter. It is conceded that calculations are not part of the betting nor are payments of winnings to the agents. The learned Crown Prosecutor argues, however, that the payment by the agents to accused 1 is part of the betting itself. I do not see how that can be the case. The contract of betting is between the punter and the agent, and the receipt of the money by the agent, whether he holds himself out to be the agent or not, is for the purpose of the contract a receipt by the principal himself. Whether the agent takes that money and gives it to the principal or whether he keeps it himself cannot in any way affect the contract, and the carrying of that money to the principal can form no part of the contract itself. That being so, the receipt of the money by accused 1 in the upper room of No. 33 Mint Street was not a part of the betting itself. Accused 1 was not, in the words of the definition of a "common gaming house" keeping or using or permitting to be kept or used a place for the purpose of gaming on a horse race. Accused 1 was not therefore keeping a common gaming house.

Such appellants as were merely calculators were in that house for the purpose of assisting accused 1 and not accused 5. If it had been proved that accused 1 had been keeping a common gaming house either at No. 33 Mint Street or at any other place, known or unknown, then the persons who were there making calculations would have been guilty of assisting accused 1 in conducting the business of that common gaming house; but since accused 1 was not keeping or using or permitting to be kept or used any place for the purpose of gaming on a horse race, these persons could not have been assisting accused 1 in opening, keeping or using or permitting to be opened, kept or used a common gaming house. It is however argued that even though that may be so, they were assisting accused 5 in conducting a common gaming house. That however cannot be the case; for it is no part of the purpose of a common gaming house to lease it to others for the purpose of conducting their business of organizing betting. The purpose of a common gaming house is to afford a place where members of the public can come and lay bets with some persons who resort there. The persons who worked there that night were not betting with accused 5; nor were they assisting him in any way. They were there solely for the purposes of accused 1. The calculators cannot therefore be said to have been assisting either accused 1 or accused 5 in the conducting of a common gaming house. It follows that the appellants other than accused 5 are not guilty of the offence for which they have been convicted.

There is definite evidence in the deposition of P. W. 2 that accused 14 was one of the agents of accused 1 and that he had brought some betting slips to accused 1 that day in connection with the race that had just been run. It is clear therefore that accused 14 had been betting either on that day or a day or two before. He was therefore guilty under S. 37 (3) of betting on a horse race. There is similar evidence against accused 5; but as his conviction under Ss. 37 (2) and 45 of the Act has been upheld, there is no need to convict him further under S. 37 (3). The learned counsel for accused 14 contends that as he was not specifically charged with the offence of betting outside No. 33 Mint Street, he ought not to be convicted of it. This is however a summons case and it is not illegal to convict an accused of an offence not specified in the charge sheet laid by the police, provided of course the accused is not prejudiced by the consideration of some charge of which he knew nothing until the Magistrate came to write his judgment. In view of the nature of the information laid by the police and the evidence in the case, I do not think that accused 14 has been prejudiced by his attention not having been drawn specifically to the possibility of his being convicted of betting before he came to No. 33 Mint Street. The conviction of accused 14 under S. 45 of the Act is therefore set aside and he is convicted instead under S. 37 (3). The sentence of Rs. 75 fine, which is not an excessive punishment for an offence under S. 37 (3), will stand.

Accused 1 abetted all the betting of his agents, and it is clear that these agents were expected to make bets with members of the public and bring the money and the betting slips to him. I have no doubt therefore that he is guilty under S. 37 (3), read with S. 109, Penal Code. His sentence, as an abetter, will be reduced to Rs. 75, the sentence awarded to accused 14, a principal. The sentence of imprisonment is set aside. The convictions and sentences of the other appellants are set aside and the fines, if paid, ordered to be refunded. The order as to the confiscation of the money in the hands of accused 1 will stand, because it is quite clear that all the money in his possession that day was money that he had obtained as the result of offences committed under S. 37 (3) of the Act.

C.R.K./G.N. *Order accordingly.*

Cr. P. C. —
(d) ('41) Chitaley, S. 246. N. 1.
('41) Mitra, Page 875, N. 795.

A. I. R. (29) 1942 Madras 356

LAKSHMANA RAO J.

Public Prosecutor — Appellant

v.

Karuppana Kone and others — Respondents.

Criminal Appeal No. 782 of 1940, Decided on 23rd January 1941, against acquittal of Joint Magistrate, Ramnad, in Cr. A. No. 58 of 1940.

Criminal P. C. (1898), S. 422 — Appeal from conviction allowed without notice to officer appointed by Provincial Government.

Where an appeal from conviction is allowed the same day without notice to the officer appointed by the Provincial Government under S. 422, the appellate order of acquittal cannot be sustained.

[P 356 C 2]

A. S. Sivakaminathan — for Appellant.

P. Sivaramakrishnayya — for Respondents.

JUDGMENT. — This is an appeal by the Provincial Government against an appellate order of acquittal. The respondents were convicted of offences under S. 147 and Ss. 323 and 379 read with S. 149, Penal Code, and an appeal was filed by them on 12th July 1940. The appeal was allowed the same day without notice to the officer appointed by the Provincial Government under S. 422, Criminal P. C., and the appellate order of acquittal cannot be sustained. It is accordingly set aside and the appeal is remanded to the District Magistrate of Ramnad for

disposal according to law by him or such other Magistrate as he may direct.

C.R.K./K.S. *Case remanded.*

Cr. P. C. —
('41) Chitaley S. 422, N. 5.
('41) Mitra, Pages 1334 and 1335, N. 1137.

A. I. R. (29) 1942 Madras 357 (1)

VENKATARAMANA RAO AND HORWILL JJ.

Ramaswami Udayar and others

v.

Sevu Rama Aru Ramanathan Chettiar.

Civil Misc. Petn. No. 879 of 1941, Decided on 1st May 1941, for leave to appeal to His Majesty in Council against order and judgment in C. M. P. Nos. 5641 and 5629 of 1940, D/- 22nd October 1940.

Civil P. C. (1908), S. 109 (a)—"Order passed on appeal"—Application to excuse delay for filing application for re-hearing appeal by deducting time taken in other proceedings dismissed—No leave to be granted.

An application to excuse delay by deducting the time taken in other proceedings in computing the time for the application for re-hearing of an appeal was dismissed and consequently no order was passed on the application for re-hearing the appeal :

Held that the orders in question were not orders passed on appeal within the meaning of S. 109 (a) and hence no leave could be granted. [P 357 C 1]

N. Sivaramakrishna Ayyer—for Petitioners.

K. S. Ramabhadra Ayyer—for Respondent.

ORDER. — This is an application for leave to appeal to His Majesty in Council against the orders passed on two applications, namely, C.M.P. No. 5641 of 1940 (S. R. No. 29098 of 1940) and C. M. P. No. 5629 of 1940. C. M. P. No. 5629 of 1940 was an application to excuse the delay by deducting the time taken in C. M. A. Nos. 643 and 644 of 1938* on the file of the High Court in computing the time for the application for re-hearing of A. S. No. 99 of 1936 on the file of the High Court. C. M. P. No. 5641 was an application to set aside the ex parte decree passed in the appeal against the applicants and for re-hearing the said appeal. On application No. 5629 of 1940 we passed the following order. "We see no reason to interfere. Dismissed." By reason of this order we thought it unnecessary to pass any orders on C.M.P. No. 5641 of 1940. Mr. Sivaramakrishna Ayyar has contended that he was entitled to make the present application for leave to appeal to the Privy Council under Ss. 109 and 110, Civil P. C., on the ground that he was entitled as a matter of right to appeal under Cls. (a) and (b) of S. 109. We are clearly of opinion that the orders in question were not orders passed on appeal within the meaning of S. 109 (a) and it is not shown how they fell under S. 109 (b). The only clause on which the applicant can seek to rely in support of his application is S. 109 (c) and we are definitely of the opinion that this is not a fit case in which we could grant our certificate for leave to appeal to the Privy Council. The application is dismissed with costs.

C.R.K./K.S. *Application dismissed.*

* *Reported in* ('41) 28 A.I.R. 1941 Mad. 373.

C. P. C.—
('40) Chitaley, S. 109 N. 5.
('41) Mulla S. 109 P. 389 Note, ' Decree or final order passed on appeal.'

A. I. R. (29) 1942 Madras 357 (2)

HORWILL J.

In re S. N. Vittal alias Sankar Valvekar and others — Appellants.

Criminal Appeals Nos. 554 and 671 of 1941, Decided on 15th January 1942, against sentences passed by Chief Presidency Magistrate, Egmore, Madras, in C. C. No. 1999 of 1941.

(a) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), S. 37 (3)—Agents of betting business found to have received bets on horse races which were being or had been held at time of raid of common gaming house are guilty under S. 37 (3) notwithstanding that they were not present there at time of raid.

Agents of the betting business who are found to have actually been receiving bets in connexion with horse races that were being held or had been held at about the time when the raid on the common gaming house in which the business was conducted was made, are guilty under S. 37 (3) notwithstanding the fact that they were not present in the house when the raid was made. [P 358 C 2]

(b) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), S. 3 — Keeping of betting slips on horse races in house makes it common gaming house — Fact that at time of raid no betting was actually going on does not in itself show that house is not common gaming house.

The first part of definition of a common gaming house in S. 3 also applies to horse racing and therefore the keeping of betting slips on horse races in a house for the owner's profit makes that house a common gaming house. If an agent merely brings his betting slips into a house in order that calculations may be made and he then takes them away again, it could hardly be said that the betting slips were kept in the house; but when slips are taken and placed in an almirah—not for immediate use, but for future use,—then it is clear that they are kept there and the house could be presumed to be a common gaming house under S. 43 of the Act. The fact that at the time when the raid was made there was no betting actually going on, does not show in itself that the house was not a common gaming house. [P 359 C 1, 2]

(c) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), S. 37 (2) and (3) and Ss. 45 and 46 — Persons found calculating in common gaming house are not guilty of any offence.

Calculating is not a necessary ingredient of the work of a common gaming house, so that when it is shown that the persons found in a common gaming house were there not for the purpose of gaming or betting but for the simple purpose of making calculations or being paid what was due to them or their clients, the statutory evidence under S. 43 is rebutted and the persons would not be guilty of any offence. [P 359 C 2]

(d) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), Ss. 37 (3) and 46— Persons in common gaming house connected with actual betting in some way or other are guilty under Ss. 37 (3) and 46.

Persons in a common gaming house found to have been connected with actual betting in some way or other as agents or by taking up betting slips from

others would be guilty both under S. 37 (3) and S. 46. [P 360 C 1]

(e) Madras City Police Act (3 of 1888 as amended by Act 13 of 1929), Ss. 45 and 37 (2) and (3) — Lessee of common gaming house organising and conducting betting on horse races is guilty under S. 45—If betting was done outside house by agents he would not be guilty under S. 37 (2) but under S. 37 (3) read with S. 109, Penal Code.

The lessee of a house used as a common gaming house who organises and conducts betting on horse races therein would be guilty under S. 45 of keeping and using a common gaming house. If, however, no betting on horse races took place within the house, but was done entirely outside by the agents, he would not be guilty under S. 37 (2), but under S. 37 (3) read with S. 109, Penal Code. [P 360 C 1]

(f) Madras City Police Act (3 of 1888), S. 45— Accused 2 owning betting club used as common gaming house and formerly managing business — Subsequently his brother-in-law accused 1 organising and conducting business and accused 2 paying visits from time to time — At time of raid accused 2 found in house discussing with his agent about some payment—Accused 2 held properly convicted under S. 45.

The betting club used as common gaming house was owned by accused 1, who was originally entirely managing the business himself but at the time when the raid was made the club was organised and conducted by his brother-in-law accused 1. Accused 2 paid visits to the house from time to time. At the time of the raid, accused 2 was found in the common gaming house discussing with his agent about some payment :

Held that accused 2 was still connected with and conducting the business in conjunction with accused 1 and was at least as much connected with the organisation as accused 1, although the details of the business may have been left to accused 1. Accused 2 was therefore properly convicted under S. 45. [P 360 C 2]

K. S. Jayarama Ayyar, B. T. Sundararajan and A. S. Veeraraghavan — for Appellants.

The Crown Prosecutor — for the Crown.

JUDGMENT. — For a very long time the Assistant Commissioner of Police, Southern Range, Madras had been watching the activities of accused 1 and 2 in connexion with what was known as the Aryan Sports Club; and when he thought he had received sufficient information about the doings of these accused and their organisation he arranged that a number of police officers should join with him and raid the present premises of that organisation in No. 7, Second Street, Ibrahim Sait Colony, Egmore. Constables who had been stationed at that house from the early morning had seen numbers of people coming and going. When the first police party forcibly entered the house, they met with some resistance, and persons inside attempted to get away by forcing themselves past the police officers. Two persons, accused 2 and another who was acquitted in the lower Court, succeeded in escaping; but with the assistance of other police officers all those found inside the house were rounded up and charge-sheeted before the Presidency Magistrate. During the course of the search the police found large quantities of materials used in connexion with betting on horse racing, a long list being given in the evidence of P. W. 1, amounting to about 150 articles or groups of articles. Accused 1 and 2 were charged under S. 37 (2) and S. 45, Madras City Police Act, as being the persons who owned or occupied the house and used it for the purpose of betting on horse races. All the other accused were charged under S. 37 (3) with being found gaming on horse races and under S. 46 with gaming or being present for the purpose of gaming in a common gaming house. Accused 1 and 2 were sentenced to two months' rigorous imprisonment each, while the other appellants were sentenced to fines of Rs. 100 or Rs. 150 each. Some other persons were charged as being connected with this association for the purpose of gaming, but they were acquitted on the ground that they were not present on the day on which the raid was made. It is not quite clear why they were acquitted. If, as the Magistrate held, they were agents of this business and had actually been receiving bets in connexion with the races that were being held or had been held at about the time when the raid was made, they were guilty under S. 37 (3) notwithstanding the fact that they were not present in the house when the raid was made. All the convicted persons have appealed.

The police have examined a number of witnesses, many of whom were police officers who took part in the raid on that day. Other persons were taken as approvers, persons who admitted having had something to do with that organization and who speak to what had been going on in that house and to the parts played by the various accused in that organization. Some witnesses were examined to show that accused 2 was present in the house on that day. Some saw him there; others speak to the manner in which he escaped from the house and very hastily engaged a taxi to take him to Renigunta, where he succeeded in catching the train to Poona. Accused 2 set up a plea of alibi and much of the discussion in the lower Court related to that plea. He examined a number of persons of status of Poona, who supported his plea of alibi; but Mr. Jayarama Iyer has very rightly not attempted to support this plea of this accused because the evidence against him on this point is overwhelming. The Assistant Commissioner and others saw him in the house; some others saw him outside the house; and the driver of the taxi which took him to Renigunta and others speak to his negotiations for the hire of the taxi for that purpose. That the taxi was used on the day when the raid was made is proved beyond all doubt by the production of petrol receipts for that day, showing that a large quantity of petrol was purchased. So accused 2, like the other accused, has to accept the position that he was present at the time of the raid; and therefore the only question in regard to him, as to the other accused, is whether they committed offences punishable under Ss. 37, 45 and 46, Madras City Police Act.

One of the important questions that arises in this case is whether this house No. 7, Second Street, Ibrahim Sait Colony, Egmore, was a common gaming house within the meaning of the definition of that expression in S. 3 of the Act. The evidence let in by the prosecution shows that the organisation did its work principally outside the building. A number of agents were employed by either accused 1 or accused 2 or by both who accepted bets all over the City of Madras and elsewhere and brought to this house betting slips after the betting contracts were completed. There—and also in other houses — calculations were made after the races had been run and it was ascertained what amounts were due to various punters who had had dealings with the agents. The agents were then paid the sums due on the winning horses and they took the money away

and distributed it to their clients outside. P. W. 3 has deposed that a number of accused, when told to pick up the slips with which they were connected, picked up the various betting slips from out of the bundles that lay on the floor in that house. P.W. 16 pointed out a number of persons who he said were agents of this organisation, and P. W. 3 gave a list of the accused engaged in calculating the winnings due to the punters and to the agents on their behalf. It therefore seems probable that at the time when the raid was made there was no betting actually going on; but that does not show in itself that this house was not a common gaming house. For example, P. W. 3, although his evidence is rather bare of detail, deposes that he betted with accused 1 and 2, though his principal business seems to have been to act as an agent for the organisation to deal with punters outside.

It will be noticed that the definition of a common gaming house falls into two parts, the second of which is included in brackets, because it was added to the definition of a common gaming house in 1936. Prior to 1929, betting on horse races was not an offence at all; but in that year a definition of "gaming" was added to the Act, so as to include wagering or betting on a horse race. At that time, however, no change was made in the definition of a common gaming house; and it is argued by Mr. Jayarama Iyer that the definition of a common gaming house, until it was extended in 1936, did not include a place in which betting slips were kept or used; and that the only offence punishable before 1936 in connexion with horse racing was betting on horse races, punishable under S. 37 (2) and (3) of the Act. I find, however, that Cornish J. in 58 Mad. 867,[1] which was a case decided in 1934, before the definition of a common gaming house was extended, took it for granted that a house in which betting slips were found was a common gaming house within the then definition of that expression in S. 3; for he proceeded to apply S. 43 to the facts of that case and found that because betting slips were found in the house, there was evidence that the house was being used as a common gaming house. Even if the matter were *res integra*, I would be of the same opinion; for by the definition then existing of "gaming," betting slips would be instruments of gaming and a common gaming house then included any room or place in which instruments of gaming were kept or used for the profit of the person owning or occupying or using or keeping it. So that if a person used a house for keeping betting slips for his profit, then the building in which he was operating would come under the definition of a common gaming house. Mr. Jayarama Iyer argues that since the part which was added to the definition in 1936 deals exclusively with horse racing, it is an indication that the Legislature did not intend that the first part, which was in existence before 1936, should be applied to horse racing; but the learned Crown Prosecutor has pointed out that the portion added was necessary, even though a house in which betting slips were kept was a common gaming house; for under the definition of a common gaming house as it stood before 1936, a house in which mere betting on horses took place would not be a common gaming house, as it was then a necessary function of a common gaming house that instruments of gaming should be kept there. I therefore, hold that the first part of the definition of a common gaming house also applies to horse racing and that therefore the keeping of betting slips in a house for the owner's profit makes that house a common gaming house.

The evidence discloses that while a search was being made, betting slips were found in an almirah inside the house and these were not then being used as a basis for calculations. If an agent merely brings his betting slips into a house in order that calculations may be made and he then takes them away again, it could hardly be said that the betting slips were kept in the house; but when slips are taken and placed in an almirah—not for immediate use, but for future use—then it is clear that they are kept there. If those betting slips were kept there, then the house could be presumed to be a common gaming house ; for under S. 43 of the Act the fact that these things were found there would be evidence that the house was used as a common gaming house. Moreover, even though the prosecution evidence shows that the principal business of that day was the calculation of winnings and the distribution of money to the agents, it is not at all certain that betting never took place there. The betting slips that were found on the floor were all initialled, whereas the slips kept in the almirah were not, unless at the end of the adding up of the amounts of the various slips, the letters 'O.K.' are the initials of an agent, which there is no reason to think was the case. In either view of the matter, therefore, whether because of the definition of a common gaming house and the presumption, if it may be so called, arising under S. 43 of the Act or whether because of the evidence of P. W. 3, this house, No. 7 Second Street, Ibrahim Sait Colony, Egmore, was a common gaming house.

It does not however follow that because this was common gaming house, all the persons engaged therein would be guilty under S. 37 (2) or S. 37 (3) of the Act, or under Ss. 45 and 46. Although their mere presence in the house is evidence of their being there for that purpose under S. 43 of the Act, the definite evidence let in by the persons who admitted having connections with this organisation that at the time of the raid the persons who were there were not there for the purpose of gaming or betting but for the simple purpose of making calculations or being paid what was due to them or their clients, rebuts the statutory evidence. In Criminal Appeal Nos. 367 and 374 of 1941,[2] I held that calculators were not guilty of any offence. The facts of that case are different from the present case, in that here there is a common gaming house used as the headquarters of the organization. But although calculating is an essential part of the organization of the Aryan Sports Club, it is not a necessary ingredient of the work of a common gaming house. So that even in this case persons who were merely calculating were not, I think, guilty of any offence. This would mean that accused 6, 12, 13, 15, 19, 20, 22 and 23 should have been acquitted. Accused 22 has another just ground for appeal ; and that is, that he was a gardener of the house and not likely therefore to have been in the house for the purpose of betting or having anything to do with betting transactions other than that on which he appears to have been engaged, namely, that of calculation. Their appeal is therefore allowed and their convictions and sentences set aside. The fines that they have paid should be refunded to them.

The remaining accused were found to have been connected with actual betting in some way or other, presumably as agents. Some of them have been definitely pointed out by witnesses as being agents,

1. ('35) 22 A.I.R. 1935 Mad. 98 : 154 I. C. 741: 36 Cr. L. J. 566: 58 Mad. 867: 68 M. L. J. 348, In re Subbier.

2. *Reported in* ('42) 29 A.I.R. 1942 Mad. 354, In re Ganapathi Sa.

while others proved their complicity by taking up betting slips from those on the floor in answer to the direction of the police to them to pick up the slips with which they were connected. These accused were therefore properly convicted both under S. 37 (3) and under S. 46. The sentences are very inadequate. The evidence shows that huge profits were made from these betting transactions, several thousand of rupees as profits being made on each race. It is a well-known fact that agents have many other means, too, of making a profit out of the man in the street with whom they are dealing. A fine of Rs. 100 or Rs. 150 is therefore not deterrent at all; these accused should have been sent to jail. As I have had frequent occasion to observe, crime is indeed a very profitable business in Madras, except for the very poor.

If, as I have found, the house that was raided was a common gaming house, then there can be no doubt at all that accused 1 was guilty under S. 45 of keeping and using a common gaming house. He has been proved to have been the lessee of the house; and the evidence very definitely shows it is he who, for the most part, now organizes and conducts this club. If, however, no betting on horse races took place within the house, but was done entirely outside by the agents, he would not be guilty under S. 37 (2), but under S. 37 (3) read with S. 109, Penal Code. As, however, I have held that betting did take place in the house he was rightly convicted under S. 37 (2) of the Act. In any event, whether he was properly convicted under S. 37 (2) or not, it is certain that the sentence of two months' rigorous imprisonment is not excessive. The evidence against the second accused is certainly not as strong as against accused 1; and a very strong plea has been made on his behalf. The evidence shows that at the inception it was accused 2 who was running this Aryan Sports Club. Both he and accused 1, who is his young brother-in-law seem to have come to Madras for the express purpose of running this organization, for it is certainly strange that a young man of Poona, like accused 1, should come to a College in Madras for the purpose of study. However, P. W. 16 who was a former agent of the Club, while saying that the club is owned by accused 2, says that: In 1939 he was conducting the business and not now. Accused 2 comes and stays with accused 1; but he did not do anything connected with the business."

P. W. 13 says that he was a punter and had had dealings with accused 25, who was an agent of the Aryan Sports Club. He deposes that as he was not quite certain about the good faith of this institution, accused 25 offered to take him there, and he did so. Both accused 1 and 2 told him that he might safely lay bets and that there was no difficulty about money. The evidence shows that at the time of the raid accused 2 was discussing with this very agent, viz., accused 25 about some payment. Mr. Jayarama Iyer contends that it has not been said that the payment related to a payment due on a horse race. That is true, but the house was full of agents who had come to discuss payments of money; and it is most unlikely that accused 25 and accused 2 were then sitting there discussing a payment unconnected with the purpose for which so many persons had gathered there. It is also improbable that accused 2 would leave Poona during Christmas and spend the whole of it in Madras with his brother-in-law on a friendly visit. The fact that he was originally entirely managing the business himself and was subsequently paying visits to the house from time to time makes it very difficult to resist the conclusion that he was still connected with and conducting the business in conjunction with accused 1. At first, the business needed the undivided attention of accused 2; but as accused 1, a young man of 22, gained experience, it became less and less necessary for accused 2 to spend a long time in Madras personally supervising the business. I have no doubt, therefore, that accused 2 was at least as much connected with the organization as accused 1 although the details of the business may have been left to accused 1. Accused 2 was therefore properly convicted and the sentence is certainly not excessive. In the result, except in the case of accused 6, 12, 13, 15, 19, 20, 22 and 23 the appeals are dismissed. The ancillary orders made by the Magistrate in connexion with the confiscation and the reward are affirmed.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 360

VENKATARAMANA RAO AND HORWILL JJ.

Tatavarthi Nagaportharow — *Appellant*

v.

Pulipati Subbarow and others — *Respondents.*

Appeal No. 49 of 1939, Decided on 5th September 1941, against order of District Court, Kistna, D/- 18th January 1939.

(a) Provincial Insolvency Act (1920), S. 28 (2) —Insolvency of Hindu father—Son's shares do not vest in official Receiver but father's right to sell son's share does — Sons can alienate their shares.

By reason of the insolvency of a Hindu father the shares of the sons do not vest in the Official Receiver but what vests in him is the right of the father to sell the son's share for the discharge of such debts as would be binding against the sons. The insolvency of the father does not prevent the sons alienating their shares. [P 361 C 2]

(b) Provincial Insolvency Act (1920), Ss. 4 and 28 (2) — Hindu father adjudicated insolvent —Suit against undivided sons for debt incurred by father for family benefit — Leave of Insolvency Court is not necessary — Decree against insolvent father and sons — Court can declare under S. 4 that decree is not binding so far as Official Receiver is concerned as representing insolvent—But no such declaration can be made as regards decree against sons.

Under S. 4 the Insolvency Court may give a declaration that a decree obtained against a Hindu insolvent father and his undivided sons is not binding so far as the Official Receiver is concerned as representing the insolvent, but it cannot make such a declaration in regard to the decree obtained against his sons, inasmuch as leave of the Insolvency Court is not necessary to file a suit against the undivided sons of a father who was adjudicated insolvent in respect of a debt incurred by the father for the benefit of joint family. The question of competency of a suit as against the sons without the father being impleaded as a party or of his being impleaded without the leave of the Insolvency Court is a matter entirely for the sons and if a decree has been obtained against them without protest it is not open to third parties including the Official Receiver to challenge the validity of the decree obtained in such a suit in

view of the fact that leave of the Insolvency Court is not necessary for filing a suit against the sons.

[P 361 C 1, 2]

V. Govindarajachari — for Appellant.

K. Kameswara Rao — for Respondents.

VENKATARAMANA RAO J. — This appeal arises out of an application filed under S. 4, Provincial Insolvency Act, in the insolvency of one Mallayya by respondent 1 who is a creditor of the said Mallayya. The relief sought is a declaration that the decree in O. S. No. 149 of 1932 on the file of the District Munsif's Court, Masulipatam, obtained by the appellant against the insolvent Mallayya and his sons, respondents 5 and 6 in this appeal, is a nullity in its entirety and does not bind the Official Receiver, Kistna, who is respondent 2 here. It was alleged in the application that the said Mallayya was adjudicated insolvent on 20th January 1932, that the appellant instituted the said suit subsequently without obtaining the leave of the Insolvency Court and obtained a decree against the insolvent personally and against the joint family property in the hands of his sons. The appellant stated in his affidavit that he was not aware of any insolvency when he filed the suit and that in any event the decree could not be set aside in its entirety and if at all, it could only be declared a nullity against the insolvent and not against his sons. The learned District Judge passed an order that he did not deem it necessary to decide the question under Sec. 4 (3), Provincial Insolvency Act, and closed the petition with the remark that the Official Receiver might proceed against any saleable interest the insolvent might have got in the sons' shares. An appeal was presented against this order and our learned brothers King and Krishnaswami Ayyangar JJ. remanded the petition for hearing in the light of the following observations contained in their order: "We consider the essential question which now requires adjudication is, what is the property which the Official Receiver is entitled to sell?" On remand the learned District Judge came to the conclusion that the suit filed against the father and the sons without the leave of the Insolvency Court was incompetent and therefore the decree was a nullity. He summed up his conclusion thus:

"The question formulated by the High Court is answered by declaring that the Official Receiver is entitled to sell the father's share and also the sons' shares for the reasons that the decree obtained in O. S. No. 149 of 1932 on the file of the District Munsif's Court, Masulipatam, is a nullity in its entirety as having been obtained on a suit filed without previous leave of the Insolvency Court to proceed against the insolvent or his property, the latter term including also the insolvent father's right to dispose of his sons' shares."

It is against this decision that this appeal has been preferred. The question for decision is whether it is open to the Insolvency Court to declare under S. 4 of the Act that the decree obtained by the appellant is a nullity in its entirety. It is not disputed that the Insolvency Court may give a declaration that the decree is not binding so far as the Official Receiver is concerned as representing the insolvent, but can it also make such a declaration in regard to the decree obtained against his sons? From a perusal of the plaint and the decree in this case it is clear that the debt on which the decree was obtained was not a personal debt of the insolvent but a debt incurred by him as the manager for the benefit of the family consisting of himself and his undivided sons, respondents 5 and 6. The debt was, therefore, as much a debt of the sons as that of the father. It is also undoubted law that by reason of the insolvency of the father the shares of the sons do not vest in the Official Receiver but what vests in him is the right of the father to sell the son's share for the discharge of such debts as would be binding against the sons. Recently the question arose in Appeal No. 321 of 1937[1] whether leave of the Insolvency Court is necessary to file a suit against the undivided sons of a father who was adjudicated insolvent in respect of a debt incurred by the father for the benefit of the joint family and it was there held that it was not necessary to do so.

After hearing learned counsel in this case, we see no reason to take a different view. If it was not open to the Official Receiver to question the decree on that ground, could the Insolvency Court make such a declaration? It was open to the sons to say that the suit would not be competent because leave of the Insolvency Court had not been obtained against the father and if the suit could not be proceeded against the father, it could not be proceeded against them as well. But if no such objection was taken by the sons on that ground and they submit to a decree being passed, we do not see how it is open to the Official Receiver to take any exception in regard thereto. The sons have till to-day not chosen to set aside the decree passed against them and as the decree now stands, it has become final as against them. The insolvency of the father does not prevent the sons alienating their shares and we have observed that it does not prevent a creditor from filing a suit as against them. But what is contended by Mr. Kameswara Rao, the learned counsel for the respondent, is that if the decree is not declared a nullity as against the sons, the appellant would proceed against the sons' shares and appropriate the sale proceeds for himself and no creditor of the insolvent is entitled to do so because the sale proceeds of the sons' shares would be property which ought to be made available for the father's creditors and the right to sell, which was in the father before the insolvency and vested in the Official Receiver on insolvency, would be lost. What we are called upon to decide in this case is whether the decree is a nullity even against the sons, and if so, whether the creditor would be entitled to bring the sons' shares to sale in execution of his decree. This is how we understand the remand order of our learned brothers King and Krishnaswami Ayyangar JJ. If the decree in so far as it is against the sons cannot be declared a nullity in this proceeding, the further question does not arise for decision.

What remedies would be open to the Official Receiver in regard to the validity of any sale effected in execution of such a decree or to prevent the creditor from appropriating the sale proceeds of the property sold in execution of the decree for himself are matters on which we refrain from expressing any opinion. The question of competency of a suit as against the sons without the father being impleaded as a party or of his being impleaded without the leave of the Insolvency Court is a matter entirely for the sons, and if a decree has been obtained against them without protest it is not open to third parties including the Official Receiver to challenge the validity of the decree obtained in such a suit in view of the fact that leave of the Insolvency Court is not necessary for filing a suit against the sons. In the result we modify the order of the learned District Judge by declaring that the decree obtained by the

1. *Reported in* ('42) 29 A. I. R. 1942 Mad. 327: (1942) 1 M. L. J. 173, Murli Mohan v. Chinta Brahmayyar.

creditor is not binding on the Official Receiver in so far as the insolvent Mallayya is concerned. Respondent 1 will pay the costs of the appellant here and in the Court below.

C.R.K./G.N. *Order modified.*

Hindu Law —
(a) ('40) Mulla, Page 307 Pt. (w) and Page 311 Pt. (j).
('38) Gour, Page 546 Pts. (8) and (10).

A. I. R. (29) 1942 Madras 362

WADSWORTH AND PATANJALI SASTRI JJ.

Swayamprabhai Ammal and others — *Petitioners*

v.

D. Muthukrishna Padayachi — *Respondent.*

Civil Revn. Petn. No. 910 of 1941, Decided on 21st January 1942, to revise order of Sub-Judge, Cuddalore, D/- 14th March 1941.

(a) Civil P. C. (1908), S. 115 — High Court will not ordinarily entertain revision under S. 115 on mere preliminary finding in absence of special circumstances.

Ordinarily the High Court will not entertain a revision against a mere preliminary finding such as one holding certain rules framed under an Act to be ultra vires unless there are special circumstances rendering it desirable. [P 363 C 1]

(Revision entertained, as an authoritative ruling on the point was necessary for guidance of lower Courts in similar cases.) [P 363 C 1]

(b) Specific Relief Act (1877), S. 42 — S. 42 relates only to suits and not to applications— It is not exhaustive even of declaratory suits.

Section 42 relates only to suits and not to applications and is not exhaustive even of declaratory suits. It contains nothing to indicate that no kind of application can lie for a mere declaration, if the law otherwise provides for such an application : ('15) 2 A.I.R. 1915 Mad. 584, *Rel. on.* [P 363 C 2]

(c) Madras Agriculturists Relief Act (4 of 1938), S. 28 (1) and (2) (b) and (c), Rules under, R. 9 — Invalidity of R. 9 cannot render whole body of rules invalid—Even without R. 9 procedure under rules would be subject to revisional control of High Court.

Assuming R. 9 to be invalid, the invalidity of that rule would not carry the consequence that the whole of the body of rules framed under S. 28 (1) and (2) (b) and (c) would have to be deemed invalid. The provision for a right of appeal is quite separate from the provisions giving the machinery for the ascertainment of the amount of the debt by the Court of first instance. It is not a case in which the rule alleged to be invalid is so inextricably mixed with the rest of the rules that a declaration of its invalidity would necessarily destroy the whole fabric of the rules. Even if the right of appeal were taken away there would remain a complete and effective procedure for the rapid and inexpensive determination of the effect of the Act upon a particular debt and even without an appeal the procedure would be subject to the control of the High Court in revision just as the procedure under Ss. 19 and 20 of the Act is also subject only to control in revision. [P 363 C 2]

(d) Madras Agriculturists Relief Act (4 of 1938), S. 28 (1) and (2) (b) and (c), Rules under, R. 2—R. 2 is not ultra vires—It does not offend against provisions of O. 2, R. 2 or O. 34, Civil P. C. or S. 42, Specific Relief Act.

Order 2, R. 2, Civil P. C., cannot be read as laying down any basic principle of law which must govern the formulation of rules of procedure under a statute. No doubt it is the law that when a man files a suit based on a particular cause of action, he must ask for all the reliefs which he can obtain with reference to the cause of action. But the procedure under rules under the Act is not intended to give to either party the power to enforce his rights on a particular cause of action. The right of a suit is left intact and if a suit intervenes while the application is pending, the procedure under the rules comes to an immediate stop. The whole purpose of R. 2 framed under the Act is to work out the provisions of the Act in an inexpensive and expeditious manner and to enable the parties to obtain a declaration as to the amount of debt as modified by the Act. Any basic principle embodied in O. 2, R. 2, Civil P. C., cannot therefore be said to be offended by R. 2 of the Madras Act. [P 363 C 1, 2]

Section 42, Specific Relief Act, relates to suits and not to applications and hence R. 2 of the Madras Act cannot be said to be bad by reason of S. 42, Specific Relief Act. [P 363 C 2]

Nor can R. 2 of the Madras Act be said to offend against O. 34, Civil P. C., merely because it provides only for notice to opposite party and does not provide for notice to other parties interested in the mortgage security inasmuch as if for the purpose of determining the amount of the debt, it is necessary to determine the indebtedness of other persons interested in the contract, the Court would undoubtedly give notice to those persons and go into their rights to the extent necessary to decide the only matter in issue. The possibility that the determination of the amount of the debt may involve questions of considerable difficulty and enquiries of some elaboration is not a reason for holding the procedure to be invalid. Consequently, R. 2 of the Madras Act is not ultra vires. [P 364 C 1]

K. S. Ramamurthi and K. Srinivasan — for Petitioners.

T. M. Krishnaswami Ayyar and T. E. Ramabhadrachariar — for Respondent.

WADSWORTH J. — This civil revision petition raises the question whether R. 2 of the rules framed under G. O. No. 2634 (Development) dated 27th October 1939, in exercise of the powers under S. 28 (1) and S. 28 (2) (b) and (c) of Madras Act 4 of 1938, is ultra vires. The rule in question prescribes a procedure whereby when any debt other than a decree debt is due by an alleged agriculturist, either the debtor or the creditor may apply to the Court for a declaration as to the amount of the debt and it is provided that no such application shall be maintainable if any suit for the recovery of the debt be pending and further that if while an application is pending a suit is filed for the debt, the application shall be dismissed. Rule 9 of the same rules gives a right of appeal and second appeal from any declaration under these rules. We are concerned in the present case with an application by the son of a mortgagor for a declaration that the mortgage debt is discharged by reason of previous payments, applying the principles laid down in the Act. The lower Court dealt with the contention that the rules under which the application was made are ultra

vires, by a preliminary finding against which the present revision is preferred. The respondent does not object to the decision of this question at this stage, though ordinarily this Court will not entertain a revision against a mere finding, unless there are special circumstances rendering it desirable. It is conceded on both sides that it is most desirable to get an authoritative ruling on this point not only for the decision of the particular case, but for the guidance of the lower Courts in other similar cases which are likely to occur.

Act 4 of 1938 is intended to provide for the relief of indebted agriculturists and in S. 7 the basic principle is laid down that notwithstanding any law, custom, contract or decree of Court to the contrary all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with its provisions and that no sum in excess of the amount so scaled down shall be recoverable from the debtor. Section 18 indicates clearly that it is the duty of the creditor after this Act came into force or even after the bill came under the discussion of the Legislature, to calculate his claim in accordance with the provisions of the Act on pain of being mulcted in costs. It is, however, in many cases a matter of considerable difficulty for either the creditor or the debtor to discover with any certainty what will be the effect of applying the provisions of the Act to a particular contract; and this was more especially so at the time when the present rules were promulgated which was before a long series of reported decisions had cleared many doubtful questions. It cannot be denied that in October 1939 many creditors must have found it extremely difficult even with the help of competent legal advice to decide what was the amount which they could justly claim having regard to the provisions of this Act.

Section 28 of the Act gives to the Provincial Government the power to make rules for carrying into effect the purposes of the Act and particularly to prescribe the form of applications under the Act and to remove any difficulty in giving effect to the provisions of the Act. Having regard to the difficulty just referred to, the local Government in the rules now under consideration have laid down a procedure whereby either a creditor or a debtor can apply to the Court for a declaration of the amount of the debt affected by the Act. The rules provide for a very small court-fee and limit the enquiry to the question of what is the amount of such debt. It is contended that these rules particularly R. 2 with which we are now concerned are ultra vires. It is suggested that R. 2 is not a rule for one of the purposes contemplated under S. 28. For the reasons already adumbrated, it will be apparent that at the time when these rules were promulgated there was a very widespread difficulty in giving effect to the provisions of the Act, at any rate without involving the parties in unnecessary expense and hardship. It is also suggested that this rule is inconsistent with the provisions of the Act. But we have not been shown how it is so inconsistent. The whole purpose of the rule is to work out the provisions of the Act in an inexpensive and expeditious manner.

The main contention against the rule has been based on the theory that it violates general principles of law and particularly that it is inconsistent with the principles underlying O. 2, R. 2, Civil P. C., and S. 42, Specific Relief Act. It is difficult to see how O. 2, R. 2, can be read as laying down any basic principle of law which must govern the formulation of rules of procedure under a statute. No doubt it is the law that when a man files a suit based on a particular cause of action, he must ask for all the reliefs which he can obtain with reference to the cause of action. But the procedure now under consideration is not a procedure intended to give to either party the power to enforce his rights on a particular cause of action. The right of suit is left intact and if a suit intervenes while the application is pending, the procedure under the rule comes to an immediate stop. All that this procedure under the rules purports to secure is an opportunity for parties to a contract to get an inexpensive, speedy and authoritative decision as to the extent to which the contract is modified by this rather drastic legislation. The procedure is in fact intended to benefit those parties who do not want to file a suit but have difficulty in ascertaining how the new statute affects the pre-existing contract. We do not see how any basic principle embodied in O. 2, R. 2 is offended by the rule; nor can we see how this rule is bad by reason of the provisions of S. 42, Specific Relief Act. Section 42, Specific Relief Act, relates only to suits and not to applications. According to the view held by this Court, *vide* 39 Mad. 80,[1] S. 42 is not exhaustive even of declaratory suits and it certainly contains nothing to indicate that no kind of application can lie for a mere declaration, if the law otherwise provides for such an application. Without going into detail we may remark that there are many instances of special statutory provisions for pure declarations which do not come within the four corners of S. 42 and we can see no reason why this rule providing for the ascertainment by the Court in an appropriate judicial proceeding of the effect on a particular debt of the provisions of the new Act and the declaration of the result should be deemed invalid by reason of the provisions of S. 42, Specific Relief Act.

The further contention is that the rules provide for a right of appeal and second appeal, that this provision is invalid and that if it is invalid the whole of the rules must be deemed to be bad. We understand that the question of validity of Rule 9 which gives the right of appeal is shortly to come before this Bench in a case in which it is directly in issue. It is not therefore desirable for us to express an opinion on this question. But even conceding that the rule providing for an appeal can be successfully attacked, we do not consider that the invalidity of that rule would carry the consequence that the whole of the body of rules would have to be deemed invalid. The provision for a right of appeal is quite separate from the provisions giving the machinery for the ascertainment of the amount of the debt by the Court of first instance. It is not a case in which the rule alleged to be invalid is so inextricably mixed with the rest of the rules that a declaration of its invalidity would necessarily destroy the whole fabric of the rules. Even taking away this right of appeal there remains a complete and effective procedure for the rapid and inexpensive determination of the effect of the Act upon a particular debt and even without an appeal the procedure would be subject to the control of this Court in revision just as the procedure under Ss. 19 and 20 of the Act has also been held to be subject only to control in revision. We do not think that any challenge to the validity of R. 9 is sufficient to throw a doubt as to the validity of the main body of these rules.

Lastly it is suggested that R. 2 is bad because it offends against the general principles governing suits

1. ('15) 2 A.I.R. 1915 Mad. 584 : 26 I. C. 883 : 39 Mad. 80 : 27 M. L. J. 634, Ramakrishna v. Narayana.

upon mortgages as embodied in O. 34, Civil P. C. It is pointed out that the rule provides only for notice to the opposite party and does not contain any provision regarding the impleading of all persons interested in the mortgage security, settlement of priorities and so on. It must, however, be remembered that the only thing which can be done under these rules is to declare the amount of the debt. If for the purpose of determining the amount of the debt, it is necessary to determine the indebtedness of other persons interested in the contract, no doubt the Court would give notice to those persons and go into their rights to the extent necessary to decide the only matter in issue. Possibly there may be cases in which the determination of the amount of the debt may involve questions of considerable difficulty and enquiries of some elaboration. But that is not a reason for holding the procedure to be invalid, more especially as the parties can at any time put an end to the proceeding by filing a suit wherein all the rights connected with the contract can be elaborately worked out.

We are therefore of opinion that for none of the reasons urged before us, can it be properly said that R. 2 is ultra vires. We therefore dismiss the petition with costs. We must decline to give a certificate under S. 205, Government of India Act.

C.R.K./G.N. *Petition dismissed.*

C. P. C. —
(a) ('40) Chitaley, S. 115, N. 5.
('41) Mulla, Page 409 Note "Interlocutory orders."
(d) ('40) Chitaley, O. 2 R. 2, N. 2.
('41) Mulla, Page 525 Note "Splitting of claim."

A. I. R. (29) 1942 Madras 364

SOMAYYA J.

Kizhakkiniyakath Kunhi Koyamutty Naha Haji — Appellant

v.

Veeran and others — Respondents.

Second Appeal No. 17 of 1940, Decided on 4th December 1941, against decree of Sub-Judge, South Malabar at Calicut, in A. S. No. 42 of 1938.

Civil P. C. (1908), S. 47 — Partition decree entitling defendant to be put in possession of property allotted to him on payment of necessary court-fee—Defendant is not obliged to pay court-fee and seek possession in execution of partition decree— He can file separate suit—S. 47 is no bar—When S. 47 may bar separate suit, stated.

Where a partition decree entitles the defendant to be put in possession of the properties allotted to him on payment of the necessary court-fee, the defendant is not obliged to pay the court-fee and seek possession in proceedings in execution of the partition decree and can file a separate suit for possession. Section 47 is no bar. [P 365 C 1,2]

The proper method of reading such a partition decree is that it declares the right of the sharers to the properties allotted to them and gives an option to the defendant-sharers to pay the court-fee in respect of the properties allotted to them and seek possession if they like in execution of that decree. But it does not oblige them to do so. If a defendant sharer does not exercise the option the allotment of the properties to him under the partition decree stands and he can bring a separate suit for possession : ('18) 5 A.I.R. 1918 Mad. 443, *Rel. on.* [P 365 C 1,2]

Section 47 may bar a separate suit by a defendant who could execute the decree unconditionally but to bring about that result there must be an unconditional decree giving the defendant a right to execute the decree to get the properties allotted to him. [P 365 C 2]

B. Pocker — for Appellant.

S. R. Sundaramier — for Respondents.

JUDGMENT.—The question in this case is whether the appellant's suit for recovery of possession of the suit properties is barred under S. 47, Civil P. C. The appellant is the purchaser of the rights of defendants 1, 3, 4 and 7 who are respondents 1, 3, 4 and 7. The four vendors of the plaintiffs along with some others were the heirs-at-law of one Marakkarkutti who died before 1910 leaving considerable properties. In 1910 all except one daughter of his entered into a partition evidenced by Ex. 2. The daughter who was then left out filed O. S. No. 10 of 1915 for a partition and a final decree Ex. G was passed in that suit. Defendants 1, 3, 4 and 7 in this suit who are the vendors of the plaintiff were also defendants in the partition action. These defendants had to pay some sums to the plaintiff in the partition action under the final decree. Partly for raising the money payable by them under the partition decree to the plaintiff in that suit and partly for some other purposes, the sale deed Ex. A was executed on 14th December 1923 in favour of the present appellant. He filed the suit after purchase. His case is that after the purchase, he leased the properties in Sch. B and items 2 to 5 in Sch. C to respondent 7 and another Kunhalan on a rental of Rs. 164-4-0 per year. Item 1 of Sch. C which is also purchased under Ex. A continues to be in his possession and the suit does not comprise that item. As his lessees committed default, he filed O. S. No. 356 of 1930 to recover the land leased to respondent 7 and Kunhalan and made respondents 1, 3, 4 and 7 in this suit and Kunhalan parties. A decree was passed and in execution, resistance was caused by respondents 6, 8 and 10. E. A. No. 610 of 1935 was filed to remove the obstruction and that application was dismissed. Thereupon the present suit was filed to establish the right of the appellant to the suit properties and to recover possession from the contesting defendants. The suit has been dismissed by the Courts below on the ground that the appellant or his vendors should have sought recovery of possession of these properties in execution of the decree in O. S. No. 10 of 1915 and that therefore S. 47, Civil P. C., is a bar. The decree in that suit is Ex. G. The plaintiff was, as already stated, the daughter and the defendants were the other heirs-at-law of Marakkarkutti. The final decree allotted various plots to the different sharers and made provision for payment of various sums of money by one party to another. Then cl. 17 which is material runs thus :

" That the remaining sharers other than plaintiff shall be put in possession of their respective shares on paying the necessary court-fees."

The next cl. (18) runs thus :

" The court-fee in respect of the excess amount allowed to plaintiff as mesne profits should be levied in execution."

The vendors of the appellant were some of the main sharers other than the plaintiff in that suit and therefore under cl. 17 of the decree in that suit (O. S. No. 10 of 1915) they were entitled to be put in possession of the properties on payment of the necessary court-fee. The question is whether they were bound to seek recovery of possession in that

decree in the execution department or whether they are entitled to file a separate suit. If it is execution of that decree, they must seek execution within three years. The sale in favour of the appellant was in the year 1923 more than three years after the date of the final decree. The final decree was on 31st December 1918 and the sale in favour of the plaintiff was on 14th December 1923, i. e., nearly five years. And if it is a question of executing that decree, the execution was barred even before the purchase by him of the property in question. It is urged for the appellant that his client was only a defendant in the partition action and that the proper construction to be put on cl. 17 is that it gives an option to the other sharers to seek possession in execution of that decree on payment of the necessary court-fee. He urges that a defendant in a partition action, though for some purposes is also a plaintiff, did not file that suit. He did not seek partition. He may not want one. If in granting a decree to the plaintiff, the Court allots certain properties to the share of the defendant, it is urged that the Court cannot oblige the defendant to pay court-fees within a particular time and to get the properties allotted to him from the other party if those properties are in the possession of the other party. It is conceivable that he may not be in possession of funds necessary for the payment of the court-fee which alone would enable him to get possession of the properties in the possession of the other parties. The properties in his possession might be allotted to another sharer and he might be dispossessed of those properties. He might also be directed to pay certain moneys to the other sharers; as in this case the defendant might be obliged to pay that sum even after three years provided the other sharer keeps the execution alive. Why then should the defendant be obliged to seek execution within three years and find the court-fees within the three years? Is it a disability placed upon him if really it is construed that the defendant must find the court-fee within the three years' period available for execution of that decree. For imposing this disability upon him, there does not appear to me to be any warrant either in the Civil Procedure Code or in the Court-fees Act. It seems to me that the proper method of reading such a decree is that it declares the right of the sharers to the properties allotted to them and to give an option to the defendant-sharers to pay the court-fee in respect of the properties allotted to them and seek possession if they like in execution of that decree. But it does not oblige them to do so and this seems to me the effect of the decision in 6 M.L.W. 448[1] where dealing with an application of a defendant in a partition action to recover the properties allotted to him on payment of the court-fee, the learned Judges Abdur Rahim and Kumaraswami Sastri JJ. said this :

"The contention is that there is no provision in law for the defendants to pay any court-fee. But if a defendant under a decree or award for partition, such as we are concerned with in this case, gets a share allotted to him of the property and if he wishes to execute the decree it seems to be reasonable that he should pay his share of the court-fee payable on the entire decree. . . . ."

Therefore it is an option given to the defendant in a partition action to pay the court-fee on the entire properties allotted to him if he wishes to execute the decree. But if he does not, the allotment of certain properties to him under the partition decree stands. His rights are declared by that document and there is no reason why in such a case a separate suit ought not to be entertained. It is possible that a decree may be passed in favour of the defendant without any condition particularly as regards the payment of court-fee. If the decree allots certain properties to the parties and directs each party to be in possession of the properties allotted to him under the decree, then it might be a decree which is executable by each and Sec. 47 may bar a separate suit by a defendant who could execute the decree unconditionally but to bring about that result, it seems to me, you must have an unconditional decree giving the defendant a right to execute the decree to get the properties allotted to him. I hold that the suit is maintainable and I reverse the decrees of both the Courts and remand the suit to the trial Court for disposal on the other issues. The court-fee paid on the second appeal to be refunded. The other costs will be provided for by the trial Court in its revised decree. Leave refused.

C.R.K./G.N. *Appeal allowed.*

1. ('18) 5 A. I. R. 1918 Mad. 443 : 42 I. C. 365 : 6 M.L.W. 448, Nagabhushanam v. Pitchayya.

C. P. C. —

('40) Chitaley, S. 47, N. 2, O. 20, R. 18, N. 1 and N. 8.

('41) Mulla, Page 177, N. " To what decrees section applies" and Page 736, Note "Partition decree."

A. I. R. (29) 1942 Madras 365

VENKATARAMANA RAO AND HORWILL JJ.

Rao Sahib V. Subbayya and others — *Appellants*

v.

C. T. Machayya and another — *Respondents.*

A. A. O. Nos. 501, 502, 576 and 577 of 1938, Decided on 1st May 1941, against order of Dist. Court, Bellary, D/- 15th March 1938.

(a) Companies Act (1913), Ss. 235, 103 — Person signing prospectus as director but resigning before declaration under S. 103 cannot be made liable for pecuniary loss sustained by company by misfeasance of directors.

A person who signed the prospectus of a company tendered his resignation before the declaration under S. 103 was sent to the Registrar and before the company commenced business :

Held that it could not be said that he was guilty of any misfeasance by reason of which any pecuniary loss was sustained by the company by virtue of payments made after his resignation. [P 367 C 1]

(b) Companies Act (1913), S. 235 — Misfeasance.

Becoming a Director by accepting a gift of shares without paying for them is a misfeasance. [P 367 C 1]

(c) Companies Act (1913), S. 235 — Section does not exclude non-feasance — It applies to every act of commission or omission.

Section 235 does not prima facie exclude non-feasance. It would apply to every act of a Director, whether of commission or omission, which is a breach of duty to the company in consequence whereof loss results to the company : (1928) 1 Ch. 861, *Expl.* [P 367 C 2]

Where *D*, a director of a company not only did not exercise that amount of reasonable care which was expected of him as a Director in ascertaining the true state of affairs of the company but also wilfully

shut his eyes to it until a very late stage :

Held that he was guilty of gross negligence which would be misfeasance within the meaning of S. 235. [P 367 C 2]

V. C. Gopalaratnam for V. R. Nataraja Iyer and A. Bhujanga Rao — for Appellants.

D. R. Krishna Rao — for Respondents.

VENKATARAMANA RAO J. — These four appeals arise out of an order passed by the learned District Judge of Bellary under S. 235, Companies Act, in the liquidation of Hospet Sugar Mills Limited. The Directors past and present of the said company were sought to be made liable in respect of various acts of misfeasance committed by them in consequence whereof the company suffered loss. During the course of the hearing of the petition the Official Liquidator confined himself to the claim against them for Rs. 25,000 which was paid as and for remuneration of Messrs. Johnson & Co., the Managing Agents of the said company, and the income-tax on it. In respect of the said sum R. Narasinga Rao the appellant in C. M. A. Nos. 576 and 577 of 1938 was made liable for Rs. 25,000, Rao Sahib V. Subbayya the appellant in C. M. A. No. 501 of 1938, for Rs. 5000 and Rao Sahib V. Dharmalingam Pillai, for Rs. 10,000. Before dealing with the question of liability, it will be very necessary to know the history of this company, its formation and its subsequent working until the date of its liquidation. This company as appears from the evidence was the creation of one C. M. Mehta who is a resident of Bombay and claims to be a share broker and whose antecedents are not at all known to anybody. He conceived the idea of starting this sugar mills with the aid of his relations, his own wife Mrs. Mehta, his sister-in-law and her husband R. Narasinga Rao. This Narasinga Rao was originally a copyist in the Anantapur District Court, later became a Local Fund contractor and absolutely had no connexion with any sugar business. He was associated in the formation of the said company and also in its subsequent working until the date he severed connexion with the company. The constitution of this company from time to time discloses a deep scheme of fraud laid out by Mehta. On 27th April 1933 a consent statement was submitted to the Sub-Registrar of Assurance which was signed by Mehta, his wife, R. Narasinga Rao and R. C. Dalal, the nephew of Mehta. Within two or three days after that submission of the statement, there was a change in the directorate, Mehta, his wife and R. C. Dalal having resigned and in their places Rao Sahib V. Subbayya, Rao Sahib V. Dharmalingam Pillai, Mr. McGavin and Mr. C. J. Court having been appointed. Rao Sahib V. Subbayya and Rao Sahib V. Dharmalingam Pillai were recruited on the specific understanding that they need not pay for their qualification shares. As observed by the learned District Judge both of them had Titles and Rao Sahib V. Dharmalingam Pillai was besides an M. L. C. and an Honorary Presidency Magistrate. Mr. McGavin and Mr. C. J. Court were recruited for the sake of European names so that the public may be taken in. Mr. McGavin described in the prospectus as a motor engineer was a mechanic in a toddy contractor's lorry living in a small house in Bellary on a rent of Rupees 3 per month. The antecedents of Mr. C. J. Court are not known and he died before the proceeding commenced, though his status seems to have been no better than McGavin. One Mr. Hackett was appointed Secretary of this company. He had absolutely no experience of business, much less of sugar business. The object of the company was to attract a large capital and this company succeeded in getting nearly two lakhs of rupees. Mehta also at the same time brought into existence three other companies and their constitution is very curious. Messrs. Johnson & Co. were appointed as the managing agents of the company under a contract dated 27th March 1933 (Ex. Y) in and by which they were allowed Rs. 1000 per month for the management and 10 per cent. of the profits. The partners of this company are Narasinga Rao and his wife, the mother of Mehta and an infant son of Mehta 18 months old. The partners are therefore Mehta and his relations and except Narasinga Rao the others are ladies and an infant who can hardly be expected to undertake the management of a sugar concern.

Another company which was brought into existence was the Eastern Underwriters Syndicate and its partners are the nephews of Mehta who disclaim all responsibility thereon on the ground that their signatures were forged by Mehta. There was another company called the Thakore & Co. whose constitution is a mystery and to whom a sum of Rs. 59,000 was advanced for the purpose of erecting a factory. As the learned Judge points out in para. 12 of his order "these facts show that the control of this company was directly or indirectly in the hands of Mehta and his various manifestations as Messrs. Johnson & Co. (by his wife, mother and his brother-in-law until 15th July 1934) as the Eastern Underwriters Syndicate and as Thakore & Co. and that the directors of the company were his relations or other persons completely under his influence with the exception of V. Subbayya, V. Dharmalingam and later of Sirdar Kanjilala, while V. Subbayya and V. Dharmalingam were recruited under conditions suggesting that all that was desired was to make use of their titles for the attraction of investors without anticipating that they would interfere in the working of the company as they lived in Madras." As already stated, the sugar mills company was incorporated on 27th April 1933 and the prospectus was issued on 3rd May 1933 and it was anticipated that the factory for manufacturing sugar would be ready to start work by December 1934. Although a sum of Rs. 57,000 is shown as spent on factory and equipment, no factory was ever erected except a few small buildings. The company was voluntarily wound up by a resolution of the directors dated 13th December 1935 and in January 1936 Bhima Rao, who was acting as the legal adviser of the company was appointed voluntary liquidator, and an original petition (O. P. No. 21 of 1936) for the winding up of the company subject to the supervision of the Court was presented to the High Court when Mr. C. T. Machayya was appointed additional liquidator.

It is admitted that no proper accounts were ever kept. For the purpose of audit the accounts were cooked up in March or April 1934 and the report of Mr. Batliboi (Ex. N) revealed a deplorable state of affairs. A reply to this report was given by Messrs. Johnson & Co. and the meeting dated 15th July 1934 presided over by Dharmalingam Pillai accepted the explanation given and condemned Mr. Batliboi's conduct. As the learned Judge remarks, it is difficult to imagine that anybody could have been satisfied with the explanation. Mr. Batliboi pointed out among other things that the entry in the cash book of Rs. 50,000 as received was false, and there was no satisfactory evidence to show that a sum of Rs. 59,000 was paid to Messrs. Thakore & Co. He has also said that he had considerable difficulty in getting the books, that many of the books were stated to be missing and that the books produced before him as

rough and fair cash books appeared to him to have been fabricated. The explanation that was given was only an attack against Batliboi and the answers given to various charges would not appear to any prudent man to be at all convincing. There was a subsequent audit by Messrs. Sharp & Co. whose report was not satisfactory and things were allowed to be drifted on in the same state as it was before, the result of which was that nearly all the money that was received by the company disappeared and when the liquidators took charge, there was a cash balance of Rs. 2-1-6. It may be stated that V. Subbayya tendered his resignation on 18th August 1933, that is, even before the company had been formed. Dharmalingam Pillai resigned on 24th June 1935 and Narasinga Rao ceased to have connexion with the company in July 1934.

In the light of the above facts the question is how far the appellants in the various appeals are responsible for the payment of the remuneration of Rs. 25,000 to Messrs. Johnson & Co. We will first consider the case of Rao Sahib V. Subbayya the appellant in C. M. A. No. 501 of 1938. It is no doubt true that he signed the prospectus dated 3rd May 1933 without in the least caring to know what the antecedents of the other directors were or knowing about the way in which the company was going to be worked and who the partners of Messrs. Johnson & Co. were. But, on 18th August 1933, he tendered his resignation, that is, nearly 12 days before the declaration under S. 103, Companies Act, was sent to the Registrar of the joint stock companies and before the company commenced business. It cannot be said therefore that he was guilty of any misfeasance by reason of which any pecuniary loss was sustained by the company and it is in evidence that whatever payments were made to Messrs. Johnson & Co., it was after July 1934, i.e., nearly a year after the date of his resignation. We are, therefore, of the opinion that the finding of the learned Judge in so far as he holds him responsible should be set aside and the appeal allowed. But having regard to his conduct in signing the prospectus, we deprive him of his costs throughout.

The case of Dharmalingam Pillai stands on a different footing. Both Subbayya and Dharmalingam Pillai agreed to be directors on the promise held out to them by Mehta that they need not pay for their shares. In the case of Subbayya the shares in favour of the wife of Mehta were transferred while in the case of Dharmalingam Pillai, though he was declared to be the holder of shares, he did not pay anything for it. Becoming a director by accepting a gift of shares without paying for them is a misfeasance. No doubt he cannot be rendered liable for the loss in respect of this act of misfeasance because no charge has been framed against him. But the fact remains that he began his connexion with the company with an act of misfeasance. This fact and the prospect of earning director's fees were the sole motive which induced him to become a director. He could not have known Mehta earlier. Before he signed the prospectus it was his duty to have acquainted himself with the antecedents of Mehta and also of the other directors and furthermore, who the partners of Messrs. Johnson & Co. were. He signed the prospectus with the recital that an agreement had been or would be entered into with Messrs. Johnson & Co. A slight enquiry would have revealed that the directors of Messrs. Johnson & Co. were ladies and an infant and Narasinga Rao who is a relation of Mehta and that that company would practically be under the control of Mehta. A reference to the agreement of Messrs. Johnson & Co. would have revealed that a sum of Rs. 1000 was to be paid to them from the date of the registration of the company exclusive of all rents of the company, salaries, emoluments and wages paid to the clerks, servants, employees of the said company which are all to be paid out of the Sugar Mills. Further they were to be paid 10 per cent. of the profits of the company. It was his duty to ascertain whether it would be prudent to entrust the management of the Sugar Mills Co. to Messrs. Johnson & Co. on such a very heavy remuneration. No prudent man would consent to the management of the Sugar Mills to a firm constituted as Messrs. Johnson & Co. were. He must have also known who the Eastern Underwriter Syndicate were, which again was the creation of Mehta. There may be cases where a director can confide in a co-director or directors whose antecedents were well-known and whose capacity for business management was well tried. But there was absolutely no reasonable ground for Dharmalingam Pillai to confide in Mr. Mehta whom he could have only met for the first time when a request was made to become a director of the company and it does not appear from the evidence that either at that time or at any time subsequently Dharmalingam Pillai ever cared to find out what the antecedents of Mehta were and whether it was prudent on his part to continue to confide in him.

Whatever may be the justification until 15th July 1934, we think that after that date his passivity is inexcusable. The audit report of Batliboi & Co. which exposed the frauds of the company should have put Dharmalingam Pillai on enquiry as to the antecedents of Mehta and particularly as to the propriety of Messrs. Johnson & Co. continuing to be the Managing Agents of the Sugar Mills or of payment of any remuneration to them. But it is rather surprising that he should have accepted the explanation of Johnson & Co. which condemned Batliboi's report on grounds which no man exercising some reasonable care would ever accept. He presided at the meeting and was a party to the resolution which condemned Batliboi's report. He signed the balance-sheet which sanctioned a remuneration of rupees 13,000 to Messrs. Johnson & Co. It was between July and November 1934 that a sum of about rupees 6000 was paid to Johnson & Co. and this could not have happened if Dharmalingam Pillai had taken steps to satisfy himself whether the allegations made in Batliboi's report were correct and whether it would be wise or safe to continue the management by Messrs. Johnson & Co., and whether they were entitled to be paid the remuneration which was stipulated for according to the agreement having regard to the way in which the company was managed and particularly in view of the serious allegations made by Batliboi that all the account books put before him appeared to be fabricated. We are therefore clearly of the opinion that Dharmalingam Pillai was guilty of gross and wilful negligence and clearly guilty of misfeasance within the meaning of S. 235 of the Act. Mr. V. C. Gopalrathnam cited to us a number of cases to show that S. 235 would not apply to a case of mere non-feasance. Section 235 does not prima facie exclude non-feasance. In our opinion the section would apply to every act whether of commission or omission which is a breach of duty to the company in consequence whereof loss to the company results. Mr. Gopalrathnam laid considerable emphasis on (1928) 1 Ch. 861[1] for the position that the section would not apply

1. (1928) 1 Ch. 861 : 97 L. J. Ch. 460 : (1928) B. & C. R. 81 : 140 L. T. 219, In re Etic Ltd.

to a case of non-feasance but that decision does not support him. Maugham J. after reviewing all the authorities sums up the position thus:

"It (S. 215) is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company."

This would take in non-feasance also. In the earlier portion of the judgment he refers to *Ex parte Pelly*[2] and to the view of Sir George Jessel, viz., that S. 215 would apply to every wrongful act by the director, manager, liquidator or other officer of the company either of the nature of misfeasance or of the nature of a breach of trust in a wide sense including no doubt a breach of trust by negligence or something of that kind. No doubt language is used in some of the cases that mere negligence is not enough but there should be gross negligence but it is unnecessary to deal with those cases because as we have already stated on the facts of this case it is clear that Dharmalingam Pillai was guilty of gross negligence which would be misfeasance within the section. He not only did not exercise that amount of reasonable care which was expected of him as a director in ascertaining the true state of affairs of the company but also wilfully shut his eyes to it until a very late stage. The only question is, what is the amount for which he should be rendered liable? He is only one of the directors and it cannot be said that he was guilty of any fraud or corruption. We therefore make him liable for a sum of Rs. 5000. In view of our findings, it is not possible to give him relief under S. 281 of the Act, but in assessing compensation we did take the matter also into consideration.

In regard to the appeals filed by Narasinga Rao, Mr. Bhujanga Rao was not able to convince us that the findings of the learned Judge are wrong. Narasinga Rao was associating in the fraud of Mehta from the very beginning. He is closely related to Mehta having married his wife's sister. He assisted Mehta in the formation of the company. He was one of the partners of Johnson & Co., and in fact the only male partner of that company. He signed the prospectus with the full knowledge of the then state of affairs of the company. It was he that signed the declaration to enable the company to get a certificate under S. 103, Companies Act. He was a party to the false statement made therein that every director of the company has paid to the company on each of the shares contracted to be taken by him and it has been proved in this case that the shares in the name of Dharmalingam Pillai were not paid for by him. No doubt he says that he was completely a tool in the hands of his wife or Mehta but it is not possible to rely on his statement. There can be no doubt that he was throughout associated with Mehta in all the frauds committed by the latter, in the formation of various companies by which the funds of the company were diverted. He signed the contract with Messrs. Johnson & Co. on behalf of Sugar Mills. Until he came away from the company, he was acquainted with all its activities. After he ceased his connexion in 1934, it was his duty to have exposed all the activities of Messrs. Johnson & Co. If he had done so, the persons interested in the company would have taken proper steps in regard to the affairs of the company, and the subsequent payment of remuneration to Messrs. Johnson & Co., would have been averted. He did not do so and he is certainly liable for all the loss which the company has sustained. He was however not a party to the payment of remuneration to Messrs. Johnson & Co. and in fact no advance was paid to them till he severed his connexion with the company. Besides, he was only one of the four partners of Messrs. Johnson & Co. Taking these circumstances into consideration in assessing the extent of his liability, we think that he should be made liable for a sum of Rs. 10,000.

In the result, C. M. A. No. 501 of 1938 is allowed and C. M. A. No. 502 of 1938 and C. M. A. Nos. 576 and 577 of 1938 are modified by limiting the compensation to Rs. 5000 and Rs. 10,000, respectively. We make no order as to costs in C. M. A. Nos. 501 and 502 of 1938 but we direct the appellant in C. M. A. Nos. 576 and 577 of 1938 to pay the costs of the respondent on the amount decreed. The Official Liquidators will be entitled to take their costs out of the estate.

C.R.K./K.S. *Order accordingly.*

2. (1882) 21 Ch. D. 492 : 47 L. T. 638 : 31 W. R. 177.

A. I. R. (29) 1942 Madras 368

PANDRANG ROW AND ABDUR RAHMAN JJ.

Rajah Mahadeva Royal Y. B. — *Petitioner*

v.

Rajah Veerabasava Chikka Royal and another — *Respondents.*

Civil Misc. Petn. No. 1933 of 1941, Decided on 2nd May 1941, for leave to appeal to His Majesty in Council against judgment and decree of High Court, in Appeal No. 6 of 1936, D/- 1st November 1940.

(a) Civil P. C. (1908), S. 110 — High Court affirming decision but interfering with order as to costs of lower Court — Decree is still one of affirmance.

Where the High Court affirms the decision of the lower Court by upholding the decree of the lower Court dismissing the suit but interferes with the decision of the lower Court as to costs, the decree is still one of affirmance. [P 369 C 1]

(b) Civil P. C. (1908), S. 110 and O. 45, R. 3 — That large stakes are involved in appeal is not by itself ground for granting leave.

The fact that large stakes are involved in the appeal in itself would be no ground for granting leave. What the Court has really to decide is whether any substantial question of law exists which would enable it to give a certificate as required by O. 45, R. 3, that the case fulfils the requirements of Section 110. [P 369 C 1]

(c) Civil P. C. (1908), S. 110 — Question of law — Value put upon statement by person.

The question as to the value to be put upon certain statement made by a person is a question of fact and not of law. [P 369 C 1]

(d) Civil P. C. (1908), S. 110 — Substantial question of law — Meaning of substantial — Important documents held inadmissible and their admissibility affecting result of appeal — Question is substantial one.

The words "substantial questions" are to be understood in their being of substance to the parties. Therefore the question as to the admissibility of certain important documents which have been held to be inadmissible by the High Court and which might

affect the result of the appeal is a substantial question of law within the meaning of S. 110. [P 369 C 1]

Advocate-General, B. C. Seshachala Ayyar and K. Seshagiri Rao Naidu — for Petitioner.

T. R. Venkatarama Sastri for N. C. Vijayaraghavachari and A. C. Sampath Ayyangar — for Respondents.

ABDUR RAHMAN J. — This is an application for leave to appeal to His Majesty in Council. The decree passed by this Court was one of affirmance although our conclusions on the two main questions of fact which were vital for the disposal of the appeal were diametrically opposed to what were arrived at by the trial Court in the suit. The suggestion by the learned Advocate-General that it is not a decree of affirmance as we interfered with the lower Court's decision in regard to costs is not sound in our opinion. The decree dismissing the suit was maintained by this Court and it is immaterial if we have superseded the order passed by the trial Court in regard to costs. The petitioner does not wish to appeal against the order directing the parties to bear their own costs, which is an order in his favour but in respect of the decree of dismissal of his suit that was passed against him.

It is true that large stakes are involved in this appeal; but that in itself would be no ground for granting leave. What we have really to decide is whether any substantial question of law exists which would enable us to give a certificate as required by O. 45, R. 3, Civil P. C., that the case fulfils the requirements of S. 110 of the Code—the value of the subject-matter of the suit being far in excess of Rs. 10,000. Two points have been urged on behalf of the petitioner : (1) that certain material documents were incorrectly held by us to be inadmissible in evidence; and (2) that we did not put proper value on the admission found in Ex. J. and that we were not justified in accepting or acting on an explanation when there was nothing on the record to support the suggestion made by us towards the end of p. 358 of the judgment. Taking the latter point first, we are of opinion that it does not raise a question of law. We considered the effect of the admission made in Ex. J. fully and gave to it such value as we considered it was entitled to; but in weighing the evidence, we took certain other documents, which were on the record, into consideration and came to the conclusion that the statement made by Somasekhara in Ex. J. was of very little value. This is a question of fact and not of law and would not justify us in giving a certificate on that ground.

In regard to the first point, although we are clearly of opinion that the documents Ex. JJJ, Ex. KKK, Ex. LLL and Ex. MMM were inadmissible in evidence we feel that we would not be justified in dismissing this application for leave on that ground as undoubtedly these documents are of great importance and if they are held to be admissible, they might affect the result of the appeal. Mr. Venkatarama Sastri, learned counsel for the respondent contends that the contention in regard to their admissibility is flimsy and without any force and cannot be said to raise a substantial question of law. We were of opinion that there was no substance in the contention advanced by the learned Advocate-General; but if the words "substantial questions" are to be understood in their being of substance to the parties, we must hold that the decision in regard to the non-admissibility of the documents is a substantial question which would entitle the petitioner to have a certificate. For that reason, and for that reason alone, we must accept the petition and grant leave to appeal. No order as to costs.

C.R.K./K.S. *Petition allowed.*

C. P. C. —

(a) ('40) Chitaley, S. 110, N. 13 Pt. 3.
('41) Mulla, Page 400 Pt. (k).

(b) ('40) Chitaley, S. 109, N. 10; S. 110, N. 6.
('41) Mulla, Page 394 Note "The sum of money . . . true value."

(c) ('40) Chitaley, Ss. 100 and 101, N. 29 and S. 110, N. 17 Pt. 20.
('41) Mulla, Page 403 Note "Appeal must involve . . . of law."

(d) ('40) Chitaley, S. 110, N. 17 Pt. 11.
('41) Mulla, Page 403 Pt. (t).

A. I. R. (29) 1942 Madras 369

PATANJALI SASTRI J.

S. Berumull Sowcar — Appellant

v.

P. Velu Gramany — Respondent.

City Civil Court Appeal No. 51 of 1940, Decided on 10th October 1941, against decree of Principal City Civil Judge, Madras in O. S. No. 3844 of 1939.

(a) Madras High Court, Civil Rules of Practice, R. 129—Application for copies struck off under R. 129 for non-deposit of stamp paper — Subsequent application to restore previous application—Court can restore former application and treat subsequent application as continuation of original application.

Where an application for copies is struck off under R. 129 for non-deposit of requisite stamp papers and a subsequent petition is put in for restoration of the previous application, the Court has power to restore the original application and to treat the subsequent application as a continuation of the original application for the purpose of computing the time for filing an appeal : 18 Mad. 374, *Rel. on.* [P 370 C 1]

(b) Mortgage — Equitable mortgage—Tenant of site putting up superstructure thereon and subsequently purchasing site — Deposit of title deed though relating only to land would create equitable mortgage of land and house standing thereon — Plea that since title deeds deposited related only to land equitable mortgage was of land and not of house standing thereon is not question of law but of fact—Plea once rejected should not be allowed to be raised subsequently.

Where a person himself puts up a superstructure on the site of which he is a tenant, and subsequently purchases the site from the landlord, the title deeds though relating only to the land would clearly cover the house and their deposit would create an equitable mortgage of the entire property consisting of the ground and the superstructure standing thereon. [P 370 C 2]

The plea that since the title deeds deposited related only to land the equitable mortgage was only of the land and not of the superstructure standing thereon is not really a question of law but depends on facts inasmuch as it would depend upon whether the house was put up by the tenant himself or was purchased by a separate sale deed. Hence, when such a plea is once refused to be put forward by way of an additional written statement it ought not to be allowed to be put forward at any subsequent stage. [P 370 C 2; P 371 C 1]

K. P. Ramakrishna Ayyar and C. R. Venkatachala Ayyar — for Appellant.

A. Nagarajan and A. Viswanathan — for Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the appellant in the City Civil Court to enforce an equitable mortgage. A preliminary objection is taken to the maintainability of the appeal on the ground that it is barred by limitation. The decree of the Court below was passed on 28th August 1940 and the application for certified copies of the decree and judgment was made on 29th August. The requisite copy stamps were called for on 26th September but as they were not deposited in time, the application was rejected on the 30th of the same month. A fresh application for copies was made on 2nd October. A petition to restore the original application was also filed on 3rd October. The Court below after hearing the objections of the respondent passed an order on 11th October that copies be granted on the original application with a note thereon that they were granted in pursuance of the petition to restore the original application which had been rejected. The requisite stamp papers were deposited on the same day and the copies were delivered on 21st October. It is not disputed that if the time prescribed for filing the appeal is computed on the basis of the application originally filed, this appeal preferred on 28th October would be in time; but it is urged that the Court below had no power to restore the original application after it was rejected on 30th September or to treat the fresh application filed on 2nd October as a continuation of the original application. It is pointed out that R. 129 of the Civil Rules of Practice which provides that if the required stamp papers have not been deposited within the time prescribed in the rule, the application shall be struck off is mandatory and that there is no provision in the rules for the restoration of an application so struck off. The appellant, on the other hand, contends that the Court below had the power to pass the order dated 11th October under O. 9, R. 9, read with S. 141, Civil P. C., and that, even if these provisions are not applicable, it had inherent jurisdiction under S. 151 to treat the subsequent application as a continuation of the original application if it was satisfied that there was sufficient cause for non-deposit of the stamp papers required, and reliance is placed on the decision of this Court in 18 Mad. 374[1] which certainly supports the contention. There also an application for copies was struck off under the copyist rules for non-deposit of the required stamp papers, and a petition was put in for restoration of the previous application which was ordered and copies were granted. It was objected that an appeal filed with the copies so obtained was barred by time but this Court held that the later application must be considered to be a continuation of the previous application for the purpose of computing the time prescribed for filing the appeal. No doubt the judgment does not state under what provision the Court has the power to treat a petition for restoration of an application for copies dismissed for default as a continuation of the previous application, but the decision clearly concludes the point in favour of the appellant. The preliminary objection therefore fails and the appeal must be held to have been preferred in time.

On the merits, the only question argued was whether the respondent was entitled to claim the benefits of the Madras Agriculturists Relief Act. Although the plaint which was filed long after the Act came into force definitely alleged that the respondent deposited as collateral security the title deeds relating to his house and ground described in the schedule, the respondent did not specifically deny the allegations but contented himself with merely pleading that he was an agriculturist as defined in the Act and as such was entitled to relief under S. 9 thereof. He filed, however, a supplemental written statement in which he sought to raise two additional pleas. The first of these, which alone is material here, was as follows :

" This defendant states that the property mortgaged to the plaintiff was only the land and the document with the plaintiff relates only to the land and not to the superstructure."

It is the respondent's case that he had purchased the superstructure of the house from a third party under a separate instrument before he purchased the site under Exs. C and D which he deposited with the appellant. On this basis the plea was sought to be raised that inasmuch as the title deeds deposited were only those relating to the purchase of the site the equitable mortgage was only of the land and not of the superstructure. This plea was of course put forward to get over the difficulty created by S. 4 (d) of the Act which provides that nothing in the Act shall affect any debt contracted on the security of house property alone in a municipality. This provision was apparently overlooked when the original written statement was filed which, as already stated, contained no denial of the specific allegation in the plaint that the suit debts were secured on the house and ground described in the schedule attached to the plaint. The Court below passed an order on 27th February 1940 refusing to allow this supplemental written statement to be filed so far as it related to this plea on the ground that it was a statement of fact which must have been within the knowledge of the respondent at the time when he filed his previous written statement. Notwithstanding this order, the learned Judge considered the plea in his judgment and held that as the title deeds (Exs. C and D) related only to the land and not to the superstructure there was no equitable mortgage of the house, and that the respondent was entitled to the benefit of the Act. This decision is clearly unsustainable. The learned Judge having refused in his earlier order to allow this point to be put forward by way of an additional written statement ought not to have allowed it to be put forward at any subsequent stage. Indeed it was represented by the appellant's junior counsel who appeared for him in the Court below that the point was not even argued at the hearing and that the learned Judge dealt with the point by mistake in the judgment pronounced two weeks after the case was closed. It is, however, urged for the respondent that the question is one of pure law turning upon the construction of the title deeds, Exs. C and D and the letters Exs. 1 and 2 which refer to the deposit of those deeds by way of collateral security.

I cannot agree, for, if the respondent had himself put up the superstructure on the site of which he was a tenant, and subsequently purchased this site from the landlord, as suggested for the appellant, the title deeds though relating only to the land would clearly cover the house and their deposit would create an equitable mortgage of the entire property consisting of the ground and the superstructure standing thereon. The respondent, however, stated in his deposition that he had purchased the superstructure for Rs. 22 or Rs. 23 from a third party under a separate unregistered sale deed which

1. ('95) 18 Mad. 374, Ramanuja Iyengar v. Narayana Iyengar.

he had in his possession. This deed was not produced and no evidence was let in on this matter on the side of the appellant. If this matter was properly raised and put in issue, it might have been possible for the appellant to show that the alleged purchase was not true and that the respondent himself had put up the superstructure. It will thus be seen that the question is not one of law but really depends on facts. Indeed, the respondent's learned counsel strongly relied on the evidence of the respondent already referred to and submitted that it should be accepted as there was no evidence contra which shows the untenability of the contention that the plea involves a pure question of law. In these circumstances, the finding of the lower Court that the equitable mortgage comprised only the land and not the superstructure because the title deeds covered only the land and not the building cannot be allowed to stand as a finding on a pure question of law.

Assuming however that it is open to the Court to go into this matter notwithstanding its exclusion from the scope of the trial by the order dated 27th February 1940, I am satisfied that the letters (Exs. 1 and 2) which refer to the deposit of the title deeds show that it was intended to create an equitable mortgage in respect of the whole house property. It is no doubt true that Ex. 2 refers in one place to the title deeds "of my land having been deposited as security" but, in another place, it states that the land and superstructure thereon have been given as collateral security. It was suggested that as Ex. 2 was given at the time of the second loan, the recital that the land and suprestructure had been given as collateral security must be understood as referring to that transaction only, and not to the earlier loan. I am unable to read Ex. 2 in this sense. Admittedly, there was no deposit of any fresh title deeds at the time of the second loan, and if an equitable mortgage was intended to be created in respect of both the land and the superstructure in respect of the second loan, it could only be on the strength of the original deposit of Exs. C and D which related only to the land. It is therefore clear that the title deeds deposited were regarded as the title deeds relating to both the land and the superstructure and as creating an equitable mortgage in respect of both the loans. This is made still more clear by Ex. 1 which refers to the deposit of documents relating to the "abovementioned house site," the expression "abovementioned" referring obviously to the house described by its municipal number at the head of the letter. I am not therefore prepared to accept the respondent's evidence that there was a separate sale deed for the superstructure and that he deposited only the sale deed relating to the land at the time of the first loan, as he had no intention of creating an equitable mortgage of the superstructure. For these reasons, I hold that the respondent is not entitled to claim the benefit of the Act although he is an agriculturist and that the appellant is entitled to a mortgage decree in respect of the entire house including the superstructure. Subject to these modifications, the decree of the lower Court will stand. The appellant will have his costs both here and below.

C.R.K./G.N. *Order accordingly.*

Limitation Act—
(a) ('42) Chitaley, S. 12, N. 17 Pt. 1.
('38) Rustomji, S. 12 P. 210 Pt. 7.
C. P. C.—
(b) ('40) Chitaley, O. 8 R. 9, N. 1.
('41) Mulla, O. 8 R. 9 P. 630 Note 'Additional Written statement.'

A. I. R. (29) 1942 Madras 371

SOMAYYA J.

Kolaparthi Venkatasubbiah—Appellant

v.

Madallapalli Venkatasubbiah and another — Respondents.

Second Appeal No. 668 of 1939, Decided on 29th August 1941, against decree of District Court, Cuddapah, D/- 14th October 1938.

Provincial Insolvency Act (1920), S. 37 — Vesting order under S. 37—Effect — Property does not revert to insolvent — Sale without impleading appointee under S. 37 is null and void.

When an order under S. 37 vesting the property in some one other than the debtor is made there is no "reversion of the debtor's property to himself." The appointee continues to be subject to the directions of the insolvency Court which appointed him. Those directions relate to the property of the insolvent and should be given in accordance with the policy and provisions of the Insolvency Act : ('35) 22 A. I. R. 1935 Mad. 826 (F. B.); ('35) 22 A. I. R. 1935 Mad. 931 and ('40) 27 A. I. R. 1940 Mad. 375 (F. B.), *Rel. on*; ('36) 23 A. I. R. 1936 Rang. 284 (F. B.) and ('31) 18 A. I. R. 1931 All. 71, *Dissent.* [P 372 C 1, 2]

The only person entitled to represent the estate is the appointee under S. 37. A sale held without him on record is a sale without the estate being represented in the execution proceedings and therefore is null and void : ('14) 1 A. I. R. 1914 P. C. 129, *Rel. on.* [P 372 C 2]

T. K. Srinivasathathachariar and T. T. Srinivasan — for Appellant.

Kasturi Seshagiri Rao — for Respondents.

JUDGMENT. — The plaintiff is the appellant and he filed the suit for recovery of possession of three items of immovable properties on the strength of a Court sale held in execution of a money decree obtained against one Yegnayya. The contesting respondents are subsequent purchasers of the properties from the heirs-at-law of Yegnayya and their defence is that no title passed to the plaintiff under the court sale. Yegnayya was adjudged an insolvent and his adjudication was subsequently annulled under S. 43, Provincial Insolvency Act, for failure to apply for discharge within time. While annulling the adjudication the Insolvency Court passed an order under S. 37 of the Act vesting the debtor's properties in the Official Receiver for a period of one year.

Before the year expired, the appellant brought the properties to sale without impleading the receiver and purchased the properties. It appears that the debtor died before the sale and his heirs were brought on record as his legal representatives. Without impleading the Official Receiver in whom the properties were directed to be vested under S. 37 and apparently without even notice to him, the Court sale was held. Is the sale valid and does it pass any title to the appellant. The question turns upon the effect of a vesting order passed under S. 37 of the Act. What is the legal status and position of the person in whom the properties are vested? In whom does the legal title rest—is it in the debtor? The effect of a vesting order has been the subject of several decisions and the High Courts have taken different views and even the same Court has expressed different opinions which it is not easy to reconcile. A Full Bench of our High Court has considered this question in

58 Mad. 908.[1] Three possible alternative views that may be held on this question are set out on pp. 921 and 922 of the report :

"Three points of view are possible. The first is that with the annulment the insolvency proceedings come to an abrupt and final conclusion. The insolvency Court has no longer any power to pass any orders in regard to the insolvent's property, its order vesting that property in the appointee being its last expiring act. The appointee is a mere custodian of the insolvent's property. No doubt he should carry on the ordinary work of administering and preserving the property in his hands, but he has no further control over it, and must merely hold it subject to any orders as to attachment and sale which he may receive from any Court entertaining an application in execution against the insolvent. The insolvent's creditors, subject to anything which may have been validated by S. 37, are restored to the position in which they found themselves before the insolvency proceedings began, and all must pursue afresh their remedies by execution or by suit in the ordinary way, which will mean in practice that the insolvent's property will go to some and some only of his creditors. The second view is that if a vesting order is made the insolvency proceedings are continued for all purposes. The third view is one intermediate between these two, and, we think, is the view which must prevail. It is this, that the appointee continues to be subject to the directions of the insolvency Court which appointed him, that these directions relate to the property of the insolvent, and that they should be given in accordance with the policy and provisions of the Insolvency Act. It will be found on our further examination that this is not in all respects equivalent to the actual continuation of the insolvency proceedings."

The first of these views was rejected by the Full Bench but has found acceptance with Rangoon High Court in 14 Rang. 254,[2] and with the Allahabad High Court in 53 All. 313.[3] The appellant's attempt to place reliance on the decisions of the Allahabad and Rangoon High Courts cannot be countenanced. The second view that the state of insolvency continues for all purposes was also negatived and this aspect was further considered by Beasley C. J. and Cornish J. in 58 Mad. 1014.[4] The decision of the Full Bench is that, "the appointee continues to be subject to the directions of the Insolvency Court which appointed him, that these directions relate to the property of the insolvent and that they should be given in accordance with the policy and provisions of the Insolvency Act." King J. who delivered the leading judgment dealing with S. 37 said this on page 924 :

"Then we come to S. 37 itself, and the first point to be noticed is the antithesis between the vesting order and the reversion of the debtor's property to himself."

The proposition that the property reverts to the debtor even when a vesting order is made was then considered at length and rejected. Then it was pointed out that the other extreme view that "insolvency proceedings are continued for all purposes" was also not tenable. The third or the intermediate view was then accepted :

"The person appointed under S. 37 has no longer by the mere fact of his appointment the powers which a receiver has under the Act. He has only such powers as are necessarily implied by the vesting order which are, as we understand them, to carry out the directions of the Court, and those directions, as we have said, should so far as the realisation and distribution of the debtor's property are concerned, be in accordance with the provisions of the Insolvency Act."

Earlier in the judgment it was pointed out that the whole significance of the Court's action in vesting the insolvent's property in some one else seems to be that the Court is intended to preserve its control over that property. This decision lays down in unmistakable terms that when there is an order under S. 37 vesting the property in some one other than the debtor, there is no "reversion of the debtor's property to himself." The same view was expressed by Beasley C. J. and Cornish J. in 58 Mad. 1014,[4] Beasley C. J. says on page 1018 :

"It is quite clear in my view—and this is also the view of the Full Bench—that the appointee under S. 37 does not hold the property for the benefit of the insolvent. . . . . But in the opinion of the Full Bench the legal effect of the vesting order will be different from the legal effect of the reversion of the property to the debtor."

The question came up in a different form before another Full Bench of this Court in I. L. R. (1940) Mad. 441.[5] After holding that the debtor should never have been adjudged a bankrupt, the Full Bench refused to hand over the monies in the hands of the Official Receiver but directed an order under S. 37 to prevent the debtors from getting the amount. And they directed the amount to be vested in the Official Receiver, not as Official Receiver but as a person appointed under S. 37, and observed that the Official Receiver should in due course distribute the sum among the creditors who had proved in the insolvency proceedings. The effect of these decisions is clear that the property did not revert to the insolvent. This being so, the Court sale passed no title to the appellant. It is not a case merely of a sale held without the leave of the Insolvency Court as Mr. Srinivasathathachariar urges but a case of a sale of certain properties as those of *A* when the properties had vested in *B*. The only person entitled to represent the estate was the appointee under S. 37. A sale held without him on record is a sale without the estate being represented in the execution proceedings. The decision of the Judicial Committee reported in 42 Cal. 72[6] is directly in point and the sale is null and void. The property vested in the Official Receiver when the order of adjudication was made and it had not yet reverted because the reverting was prevented by the vesting order under S. 37. I hold that the appellant got no title under the Court sale; hence this second appeal is dismissed with costs. No leave.

C.R.K./G.N. *Appeal dismissed.*

1. ('35) 22 A.I.R. 1935 Mad. 826 : 158 I. C. 1060 : 58 Mad. 908 : 69 M.L.J. 364 (F. B.), Veerayya v. Srinivasa Rao.
2. ('36) 23 A.I.R. 1936 Rang. 284 : 163 I.C. 217 : 14 Rang. 254 (F.B.), Annamalai Chettiar v. Banerjee.
3. ('31) 18 A.I.R.1931 All.71 :134 I.C. 848 : 53 All. 313:1931 A.L.J. 18, Pannalal v. Official Receiver.
4. ('35) 22 A.I.R. 1935 Mad 931 : 157 I. C. 1007 : 58 Mad. 1014 : 69 M.L.J. 856, Venkata Srinivasa Rao v. Secretary of State.
5. ('40) 27 A.I.R. 1940 Mad. 375 : 189 I. C. 573 : I.L.R. (1940) Mad. 441 : (1940) 1 M.L.J. 228 (F.B.), Periakaruppan Chettiar v. Arunachalam Chettiar.
6. ('14) 1 A.I.R. 1914 P. C. 129 : 24 I. C. 304 : 42 Cal 72 : 41 I. A. 251 (P. C.), Raghunath Das v. Sundar Das.

C. P. C.—
('40) Chitaley, S. 50, N. 12 Pt. 10.
('41) Mulla, O. 21 R. 22 Page 784 Pt. (h).

a

* A. I. R. (29) 1942 Madras 373

KRISHNASWAMI AYYANGAR J.

Premji Tulsidas Sait — *Petitioner*

v.

P. S. Sethuramaswami Iyer and others — *Respondents.*

Civil Revn. Petns. Nos. 1224, 1225 and 2127 of 1940, Decided on 24th January 1941, to revise orders of Sub-Judge, Coimbatore, D/- 16th July 1940.

*** Civil P. C. (1908), O. 23, R. 1—One of plaintiffs applying for unconditional withdrawal from suit — Sub-rule (4) does not apply and consent of other plaintiffs is not necessary — But Court can refuse such application if it will be prejudicial to other plaintiffs—Mere inconvenience to other plaintiffs having no relation to conduct of suit is not prejudice — It must amount to legal obstacle to continuation of suit.**

b

Sub-rule (4) of O. 23, R. 1 does not govern an application for the unconditional withdrawal of a suit under sub-r. (1). Rule 1 does not contemplate the necessity for a plaintiff to obtain the permission of the Court to withdraw a suit or abandon part of his claim when he does not seek for liberty to institute a fresh suit on the cause of action withdrawn. It is only in case where the permission of the Court is required that sub-r. (4) is called into operation and the Court is not to give the permission when the other plaintiffs did not accord their consent. But this does not mean that one of several plaintiffs has an unconditional right to withdraw from a suit though it may be that for such a purpose, the consent of the

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other plaintiffs may not be necessary. The Court can refuse to allow one of several plaintiffs to withdraw if such a course is not consented to by the remaining plaintiff or plaintiffs and if it be prejudicial to his or their interests. In other words, the Court is entitled to take into account the consideration whether the result of the withdrawal would tend to prevent the successful prosecution of the suit as framed or create obstacles in the way of the plaintiff so doing. If there is real prejudice to the remaining plaintiffs and they do not consent to the withdrawal, the Court will take this circumstance into consideration before it comes to a decision one way or the other on an application for withdrawal. There must be a legal obstacle to the continuation of the suit by such withdrawal. Mere inconvenience to the other plaintiffs having no relation to the conduct of the suit cannot be regarded as a prejudice which should prevent the

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Court from granting an application to withdraw by one of several plaintiffs: 9 C. L. R. 332 and ('27) 14 A.I.R. 1927 Bom. 244, *Rel. on;* ('33) 20 A.I.R. 1933 Mad. 824, *Expl.* [P 374 C 1, 2]

A suit by three plaintiffs for specific performance of a contract to reconvey certain properties between plaintiffs 1 and 2 and defendant was filed. Plaintiff 3 had agreed to finance plaintiffs 1 and 2 in getting the reconveyance and the arrangement was that plaintiff 3 was to get a usufructuary mortgage of the properties. The defendant refused to accept the tender of the money whereupon the suit by the plaintiff 3 was filed and the money deposited by plaintiff 3 in Court along with the plaint. Due to subsequent disputes between plaintiffs 1 and 2 and plaintiff 3, plaintiff 3 put in an application to withdraw from the suit unconditionally without any prayer for permission to file a fresh suit. Plaintiffs 1 and 2 had not consented to the withdrawal but they objected to such withdrawal on the ground that they will be inconvenienced by having to search for e another financier :

Held that such an inconvenience did not amount to a legal obstacle to the continuation of the suit and hence the withdrawing of plaintiff 3 from the suit would not operate to the detriment of the other plaintiffs. [P 374 C 2]

D. Ramaswamy Iyengar and T. P. Kannabiram — for Petitioner.

S. Panchapagesa Sastri and P. S. Ramachandran — for Respondents.

ORDER. — *C. R. P. No. 1225 of 1940.* This is a civil revision petition filed against the order of the Subordinate Judge of Coimbatore in I. A. No. 554 of 1939 on his file. That application was made by plaintiff 3 in O. S. No. 33 of 1939 for an order permitting him under O. 23, R. 1 read with S. 151, f Civil P. C., to withdraw from the suit and to strike his name off from the record. The learned Subordinate Judge dismissed the application and hence the revision petition. O. S. No. 33 of 1939 was instituted by the first two plaintiffs along with the petitioner for the specific performance of a contract entered into between the first two plaintiffs and the defendant by which the defendant had agreed to reconvey certain properties purchased by him from the former. The properties consisted of a mill and premises and also certain agricultural lands which belonged to the first two plaintiffs. They sold those properties for a consideration of Rs. 26,000 of which Rs. 17,000 was actually advanced by the defendant and the balance was undertaken to be paid by him towards a Government loan taken by the first two plaintiffs on the security of the property conveyed. Simultaneously with the sale deed, an agreement was executed by g the defendant to reconvey the properties on receipt of the moneys advanced by them for the purchase. It was mentioned in the plaint that a sum of Rupees 17,000 only had been advanced by the defendant and that the two plaintiffs were therefore entitled to reconveyance on payment of that sum only. The petitioner who was plaintiff 3 was a financier of the first two plaintiffs, having agreed in pursuance of an agreement of 17th November 1938 to advance the said sum of Rs. 17,000 in order to enable plaintiffs 1 and 2 to obtain a reconveyance of the property from the defendant. The arrangement between the parties was that a further sum of Rs. 3000 should be advanced by the petitioner and for the consolidated amount of Rs. 20,000, plaintiffs 1 and 2 should give a usufructuary mortgage over the properties sought to be recovered in the suit. It also appears that on the date on which the suit was instituted a mortgage h was executed by plaintiffs 1 and 2 in favour of plaintiff 3 by which the former mortgaged the right to obtain a reconveyance from the defendant for a sum of Rs. 50 advanced by plaintiff 3.

On the facts mentioned, the parties apparently considered that the suit to obtain a reconveyance should be instituted by all the three plaintiffs. Plaintiff 3 who had unsuccessfully attempted to tender the sum of Rs. 17,000 before suit deposited the money into Court along with the plaint. Disputes and differences seem to have arisen between the first two plaintiffs on the one hand and plaintiff 3 on the other after the institution of the suit which led to plaintiff 3 desiring to withdraw from the suit and calling back the money deposited by him. Two applications were accordingly taken out by him; I. A. No. 554 of 1939 for leave to withdraw from the suit and I. A. No. 555 of 1939 for refund of Rs. 17,000

paid into Court as aforesaid. The learned Judge was of opinion that the petitioner should not be allowed to withdraw from the suit as that course would operate to the prejudice of the remaining plaintiffs. He held that it was not necessary for him to obtain the consent of the other plaintiffs as he was neither asking for liberty to institute a fresh suit under O. 23, R. 2 nor seeking to avoid the consequences which O. 23, R. 3 imposes upon a plaintiff who withdraws from the suit without the permission of the Court. He seems to have accepted the view laid down in 29 Bom. L. R. 299[1] and 9 C.L.R. 332[2] that sub-r. (4) does not govern an application for the unconditional withdrawal of a suit under sub-r. (1). My attention was called on behalf of the respondents to 1 Pat. 228[3] and A.I.R. 1928 Mad. 496[4] and it was argued that in the light of the decisions in these cases, sub-r. (4) should not be limited in its application to sub-rr. (2) and (3) only but that it should be held to govern sub-r. (1) as well. In none of these cases has the question been discussed or the reasoned view put forward in 9 C.L.R. 332[2] and 29 Bom. L. R. 299[1] considered. In fact, these two cases do not appear to have been cited before the learned Judges who decided them. The point was noticed in a Bench decision of this Court in 57 Mad. 299[5] but the learned Judges did not find it necessary to decide it and based their decision upon a different point altogether. In the absence of any binding decision, I am inclined to follow the view propounded in 9 C.L.R. 332[2] and 29 Bom. L. R. 299,[1] which proceeded upon the specific words contained in sub-r. (4) which is to the following effect :

" Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others."

Rule 1 does not contemplate the necessity for a plaintiff to obtain the permission of the Court to withdraw a suit or abandon part of his claim when he does not seek for liberty to institute a fresh suit on the cause of action withdrawn. It is only in case where the permission of the Court is required that sub-r. (4) is called into operation and the Court is not to give the permission when the other plaintiffs did not accord their consent. This view, however, does not mean that one of several plaintiffs has an unconditional right to withdraw from a suit though it may be that for such a purpose, the consent of the other plaintiffs may not be necessary. On this point, the decision of this Court in the case already cited, namely, 57 Mad. 299[5] lays down the proposition that the Court can refuse to allow one of several plaintiffs to withdraw if such a course is not consented to by the remaining plaintiff or plaintiffs and if it be prejudicial to his or their interests. In other words, the Court is entitled to take into account the consideration whether the result of the withdrawal would tend to prevent the successful prosecution of the suit as framed or create obstacles in the way of the plaintiff so doing. If there is real prejudice to the remaining plaintiffs and they do not consent to the withdrawal, the Court will take this circumstance into consideration before it comes to a decision one way or the other on an application for withdrawal.

I am unable to see in this case how it could possibly be said that the first two plaintiffs are prejudiced by plaintiff 3 withdrawing from the suit. The suit for specific performance can still go on to a successful termination even in the absence of plaintiff 3 if the remaining plaintiffs are able to produce the necessary money for obtaining a reconveyance from the defendant. The prejudice suggested is not a prejudice to the conduct of the suit in the sense of a legal difficulty to the Court going on with a suit. What was said was that the first two plaintiffs had secured a financier and if he dropped out, they will be put to the necessity of searching for another. This is no doubt an inconvenience but it does not amount to a legal obstacle to the continuation of the suit. It is merely an inconvenience to the plaintiffs having no relation to the conduct of the suit. Such an inconvenience cannot be regarded as a prejudice which should prevent the Court from granting an application to withdraw by one of several plaintiffs. The learned Subordinate Judge is of opinion that the petitioner is a necessary and proper party to the suit on the facts alleged in the plaint. It may be that he is a proper party but I do not see how he is a necessary party to a suit based upon a contract to which plaintiff 3 was not a party at all. In view, however, of the fact that he has evinced his intention to withdraw from the suit unconditionally without seeking liberty for instituting a fresh suit, he ceases to be even a proper party. But I do not and am not called upon to express any final opinion on this aspect of the question. It is enough to say that that is a question which will arise between him and the other two plaintiffs and it is unnecessary for me to consider it in connexion with this petition. For the reasons mentioned, I am of opinion that the learned Subordinate Judge was in error in considering that the withdrawing of the petitioner from the suit would operate to the detriment of the other plaintiffs. The error was due to his failure to appreciate the proper significance of the decision in 57 Mad. 299.[5] I therefore set aside the order of the learned Subordinate Judge and allow the petitioner's application I. A. No. 554 of 1939.

C. R. P. No. 1224 of 1940 :—C. R. P. No. 1224 of 1940 arises out of I. A. No. 555 of 1939, an application filed in the lower Court by the petitioner for payment out to him of the sum of Rs. 17,000 deposited into Court along with the plaint. The Subordinate Judge has permitted the petitioner to withdraw the amount from Court on the condition of his redepositing into Court in the event of the plaintiff's success and furnishing security in the meanwhile for so doing to the satisfaction of the lower Court. The learned Judge's view undoubtedly was that the petitioner was not entitled to withdraw the money and retain it for himself without a liability to bring it back into Court. If he allowed him to withdraw, it was more for the purpose of preventing the money remaining idle in Court rather than in recognition of an unconditional right in him to withdraw the money.

The question is whether the petitioner is entitled unconditionally to withdraw the money from the Court. In view of my order in C. R. P. No. 1225 of 1940 the petitioner ceases to be a party to the suit but his right must be determined on the footing that while he was a party he made the deposit. In order to arrive at a conclusion on this point, it is necessary to find whether the money remained the property of the petitioner even after deposit or it became the

1. ('27) 14 A.I.R. 1927 Bom. 244 : 101 I. C. 348 : 29 Bom. L.R. 299, Nilappa Gouda v. Basan Gouda.
2. ('82) 9 C. L. R. 332, Mohamaya Chowdhrain v. Durga Churnshaba.
3. ('22) 9 A.I.R. 1922 Pat. 489 : 1 Pat. 228, Mt. Ram Devi v. Mt. Bahu Rani.
4. ('28) 15 A.I.R. 1928 Mad. 496 : 107 I. C. 431, U. Punnayya v. P. Lingayya.
5. ('33) 20 A.I.R. 1933 Mad. 824 : 147 I. C. 203 : 57 Mad. 299 : 65 M. L. J. 693, Ramaswami Chettiar v. Rengan Chettiar.

property of one or other of the parties to the suit. This question can be determined only by reference to the contract between the parties contained in Ex. C, the agreement of 17th November 1938. The petitioner is a moneylender by profession and the terms of the agreement show that he was not agreeable to the money being paid to the plaintiffs with the risk of the reconveyance not being obtained if the plaintiffs spent away the money without paying it to the defendant. To avoid such a contingency, the stipulation was inserted in the document that the money should be paid for the purpose of obtaining reconveyance either to the defendant himself direct or deposited into Court. In the light of this stipulation, it is clear to my mind that when that money was deposited into Court, it was deposited for the purpose of payment to the defendants and not that it should forthwith become the property of the other plaintiffs. The defendant by his conduct has shown that he is not prepared to accept the money. In fact when the money was tendered to him before suit, he declined to accept it. The position, therefore, is as if the petitioner has attempted to make a second tender through Court, a tender which down to the present day has not been accepted. It was never intended that the first two plaintiffs should receive the money or become liable for it unless the defendant actually received the money. At the present stage, the event has not occurred and it seems to me that the money therefore should be regarded as money still belonging to the petitioner, tendered to but not accepted by the defendant.

As I have already mentioned, there has been a breach between the first two plaintiffs and the petitioner and the rights of the parties in consequence of the breach have therefore to be determined elsewhere in other proceedings. Whatever those rights may be and whatever liability for damages the petitioner might have incurred, his right to withdraw the money which is still his can scarcely be open to doubt. The order of the Subordinate Judge is accordingly set aside and there will be in its place an order directing the refund of the sum of Rs. 17,000 deposited by the petitioner into Court. I understand that the money has been already withdrawn on the petitioner furnishing security. The result of my order will be that the security will stand cancelled. The respondent will pay the costs of the petitioner in both the civil revision petitions. One set advocate's fee. C.R.P. No. 2127 of 1940 will be dismissed, but there will be no order as to costs.

C.R.K./K.S. *Order accordingly.*

C. P. C. —

('40) Chitaley, O. 23 R. 1, N. 2 Pt. 1, N. 19 and N. 26.
('41) Mulla, O. 23 R. 1 P. 952 Pt. (o), P. 963 Pt. (J), P. 954, Note 'Other sufficient grounds.'

A. I. R. (29) 1942 Madras 375 (1)

VENKATARAMANA RAO J.

Kuppala Subbarayudu and another — *Appellants*

v.

Ammanamanchi Venkatasubbamma — *Respondent.*

Appeal No. 266 of 1940, Decided on 27th August 1941, against appellate order of Sub-Judge, Bapatla, D/- 22nd July 1940.

Civil P. C. (1908), S. 60 (1) (c) — "Agriculturist" — Meaning — House used by person for carrying on his calling effectively as agriculturist is exempt.

An 'agriculturist' within the meaning of S. 60 (1) (c) must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise : ('37) 24 A. I. R. 1937 Mad. 551 (F. B.), *Foll.* [P 375 C 2]

The debtor had no other vocation except agriculture. He kept his plough, bullocks and carts in his house :

Held that the house was really used for the purpose of carrying on his calling effectively as agriculturist and as such was exempt from attachment : ('26) 13 A.I.R. 1926 Mad. 350, *Expl.* [P 375 C 2]

K. Krishnamurthi — for Appellants.

K. Kotayya — for Respondent.

JUDGMENT. — In I.L.R. (1937) Mad. 777[1] for the purpose of S. 60 (1) (c), Civil P. C., an agriculturist is defined as follows : "An 'agriculturist' within the meaning of S. 60 (1) (c), Civil P. C., must be a tiller of the soil really dependent for his living on tilling the soil and unable to maintain himself otherwise." It seems to me having regard to evidence in this case, the appellants would be agriculturists within the meaning of Sec. 60 (1) (c). The evidence in this case is that the appellants have no other vocation except agriculture. They keep their plough, bullocks and carts in their house. Therefore the house is really used for the purpose of carrying on their calling effectively as agriculturists. This would satisfy even the view taken in 49 Mad. 227[2] on which the lower Courts rely. I therefore reverse the decision of both the lower Courts and hold that the appellants can claim exemption under S. 60 (1) (c), Civil P. C. I direct each party to bear his own costs throughout. Leave to appeal is refused.

C.R.K./K.S. *Appeal allowed.*

1. ('37) 24 A. I. R. 1937 Mad. 551 : 170 I. C. 198 : I.L.R. (1937) Mad. 777 : (1937) 2 M.L.J. 11 (F.B.), Lakshmayya v. Official Receiver, Masullipatam.
2. ('26) 13 A.I.R. 1926 Mad. 350 : 92 I.C. 398 : 49 Mad. 227 : 50 M. L. J. 90, Muthu Venkatarama Reddiar v. Official Receiver, South Arcot.

C. P. C. —

('40) Chitaley, S. 60, N. 10 Pts. 1, 11 and 13.
('41) Mulla, S. 60 Page 243 Pts. (t), (w) and (v).

A. I. R. (29) 1942 Madras 375 (2)

WADSWORTH AND PATANJALI SASTRI JJ.

S. Vaidyanatha Ayyar — *Petitioner*

v.

V. N. Srinivasa Ayyar — *Respondent.*

Civil Revn. Petn. No. 2103 of 1939, Decided on 1st May 1941, to revise order of Dist. Munsif, Mannargudi, D/- 29th June 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 14 — Words "debt" and "family debt" in S. 14—Meaning—*A* and *B* brothers members of joint Hindu family executing pronote for family debt—Partition — Liability under pronote assigned to *A*—Creditor obtaining decree against *A* and *B*—*B* agriculturist taking no steps to scale down debt—*A* non-agriculturist claiming that debt being family debt within S. 14 decree could be executed against his proportionate share of debt — Debt under decree held not "family debt"—*A* held entitled to no relief.

Under S. 3 (iii) in deciding whether a debt is one due from an agriculturist regard must be had to the state of affairs existing at least on 1st October 1937 since the definition of agriculturist cannot properly be applied to the status of any one as it existed at an earlier period. The term "debt" in S. 14 must be restricted to debts due from an agriculturist and the term "family debt" therefore necessarily means a debt due from a family which was an agriculturist at the commencement of the Act or at least on 1st October 1937. It is not the intention of S. 14 to confer upon a non-agriculturist the power to get rid of his liabilities in a case in which those liabilities do not necessarily form part of a major liability to which the Act necessarily applies. [P 376 C 2; P 377 C 1]

In 1933 *A* and his brother *B* members of a joint family executed a promissory note in discharge of a family liability. In November 1934, there was a partition and the debt was allotted to *A*. In 1936 the creditor got a decree against both *A* and *B*. The decree was based on the joint liability of the brothers under the promissory note and did not proceed on any family liability. *B* the agriculturist brother took no action to get his liability under the debt scaled down. But *A* (the non-agriculturist brother) tried to stop execution against himself on the ground that by reason of S. 14 the debt was a family debt the decree for which could only be executed against him to the extent of his proportionate share in the debt:

Held that in ordinary cases when an agriculturist and non-agriculturist were jointly liable for a debt, the Act did not provide that the non-agriculturist shall be liable only for half the debt and that the agriculturist shall get the other half scaled down. The liability which formed the subject of the decree was not a family debt and that *A* was entitled to no relief. [P 376 C 2; P 377 C 1]

R. Ramamurthy and K. Soundararaja Ayyangar — for Petitioner.

M. S. Venkatarama Ayyar — for Respondent.

WADSWORTH J.—This Civil Revision Petition arises out of an application for stay of execution under S. 20, Madras Act, 4 of 1938. The petitioner, who was also the applicant before the lower Court is admittedly a non-agriculturist. In 1933 he and his brother (who is an agriculturist) were members of a joint family and they executed a promissory note which is said to be in discharge of a family liability. In November 1934, there was a partition between the two brothers and at that partition the debt in question was allotted to the present petitioner, though of course this arrangement would not bind the creditor. In 1936, the creditor got a decree against both the brothers. The decree is based on the joint liability of the brothers under the promissory note and does not proceed on any family liability. Now the agriculturist brother has taken no action to get his liability under this debt scaled down. But the petitioner (the non-agriculturist brother) tried to stop execution against himself on the ground that by reason of S. 14 of the Act this was a family debt the decree for which could only be executed against him to the extent of his proportionate share in the debt. The lower Court repelled this contention mainly on the ground that the petitioner was really liable for the whole of the debt by the arrangement with his brother and that he was not an agriculturist and therefore not entitled to the benefits of the Act.

It has been argued before us that when once it is established that the debt in question was a family debt before partition, S. 14 comes into play and the joint decree has to be scaled down at the instance of the non-agriculturist judgment-debtor on the basis that he should be liable only for his proportionate share of the debt and that the other portion due from the agriculturist member will have to be scaled down. This argument assumes that the word 'debt' in S. 14 is not used in the technical sense given to it by the definition in S. 3 of the Act. Under S. 3 (iii) 'debt' means any liability in cash or kind whether secured or unsecured due from an agriculturist, and we have held that in deciding whether a debt is one due from an agriculturist, we have to have regard to the state of affairs existing at least on 1st October 1937 since the definition of agriculturist cannot properly be applied to the status of any one as it existed at an earlier period. It is argued by Mr. Venkatarama Iyer for the respondent that unless there is something repugnant in the context, the definition of 'debt' found in the Act has to be applied and the result of applying that definition to S. 14 would be to give the operative words a meaning more or less as follows: "Where in any Hindu family, whether divided or undivided at the time of the application, some of the members who are liable in respect of what was at the commencement of the Act a joint family debt due from an agriculturist family, are not agriculturists, while others are agriculturists," and so on. It may at first sight appear that this is putting rather a heavy weight on the word 'debt'; but clearly the definition in the Act has to be applied unless it is obviously inapplicable having regard to the context. It has been suggested that the words "whether divided or undivided" make it clear that the Legislature when talking of a family debt are using the word "debt" in its ordinary dictionary sense and meant to include any liability which could be traced back to a joint family liability. But it seems to us that full effect can be given to the words "whether divided or undivided" even when the word 'debt' is interpreted according to the definition in the Act. This can be done by relating the word 'debt' to the state of affairs existing at the time contemplated in that definition, viz., the state of affairs at or just before the commencement of the Act and by relating the words "whether divided or undivided" to the state of affairs existing at the time when the question of liability comes before the Court. It seems to us that there is a good deal of logic in this reading of the section.

There is, after all, no particular reason to give any special relief in respect of a debt merely because it can be traced back historically to a family debt. In ordinary cases, when an agriculturist and non-agriculturist are jointly liable for a debt, the Act does not provide that the non-agriculturist shall be liable only for half the debt and that the agriculturist shall get the other half scaled down. The only reason for applying a special rule to family debts seems to us to lie in the fact that by the definition of 'person' in S. 3 of the Act a joint Hindu family can itself be an agriculturist and a debt due by such a family can itself be the subject of the scaling down process; and in such a case the Legislature has endeavoured to solve the problem of what is to be done when one of the coparceners is disqualified from relief, he being a non-agriculturist in his personal capacity though the family as a whole is an agriculturist and also what is to happen when the debt at the commencement of the Act was one which would come under the operation of the Act but by subsequent changes in the constitution of the family, the liability comes to be split up between individuals, some of whom are agriculturists and others are non-agriculturists. To deal with these

two sets of circumstances, the Legislature seems to have enacted S. 14, so that the debt which at the commencement of the Act was a family debt due by the statutory person possessed of an agriculturist character, could be scaled down when one or more of the persons liable for that debt had no equitable right to demand relief, they being non-agriculturists. With that object in view, the section was enacted giving the creditor the right to proceed in full only for the proportionate share of the debt due from the non-agriculturist member of the family, even though he had subsequently become divided, and restricting the scaling down process to the proportionate liability of the agriculturist member. It is not, in our opinion, the intention of this section to confer upon a non-agriculturist the power to get rid of his liabilities in a case in which those liabilities do not necessarily form part of a major liability to which the Act necessarily applies. In this view we are of opinion that the term 'debt' in S. 14 must be restricted to debts due from an agriculturist and that the term "family debt" therefore necessarily means a debt due from a family which was an agriculturist at the commencement of the Act or at least on 1st October 1937. It follows that the liability which forms the subject of the decree in the present case is not a family debt and that the petitioner is entitled to no relief. The petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 377

VENKATARAMANA RAO J.

In re Travancore National and Quilon Bank Ltd. (in liquidation).

Modern Automobiles by Proprietor R. G. Patel — Applicant

v.

Travancore National and Quilon Bank Ltd. (in liquidation) by Official Liquidators — Respondents.

Application No. 2916 of 1940, Decided on 16th December 1941, in O. P. No. 158 of 1938.

Banker and customer—Customer of Bombay branch of bank on 16th June 1938 delivering two cheques drawn in his favour on Madras branch of bank to be credited in current account at Bombay—Cheques despatched to Madras on same day and amount of first cheque realised on 18th June 1938 and of second cheque on 20th June 1938 — Customer under rules of bank not entitled to draw on cheques until it was ascertained that proceeds thereof were realised by bank—Relationship of debtor and creditor held did not arise when cheques were delivered — Realisation of cheques by Madras branch held realisation by Bombay branch — Proceeds of first cheque held must be deemed to have been ascertained within rules of bank but not of second cheque—Customer held entitled to rank as preferential creditor in respect of second cheque and as ordinary creditor in respect of first.

A customer of the Bombay branch of the bank who had a current account with them delivered on 16th June 1938 a cheque bearing the said date for Rs. 1500 drawn in his favour on the Madras branch of the bank and another cheque for a sum of Rs. 433-2-0 drawn in his favour on the same branch for realisation and credit in his current account. Under the rules of the bank the cheques were not available for drawing until it was ascertained that the proceeds had been realised by the bank. The customer contended that before he received any intimation that the amounts of his cheques were realised and were available for drawing against, the bank suspended payment and therefore the said moneys realised by the bank must be held to be money held in trust for him and he was therefore entitled to rank as a preferential creditor. The cheques were despatched to the Madras branch on 16th June 1938. The sum of Rs. 1500 in respect of the cheque dated 16th June 1938 was realised by the Madras branch on 18th June 1938 and the sum of Rupees 433-2-0 in respect of the second cheque was realised on 20th June 1938 before the bank suspended payment :

Held that since the moneys were to be credited into the current account the relationship intended to be established between the customer and the bank was that of a debtor and creditor. On the date on which the customer paid the cheques into the bank it could not be said that such a relationship arose because he was not allowed to draw on those cheques until the proceeds thereof had been realised by the bank : [P 378 C 1]

Held further that the proceeds of the cheques must be deemed to have been realised by the Bombay branch on the respective dates on which they were realised by the Madras branch : (1843) 57 R. R. 183 and (1923) 1 Ch. 41, *Rel. on.* [P 379 C 1]

So far as the proceeds of the cheque for Rs. 1500 were concerned, it must be held that there was ascertainment. The amount was realised on 18th June and it would have been open to the customer to draw upon the bank and he could have easily ascertained that the amount was realised by the bank. But in regard to the second cheque namely for Rs. 433-2-0, it could not be said that there had been ascertainment within the meaning of the rules of the bank. Consequently, the customer was entitled to rank as an ordinary creditor for the sum of Rs. 1500 and as a preferential creditor in regard to the sum of Rs. 433-2-0. [P 379 C 1]

V. C. Gopalaratnam — for Applicant.

C. Krishnaswami Ayyar — for Respondents.

ORDER.—This is an application by one Mr. Patel the proprietor of Modern Automobiles carrying on business at Bombay for payment of two sums, Rs. 1500 and Rs. 433-2-0. The case for the applicant is that he was a customer of the Bombay branch of the Travancore National and Quilon Bank Ltd., and had a current account with them, that he delivered on 16th June 1938 a cheque bearing the said date for Rs. 1500, drawn in his favour on the Anderson branch of the bank at Madras and another cheque for a sum of Rs. 433-2-0 drawn in his favour on the same branch for realisation and credit in his current account, that according to the course of dealings he had with the bank he could draw on the said bank only after the said amounts were realised and intimation thereof had been given to him, that before he received any such intimation the bank suspended payment and therefore the said moneys realised by the bank must be held to be moneys held in trust for him and he is therefore entitled to rank as a preferential creditor in respect thereof. The receipt of the cheques by the Bombay branch of the bank and the realisation of the said cheques by the Anderson branch of the bank are admitted by the Official Liquidators. The sum of Rs. 1500 in respect of the

cheque dated 16th June 1938 was realised by the Anderson branch on 18th June 1938 and the sum of Rs. 433-2-0 in respect of the second cheque was realised on 20th June 1938 before the bank suspended payment. There are two paying in slips Exs. A and A-1 evidencing the payment of cheques to the Bombay branch of the bank. They indicate that the said cheques were paid in to the credit of the Modern Automobiles in current account. There are certain rules framed by the bank in regard to the current account and two rules appear to be relevant in regard to the cheques in question. Rule 10 runs thus :

"Cheques, drafts, etc., (either local or mofussil) on other banks received after 1 P. M. (on Saturdays 11-30 A. M.) will not be sent for collection until the following business day and should accordingly be drawn against only after they are realised."

Rule 12 says :

"It must be distinctly understood that though entries may have been made to the credit of an account and initialled for in the pass-book, should such credits be made up of cheques which have to be collected, they are not available for drawing against until it has been ascertained that the proceeds have been realised by the bank."

Mr. Gopalaratnam appearing for the applicant examined Mr. Patel. He deposed that he was receiving advice notes in regard to the amounts realised in respect of cheques delivered to the bank from time to time. He also filed his pass-book which contains the rules on which the relationship between him and bank in regard to these cheques was regulated. The question that arises is whether in respect of moneys realised by the Anderson branch in respect of these cheques the relationship of debtor and creditor was established between the bank and the applicant. From the paying in slips it is clear that the moneys were intended to be credited into the current account and therefore, the relationship intended to be established between the applicant and the bank was that of a debtor and creditor. On the date on which the applicant paid the cheques into the bank it cannot be said that such a relationship arose because he was not allowed to draw on those cheques except according to the provisions contained in Rr. 10 and 12. It does not appear from the evidence when the cheques were delivered at the Bombay branch, that is, whether it was after 1 P. M. or before that hour. But it appears that those cheques were despatched on the very day to the Anderson branch at Madras and realised by them immediately in the ordinary course of business. Under R. 12 those cheques were not available for drawing until it was ascertained that the proceeds had been realised by the bank. The question is, can it be said that it has been ascertained that the proceeds have been realised by the bank? The receipt by the Anderson branch at Madras of these sums on the respective dates must be held to be receipts by the bank and the proceeds must be said to have been realized by the Bombay branch of the bank on the respective dates. In (1843) 9 Cl. & F. 818 (852) : 57 R.R. 183,[1] one Mackersy had an account with the firm of Ramsays. He delivered a draft dated 10th February 1832 drawn in his favour on a firm in Calcutta requesting the firm of Ramsays to realize the proceeds of the cheque and place them to his credit. Ramsays delivered this bill to Coutts & Co. requesting them to forward it to their agents at Calcutta for realisation. Coutts & Co. sent that bill to their correspondents Alexander & Co. at Calcutta who realized the proceeds of the bill but failed to remit the amount to Coutts & Co. and subsequently became bankrupt. The question that arose in that case was whether Mackersy was entitled to have credit for the amount realized by Alexander & Co. in spite of their bankruptcy and when it could be said that the proceeds should be deemed to have been realized to the credit of Mackersy.

The House of Lords held that in spite of the bankruptcy Mackersy would be entitled to have credit for the said amount and the amount must be deemed to have been realized by Ramsays when Alexander & Co. collected the amount in Calcutta. Lord Ordinary who tried the case took the view that at the moment when Alexander & Co. realized the amount, at that moment the law placed it to the credit of Mackersy (page 191). This view was affirmed by the House of Lords. Lord campbell at p. 203 observed : "I approve of the expression of the Lord Ordinary, when speaking of the receipt of the money by Coutts' correspondents at Calcutta, that at that moment the law placed it to the credit of the defender." Lord Cottenham also took the same view. From this decision it is clear that the realisation of the cheques by the Anderson branch must be held to be realisation by the Bombay branch. Mr. Gopalaratnam placed considerable reliance on (1923) 1 Ch. 41.[2] The facts in that case were as follows : One *V* on 16th December 1920 paid into his credit at Farrow's Bank, Birmingham branch, a cheque drawn in his favour on the London Joint City and Midland Bank, West Bromwich branch. The Farrows Bank remitted the cheque to Barclays Bank for realisation. On 17th December Barclays Bank presented the cheque at the clearing house to the London Joint City and Midland Bank who remitted it to their West Bromwich branch. On 18th December the West Bromwich branch advised the Head Office that the cheque was cleared. On 20th December the London Joint City and Midland Bank settled with Barclays Bank through the clearing house at 12-30 P. M. so that it may be taken that Barclays Bank must be deemed to have realized the amount at that hour on that date. Barclays Bank immediately advised Farrow's Bank that the cheque was cleared but on the early morning at 8-30 A. M. Farrow's Bank had suspended payment. The relations between *V* and Farrow's Bank in regard to the cheques paid to his current account were regulated by R. 4, namely, "The bank will not be responsible for any cheques, bills, notes, coupons, or securities forwarded by post for collection or acceptance, nor for any delay which may arise. Proceeds of remittances will only be available after receipt of the same by the bank." Astbury J. took the view that the proceeds of the cheque could not be said to have been received by the Farrow's Bank till after suspension on the ground that it must have been received only at 12-30 P. M. the hour at which Barclays Bank must be deemed to have realized the amount when they settled the account with the London Joint City and Midland Bank. I refer to the following observation of Astbury J. which makes the point clear :

"Now, in the present case, it is common ground that the time at which this cheque was cleared in fact and the moneys made available for Barclays Bank as agent for Farrow's Bank was 12-30 on Monday, 20th December. Farrow's Bank, however, had stopped payment, if not on Saturday or Sunday certainly in the early hours of Monday morning, and

1. (1843) 9 Cl. & F. 818 : 2 Bell 30 : 57 R. R. 183, Mackersy v. Ramsays.

2. (1923) 1 Ch. 41 : 92 L. J. Ch. 153 : 128 L. T. 332 : 66 S. J. 78, In re Farrow's Bank Ltd.

long before 12-30 in the day. That being so it seems to me that after ceasing to act as a going concern and stating their intention no longer to act as a going concern they had no longer any authority from Voyce to take what was in fact his money received after the stoppage and convert it into money forming part of their assets, in respect of which they would be entitled to assume the position of debtors instead of agents. On that short ground I am of opinion that these moneys never were in fact collected by Farrow's Bank at a time when they were entitled to claim them as part of their assets."

From these observations it is clear that the receipt by the Barclays Bank was held to be receipt by the Farrow's Bank but as that receipt was only after 12-30 P. M. it was held that the amount was received after the suspension of payment by the Farrow's Bank. This view was affirmed by the Court of Appeal. I therefore hold that the proceeds of the cheque must be deemed to have been realized by the Bombay branch on the respective dates on which they were realized by the Anderson branch. The question is, can it be said that it has been ascertained within the meaning of R. 12 because until then the proceeds will not be available for drawing. It seems to me that so far as the proceeds of the cheque for Rs. 1500 are concerned it must be held that there was ascertainment. The amount was realized on 18th June and certainly it would have been open to the applicant to draw upon the bank and he could have easily ascertained that the amount was realized by the bank. But in regard to the second cheque, namely for Rs. 433-2-0, I find it difficult to hold that there has been ascertainment within the meaning of the said rule. I therefore hold that the applicant is entitled to rank as an ordinary creditor for the sum of Rs. 1500 and as a preferential creditor in regard to the sum of Rs. 433-2-0. The applicant will have Rs. 35 for his costs and the Official Liquidators will have Rs. 35 for their costs, both out of the assets of the bank.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 379

LEACH C. J. AND BELL J.

Behara Viyyamma and others — *Appellants*

v.

Ayyagari Veera Venkata Satya Suryaprakasa Rao minor by his next friend Vaddiparti Ramayamma and another — *Respondents.*

Appeal No. 157 of 1940, Decided on 16th January 1942, against decree of Sub-Judge, Cocanada, in O. S. No. 5 of 1931.

(a) Hindu law — Adoption — Widow living in concubinage and in state of pregnancy — She is incompetent to adopt.

A Hindu widow who is living in concubinage and is in a state of pregnancy resulting from such concubinage is incompetent to receive a son in adoption to her deceased husband : 5 Beng. L. R. 362, *Approved.* [P 380 C 1]

(b) Hindu law — Adoption — Validity — Unchastity — Widow must be shown unchaste at time of adoption — She cannot be regarded unchaste at time of adoption on account of her conduct many years before adoption.

A person challenging an adoption by a widow on the ground of her unchastity must show that she was living an immoral life at the time of adoption. The Hindu law will not regard a widow as unchaste because of her conduct many years before the adoption. Consequently, the fact that four years after her husband's death in 1914 the widow became the mistress of some person in itself would not mean she could not make a valid adoption in the year 1928. [P 380 C 1]

(c) Hindu law—Adoption—Giving and accepting — Natural father and adoptive parent can appoint agent to give or take boy.

Since a natural father can lawfully authorise another to give his son in adoption, it must follow that the adoptive parent can delegate some one to accept the child in adoption on his or her behalf. Where the adoptive mother having appointed agents to receive the boy, was herself present at the time of the datta homam ceremony and accepted the boy through the hands of her representatives who were sitting close to her, the giving and taking must be regarded as lawful : 8 Bom.H.C.R. 244 and 25 Bom. 551, *Approved.* [P 380 C 2]

(d) Hindu law—Alienation—Widow—Necessity — Alienees not attempting to satisfy themselves that money was necessary for family or estate—Alienations cannot bind adopted son.

Where the alienees from a widow make no attempt to satisfy themselves that the raising of the moneys was necessary for the purposes of the family or the estate, the alienations are not binding on the adopted son. [P 380 C 2]

P. Somasundaram and P. Suryanarayana — for Appellants.

G. Balaparameswari Rao — for Respondents.

LEACH C. J. — The main question in this appeal is whether respondent 1 is the adopted son of one Suryaprakasa Rao, an inamdar of Tirupathi in the Godavari District. Suryaprakasa Rao died in the year 1914 and it is respondent 1's case that his widow adopted him as a son to her deceased husband in 1928, the consent of the nearest sapinda having been obtained. The appeal also challenges the validity of three alienations made by the widow before the adoption. The Subordinate Judge held that the adoption of respondent 1 was valid and that the alienations were not binding on him. The suit was filed by respondent 1 for a declaration that his adoption was valid and for an order setting aside the alienations. The appellants are defendant 6 who bought 1·36 acres of land from the widow, the legal representatives of one Peda Subbanna in whose favour the widow executed a usufructuary mortgage of another property, and the legal representatives of another person named Subbanna who was also a mortgagee of land belonging to Suryaprakasa Rao's estate.

The appellants challenge the correctness of the finding of the Subordinate Judge that respondent 1 was validly adopted on two grounds. In the first place they say that when the widow adopted respondent 1, she was unchaste and therefore under Hindu law could not adopt a son to her husband. In the second place they say that the adoption ceremony was not valid because the widow did not herself receive the boy direct from the hands of the natural father, but through agents appointed by her for this purpose. In 5 Beng. L. R. 362[1] the Calcutta High

1. ('70) 5 Beng. L. R. 362, Sayamalal Dutt v. Soudamani Dasi.

Court held that a Hindu widow who was living in
a concubinage and was in a state of pregnancy resulting from such concubinage was incompetent to receive a son in adoption to her deceased husband. The Court has been informed that there is no decison of this Court on the question; but I think that it may be taken that a Hindu widow cannot lawfully adopt in the circumstances like those set out in the report in 5 Beng. L. R. 362.[1] It is not necessary to consider to what length the Hindu law goes in this respect, because it is quite clear that the evidence in this case does not prove that the widow was unchaste at the time she made the adoption.

When her husband died in the year 1914 the widow was only 11 years of age. The village schoolmaster, the priest, and the karnam have all given evidence on this question and they are in agreement that the widow was not living, and according to them she had never lived an immoral life. The appellants
b rely on a statement of the widow herself when in the witness box. The statement is to the effect that four years after her husband's death, she lived with one Venkatachalapathy. The Subordinate Judge has refused to believe this because the widow has now repudiated the adoption and is supporting the alienees. Even if it were true that four years after her husband's death she became the mistress of the person mentioned, that in itself would not mean she could not make a valid adoption in the year 1928. I will assume for the purposes of this case that her evidence as to what happened four years after her husband's death is true ; but before the appellants can succeed on this point, they must show that she was living an immoral life in 1928. Admittedly the evidence does not go to this extent. In fact, Behara Tammiraju, the third witness called for the contesting defendants, stated that the widow had re-
c pented of what she had done. Mr. Somasundaram for the appellants has very properly stated that the Hindu law will not regard a widow as unchaste because of her conduct many years before the adoption. The appellants have entirely failed to prove immorality against the widow in recent years, and I have no hesitation in concurring in the opinion of the Subordinate Judge that the widow was not precluded from making a lawful adoption of a son to her deceased husband.

Admittedly the natural father was asked to give his son in adoption. He consented and the datta homam ceremony was performed. The natural father and the adoptive mother were present at the giving and taking of the boy and during the datta homam ceremony. The boy was actually handed over by the natural father to one Ayyagari Ramachandrudu and
d his wife who were authorised by the widow to receive the boy from him, and having received the boy, they handed him to the widow. The plea of invalidity here is based entirely on the fact that the widow did not receive the boy direct from the hands of the natural father. This plea I find myself unable to accept. The essentials here are the giving by the natural father of the boy and the acceptance of him by the adoptive parent, and in this case there was a giving and an acceptance. On 15th October 1928, that is, some two months after the adoption, the widow executed a deed in which she made the boy's natural father his guardian. This deed contains the following statement :

" I had the said boy with me and on 18th August 1928 I requested you to give him in adoption as the son to my husband according to the Hindu Dharma Sastras ; consenting thereto you gave the said boy to me and so I received him and after causing all the ceremonies, namely, Datta homams, Bhoothakarma, Namakaranams etc., to be duly performed e and after giving (the boy the name of Ayyagari Veera Venkata Satya Sooryaprakasa Rao), I have chosen (the boy) as the son and the kartha of my husband and myself."

The question whether the father could appoint an agent to give the boy in adoption on his behalf was raised in the Bombay High Court in 8 Bom. H.C.R. 244[2] and it was held that an agent could act in this respect. In the course of his judgment in that case, West J., observed :

" The gift and acceptance in such a case must, as Sir T. Strange (I, 95) has observed, be manifested by some overt act ; and here Yeshvadabai did not in person hand over her son to Savitri. But she commissioned her uncle to do this, being at the time too unwell to attend the ceremony herself. The Hindu
f law recognises the vicarious performance of most legal acts ; the object of the corporeal giving and receiving in adoption is obviously to secure due publicity (Colebrook's Digest, Book V. T. 273, Commentary), and Yeshvada's employing her uncle to perform this physical act, which derived its efficacy from her own volition accompanying it, cannot, we think, deprive it of its legal effect. We hold, therefore, with the learned Judge, that the adoption is proved and effectual."

This decision was approved of by the Bombay High Court in 25 Bom. 551.[3] In that case a Hindu father had been converted to Mohamedanism. He had a son and it was arranged that the son should be given in adoption. For this purpose he delegated authority to his brother. The Court held that the delegation was lawful and that the adoption which followed was lawful. In my opinion, these decisions
g are correct and if a natural father can lawfully authorise another to give his son in adoption, it must follow that the adoptive parent can delegate some one to accept the child in adoption on his or her behalf. If this were not so, what would be the position when through accident or illness the natural father or the adoptive parent could not be present in person to do what is necessary ? There could be no adoption. In the present case the adoptive mother having appointed agents to receive the boy, was herself present and accepted the boy through the hands of her representatives who were sitting close to her. Here again I have no hesitation in concurring in the finding of the Subordinate Judge that there was a lawful giving and taking and that Datta homam ceremony was properly performed. The con-
h tentions of the appellants that the Subordinate Judge was wrong in setting aside three of the alienations can be disposed of in very few words. The properties were sold or mortgaged for the payment of "sundry debts" or "for family expenses." There is no evidence as to what the sundry debts were, whether they were debts which had been incurred on behalf of the estate or whether they were debts of the deceased or the widow's personal debts, and there is no evidence as to what the family expenses were. Further, the alienees made no attempt to satisfy themselves that the raising of the moneys was necessary for the purposes of the family. In these circumstances the Subordinate Judge was quite right in holding that the alienations were not binding on

2. ('71) 8 Bom. H. C. R. 244, Vijiarangam v. Lakshuman.

3. ('01) 25 Bom. 551 : 3 Bom. L. R. 89, Shamsingh v. Santabai.

the adopted son. The appeal fails and will be dismissed with costs in favour of respondent 1.

BELL J.—I agree.

C.R.K./G.N. *Appeal dismissed.*

Hindu law—
(a) ('40) Mulla, P. 531 Pt. (t).
('38) Gour, P. 230 Pt. 16.
(b) ('40) Mulla, P. 531 N. 466.
(c) ('40) Mulla, P. 539 Pt. (p), P. 545 Pt. (s).
('38) Gour, P. 174 Pt. 5, P. 177 Pt. 1 and N. 509.
(d) ('40) Mulla, P. 186 Pt. (o).

A. I. R. (29) 1942 Madras 381

HORWILL J.

Murugayya Pillai — Petitioner

v.

Rajagopal Pillai and others — Respondents.

Civil Revn. Petn. No. 2557 of 1939, Decided on 1st October 1941, to revise decree of Dist. Munsif of Mayavaram, D/- 26th June 1939.

(a) Stamp Act (1899), S. 32 — Endorsement by Collector under S. 32 on instrument is final even if wrong and made out of time — Civil Court cannot question it.

An endorsement made on an instrument by a Collector under S. 32 is final and cannot be questioned by a Civil Court even if it was erroneous or was made out of time. [P 381 C 2]

(b) Stamp Act (1899), S. 32 (2)—S. 32 (2) does not contemplate endorsement on separate paper —Such endorsement does not bind Civil Court —In such case Court may grant time to get endorsement on instrument — Endorsement on separate paper made out of time — Court is justified in not returning document for endorsement thereon.

Section 32 (2) contemplates an endorsement on the instrument itself and not on separate letter. The endorsement on separate letter therefore would not bind a Civil Court. If the fact that the endorsement was made separately and not on the paper is the only defect in the plaintiff's case, the Court may give him an opportunity of getting an endorsement on the document itself before disposing of the case; but the fact that the Collector gave that endorsement beyond time will justify the Court in not returning the document for obtaining an endorsement thereon. [P 381 C 2]

(c) Stamp Act (1899), Ss. 32 (2) and 38— Probate — Suit on—Endorsement under S. 32 (2) made on separate letter and beyond time— Court pointing out defect and asking plaintiff to be ready with necessary stamp and penalty at next hearing and allowing fortnight's time— On plaintiff's persistence that endorsement was right Court dismissing suit — Dismissal held justified— Subsequent endorsement under S. 38 that document was properly stamped held could not avail plaintiff in revision.

In the suit on a pronote assigned in favour of the plaintiff, the Court pointed out that the endorsement by the Collector that the pronote required no stamp duty having been made on a separate letter and out of time was not in accordance with S. 32 and asked the plaintiff to be ready with the necessary stamp duty and penalty at the next hearing. A fortnight's time was granted but the plaintiff persisted in his attitude that the endorsement was in order and hence the Court dismissed the suit. In revision against the dismissal :

Held that having granted to the plaintiff every reasonable concession the Court was justified in dismissing his suit. [P 382 C 1]

Held further that the fact that the Collector had, after the disposal of the suit made an endorsement under S. 38 that the pronote was properly stamped could be of no avail to the plaintiff : 27 A. W. N. 38, *Dissent*. [P 382 C 1]

K. S. Desikan — for Petitioner.

R. Sundaralingam, K. R. Subramania Iyer and R. Balaram — for Respondents.

ORDER. — The petitioner's suit was dismissed for want of evidence showing the plaintiff's title to sue. The want of evidence was due to the fact that the assignment in his favour of the promissory note which he sued on was not properly stamped. Prior to the filing of the suit, the petitioner had taken the assignment to the Collector for his opinion under S. 32, Stamp Act. The Collector expressed his opinion that no stamp duty was necessary and sent the petitioner a letter to that effect. The petitioner relied on that letter from the Collector and contended that even though the assignment should have been stamped, yet the Collector's certificate was final and could not be questioned by a Civil Court. The District Munsif however found that the Collector's decision that no stamp duty was necessary was wrong. He also found that even though the Collector's decision might be binding on him, the Collector had no jurisdiction to entertain the application under S. 32, because it was sent to him more than a month after the execution of the assignment. He also found that the Collector's certificate was of no avail; because it was not of the nature of the certificate referred to in S. 32, in that it was not endorsed on the instrument itself.

I am quite satisfied that even though the Collector erred in thinking that no stamp was necessary, his decision would have been final if he had granted a certificate on the document in question; because the very object of this section is to protect persons who are not sure what duty is payable and yet are anxious to stamp their documents properly. It is more difficult to decide whether the fact that the Collector entertained this application more than a month after the document was executed would invalidate the certificate. It might be argued that he acted without jurisdiction and that therefore his certificate could be of no avail. I am inclined to think, however, that it is not open to a Civil Court to question an endorsement on the instrument, even though the Collector ought not to have granted the certificate because it was out of time. However, the respondent is certainly on firm ground in contending that the Collector's letter is not the certificate referred to in S. 32 (2) and that therefore it is not binding on the Civil Court. If the fact that the endorsement was made separately and not on the paper had been the only defect in the plaintiff's case, the Court might have given him an opportunity of getting an endorsement on the document itself before disposing of the case; but I think the fact that the Collector could not rightly have given an endorsement after such a lapse of time justified the Court in not returning the document for obtaining such an endorsement. In fact, the petitioner did not ask the Court for such an opportunity. On the contrary, he persisted that the endorsement was in

order and that the Court was bound to accept it. a The Court pointed out to the plantiff on the day of hearing immediately preceding the date of disposal that he was deciding that point against him and that the petitioner had better be ready at the next day of hearing with the necessary money to pay the stamp duty and penalty. A fortnight's time was given; but the plaintiff persisted in his attitude and so his suit was dismissed. Mr. Desikan for the petitioner contends that even so, this revision petition ought to be allowed, because the District Munsif impounded the document and sent it to the Collector under S. 38 and because the Collector had made an endorsement on the document that it was properly stamped, which endorsement made the document admissible in evidence. Such an argument seems to have been accepted in 27 A. W. N. 38,[1] but we do not know for what reason the learned Judges thought it necessary to require the Subordinate b Judge to take account of what happened after the disposal of the suit. As I have already said, if there had been a mere formal defect and the plaintiff had not persisted in his attitude that the endorsement was right and must be acted on, I think the learned District Munsif might well have granted some indulgence to the petitioner. Under the circumstances, however, I am satisfied that the learned District Munsif granted to the petitioner every reasonable concession and was justified in dismissing the suit. The petition is therefore dismissed, but under the circumstances without costs.

C.R.K./G.N. *Petition dismissed.*

1. ('07) 4 A.L.J. 205 : (1907) 27 A.W.N. 38, Umda Bibi v. Takai Ram.

A. I. R. (29) 1942 Madras 382

c WADSWORTH AND PATANJALI SASTRI JJ.

Manikkam Chettiar and others — *Appellants*

v.

Krishnappa Chettiar — *Respondent.*

Appeal No. 163 of 1939, Decided on 4th September 1941, against decree of Sub-Judge, Coimbatore, D/- 15th March 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii), proviso (B)—Applicability—Only income in respect of which agriculturist has actually been assessed to profession tax under District Municipalities Act should be considered — His share of income of firm separately assessed to profession tax should be excluded.

d "Person" under Act 4 of 1938 does not include an unincorporated company or association. Therefore, what disqualifies a person under S. 3 (ii), proviso (B) is the individual assessment of that person to profession tax on a certain stipulated income. [P 383 C 1]

Under the District Municipalities Act, however, a partnership is included in the definition of "company" and for the purpose of profession tax a company is a separate unit classified and assessed to profession tax without reference to the private income of the individuals of whom the firm is composed. When a firm has been assessed to profession tax the individual members of that firm cannot be assessed again on their share of the income of the firm. The tax imposed on the firm is clearly an assessment on that firm as a separate unit and the tax imposed on the individual is imposed upon that individual without reference to his capacity as a member of the firm. Therefore, when the firm is assessed to profession tax, it cannot properly be said e that the individual partner is assessed to profession tax, though no doubt indirectly he pays that tax. Consequently, in applying S. 3 (ii), proviso (B) only the income in respect of which the alleged agriculturist has been actually assessed to profession tax under the District Municipalities Act, should be considered and his share of the income of a firm, which firm has been separately assessed to profession tax should be excluded : ('35) 22 A.I.R. 1935 Mad. 298, *Approved*; ('41) 28 A. I. R. 1941 Mad. 672, *Disting.* [P 383 C 1, 2]

(b) Madras District Municipalities Act (5 of 1920), S. 93 and Sch. 4, R. 16 — Assessment under S. 93—Determination of class into which assessee's income falls under Sch. 4, R. 16—Income to which assessee is entitled as member of firm separately assessed cannot be considered. f

When an individual is assessed to profession tax under S. 93 the income to which he may be entitled as a member of a firm which is separately assessed cannot be taken into consideration in determining the class into which his income will fall under Sch. 4, R. 16. [P 383 C 1]

V. Ramaswami Iyer — for Appellants.

A. C. Sampath Iyengar and C. D. Venkataramanan — for Respondent.

WADSWORTH J.—The appellants are certain of the defendants in a suit on a mortgage deed (Ex. A) dated 6th March 1926. The mortgage was executed by four brothers, namely, defendants 1 to 3 and one Gopalaswami who is dead and who is represented by defendants 4 to 8. The appellants represent the branches of defendants 1 and 3 who were held by the lower Court not to be agriculturists. The only g question argued in appeal relates to the correctness of this conclusion. It was conceded in the lower Court that the appellants had a saleable interest in agricultural property, but the plaintiff sought to exclude them from the benefits of the Act on the basis that both defendants 1 and 3 had been assessed to profession tax so as to bring them within the purview of proviso (B) to S. 3 (ii) of the Act and applying S. 6 of the Act, the same exclusion operated against the sons of these two defendants. The evidence regarding the assessment of these two defendants to profession tax was by no means complete. With reference to defendant 1 there was a certificate (Ex. D) showing that he was assessed to profession tax for the half years ending 31st March 1936 and 30th September 1937 and a half yearly income of Rs. 300, which of course is not sufficient to disqualify him under proviso (B). h

There was also filed an extract from the Profession Tax Demand Register (Ex. D-1) which showed that in 1936-37 the firm of S. M. P. C. K. Chidambaram Gounder was assessed on a half yearly income of Rs. 360 and the plaintiff gave evidence that defendant 1 was a partner in that firm, though his evidence was a little obscure. Defendant 1 himself said that he was a working partner with Chidambaram Chetti getting a five annas share during the relevant period. No question was asked to elucidate the difference in the name of Chidambaram Chetti from the name of the firm Chidambaram Gounder, and he was not aked whether Ex. D-1 related to the profession tax of the firm of which he was a partner. With reference to defendant 3 the evidence is even more incomplete. Exhibit E shows that defendant 3 was assessed to profession tax on a half yearly income of Rs. 200 for the half year ending 31st March

1936 and on a half yearly income of Rs. 180 for the two succeeding half years. This certificate, like Ex. D, does not state that he was assessed within the period referred to in proviso (B). There is also an extract from the Profession Tax Demand Register (Ex. E-1) which shows that the firm of K. N. Ponnuswami Gounder was assessed on a half yearly income varying between Rs. 1600 and Rs. 2000 for the relevant period; but this register, just like Ex. D-1, does not show the actual date of the assessment. The plaintiff says that defendant 3 is a partner in the firm of K. N. Ponnuswami Gounder and Company, receiving a four annas share of the profits. But he makes the mistake of saying that Ex. E relates to defendant 3's profession tax for that business and that Ex. E-1 relates to the following year. The evidence of defendant 1 is that defendant 3 was a partner with Ponnuswami Chetti, not Ponnuswami Gounder, and that his share might be a four annas share. He appears to concede that Ex. E-1 is the relevant assessment document. It will appear that the precise facts regarding the assessment to profession tax have not been very clearly elicited, though it would seem probable that each of these defendants has been assessed to profession tax on his personal income and that each of them is a member of a firm which as such firm has been separately assessed to profession tax.

Assuming for the moment that the personal income assessed to profession tax together with the party's share in the firm's income which has been taxed would in the case of each of these defendants, if added together, be sufficient to bring them within the limit laid down in proviso (B), is such a procedure contemplated by the terms of this proviso? Proviso (B) disqualifies a person who within the relevant period has been assessed to profession tax on a half yearly income of more than Rs. 300 derived from a profession other than agriculture. 'Person' under Act 4 of 1938 does not include an unincorporated company or association. It would seem, therefore, to follow that what disqualifies a person under proviso (B) is the individual assessment of that person to profession tax on a certain stipulated income. Under the District Municipalities Act, however, a partnership is included in the definition of "company" and for the purpose of profession tax a company is a separate unit classified and assessed to profession tax without reference to the private income of the individuals of whom the firm is composed. It has, we think, been settled that when a firm has been assessed to profession tax the individual members of that firm cannot be assessed again on their share of the income of the firm.

The principle laid down in 14 Mad. 140[1] has been treated as applicable under the new District Municipalities Act in 68 M. L. J. 162.[2] It does not appear that when an individual is assessed to profession tax under S. 93, Madras District Municipalities Act, the income to which he may be entitled as a member of a firm which is separately assessed will be taken into consideration in determining the class into which his income will fall under Sch. 4, R. 16. Whether that be so or not, the tax imposed on the firm is clearly an assessment on that firm as a separate unit and the tax imposed on the individual is imposed upon that individual without reference to his capacity as a member of the firm. It seems therefore to follow that when the firm is assessed to profession tax, it cannot properly be said that the individual partner is assessed to profession tax, though no doubt indirectly he pays that tax. Granting so much, it is difficult to say that in applying proviso (B) one is entitled to take into consideration not only the income in respect of which the alleged agriculturist has been actually assessed to profession tax under the District Municipalities Act, but also his share of the income of a firm, which firm has been separately assessed to profession tax. No doubt this conclusion may involve the anomalous result that a partner of a firm may claim to be an agriculturist and as an agriculturist scale down his liability under a partnership debt, though the firm itself may be paying a large sum as profession tax under the District Municipalities Act. But the fact that the words of the proviso lead to an anomalous result is not in our opinion a sufficient justification for adding to those words other words which the proviso does not contain.

Our attention has been drawn to the decision in (1941) 1 M. L. J. 782.[3] That was a case relating to the exclusion of a person from the definition of 'agriculturist' by reason of the fact that the partnership of which he was a member had been assessed to income-tax. It was pointed out that when the income of a partnership is assessed to tax under the Income-tax Act, what is really assessed is nothing else than the income of the individual partners and having regard to the terms of the Income-tax Act, it could not be said that the individual partner had not been assessed to income-tax when the firm of which he was a member had been so assessed. It was therefore held that for the purpose of applying proviso (A) to S. 3 (ii) of Act 4 of 1938 the tax to which a person had been assessed as a member of a partnership had to be taken into consideration in deciding whether or not a person was an agriculturist. We do not think that the principle of this decision is applicable to a case of assessment to profession tax, the reason being that profession tax under the District Municipalities Act is assessed on the basis that the firm is a distinct person and there appears to be no assessment of the individual as a member of the firm. In this view we must differ from the conclusion of the learned Subordinate Judge and hold that the appellants have not been shown to be disqualified from claiming relief as agriculturists. Defendant 12, one of the minor sons of defendant 1 has, apparently owing to some difficulty about his guardian, not been made one of the appellants before us. But he stands in exactly the same position as the other sons of defendant 1 and it would be inequitable not to give to him the relief to which he is entitled on our findings. In the result, therefore, the appeal is allowed with costs and the decree of the lower Court will be modified so as to make defendants 1, 3, 9 to 12 and 15 liable only for Rs. 3500 (half the principal) and interest at 6¼ per cent. per annum from 1st October 1937 to the date of plaint, namely, Rs. 220 and thereafter at the same rate till the date fixed for payment which will be three months from today and proportionate costs in the lower Court and subsequent interest at 6 per cent.

C.R.K./G.N. *Appeal allowed.*

1. ('91) 14 Mad. 140, Davies v. President of the Madras Municipal Commission.
2. ('35) 22 A. I. R. 1935 Mad. 298 : 159 I. C. 372 : 58 Mad. 949 : 68 M.L.J. 162, Venkata Narasimha Rao v. Chairman, Municipal Council, Narasaraopet.
3. ('41) 28 A.I.R. 1941 Mad. 672: (1941) 1 M. L. J. 782, Somappa v. Venkataswami Chetti.

A. I. R. (29) 1942 Madras 384

LEACH C. J. AND KUPPUSWAMI AIYER J.

N. P. L. Egappa Chettiar minor through his next friend V. A. B. Subramanian Chettiar — Appellant

v.

Rm. S. V. L. Ramanathan Chettiar and others — Respondents.

Appeal No. 35 of 1939, Decided on 8th December 1941, against decree of Sub-Judge, Devakottai, D/- 29th July 1938.

Minor—Decree against—Minor can challenge on ground of guardian's gross negligence in conduct of suit.

It is open to a minor to challenge a decree passed against him on the ground that his guardian had been grossly negligent in the conduct of the suit in which the decree was passed even in the absence of fraud or collusion : ('22) 9 A. I. R. 1922 Mad. 273, *Foll.*; ('39) 26 A. I. R. 1939 Bom. 66 (F. B.), *Not approved*; ('37) 24 A.I.R. 1937 P. C. 1, *Expl.*; *Case law discussed.* [P 384 C 1, 2; P 385 C 1]

T. V. Muthukrishna Ayyar and T. V. Ramiah — for Appellant.

C. A. Md. Ibrahim, T. S. Santhanam, and R. Kesava Ayyangar — for Respondents.

LEACH C. J. — The appellant instituted this suit in the Court of the Subordinate Judge of Devakottai for a declaration that the decree passed in O. S. No. 88 of 1933 by the Subordinate Judge of Coimbatore is void and therefore not binding on him. When that suit was tried the appellant was a minor and his adoptive mother acted as his guardian-ad-litem at all times material to the present suit. The suit resulted in a decree being passed against him for the payment of the sum of Rs. 31,497-10-6. It had been filed to recover money deposited with a firm belonging to the family in which the appellant was born. Before the suit was instituted he was given in adoption to another family and therefore was not responsible for the liabilities of his father's family. In the present suit the appellant averred that his guardian-ad-litem had been guilty of gross negligence in that she had not pleaded a partition and in not proving his adoption. At the hearing the Official Assignee, who is defendant 7, raised the contention that the suit was not maintainable unless the plaintiff could show fraud or collusion, although this plea was not raised in his written statement. An issue was, however, framed and the question was argued. The result was that the Subordinate Judge came to the conclusion that the suit did not lie unless fraud or collusion was alleged and consequently he dismissed the suit with costs. The appeal is from this decision.

For many years this Court has consistently held that it is open to a minor to challenge a decree passed against him on the ground that his guardian had been grossly negligent in the conduct of the suit. The leading case is 45 Mad. 425[1] and this has been followed on numerous occasions since. In 45 M.L.J. 324,[2] the Court went a step further and held that a minor could by way of defence raise a plea of gross negligence on the part of his guardian-ad-litem in a previous suit. The opinion of this Court expressed in 45 Mad. 425[1] is shared by the High Courts of Calcutta, Allahabad, Patna, Lahore and until recently by the Bombay High Court. At first the Calcutta High Court took the view that a minor could not maintain such a suit without pleading fraud or collusion on the part of his guardian : *see* 12 Cal. 69.[3] But a contrary opinion was expressed some ten years later in 22 Cal. 8.[4] The opinion formed in that case is still maintained : *see* 45 C. W. N. 508.[5] A Full Bench of the High Court of Allahabad considered the question in 54 All. 646[6] and came to the conclusion that a suit would lie even in the absence of fraud or collusion if there had been gross negligence. The Patna High Court came to the same conclusion in 14 Pat. 824.[7] Like the Calcutta High Court the Lahore High Court at first held that there must be fraud or collusion. The first decision was given in 1 Lah. 27[8] in which reliance was placed on 12 Cal. 69,[3] but in two later cases, A. I. R. 1928 Lah. 674[9] and A.I.R. 1940 Lah. 205,[10] the opinion that gross negligence is sufficient to found a suit was expressed.

The earlier decisions of the Bombay High Court were to the effect that gross negligence gave a minor a cause of action : *see* 19 Bom. 571,[11] 24 Bom. 547[12] and 40 Bom. L. R. 127.[13] But strong doubt was expressed by Beaumont C. J. in I. L. R. (1937) Bom. 839.[14] When the question was raised later in I.L.R. (1939) Bom. 340[15] it was referred to a Full Bench. In that case the learned Chief Justice expressly held that under the English law an infant cannot challenge a decree properly passed against him on the ground that his guardian-ad-litem was guilty of gross negligence in suffering the decree and that being so there was no reason why such a cause of action should lie in British India. The other learned Judges concurred. The result is that in Bombay a suit cannot be instituted unless there is fraud or collusion averred.

1. ('22) 9 A.I R. 1922 Mad. 273 : 70 I. C. 668 : 45 Mad. 425 : 42 M. L. J. 429, Chunduru Punnayyah v. Rajam Viranna.

2. ('23) 10 A.I.R. 1923 Mad. 718 : 74 I.C. 218 : 45 M.L.J. 324, Kari Bapanna v. Yerrama.

3. ('86) 12 Cal. 69, Raghubar Dayal Sahu v. Bhikya Lal Misser.

4. ('95) 22 Cal. 8, Lalla Sheo Churn Lal v. Ramnandan Dobey.

5. ('41) 28 A. I. R. 1941 Cal. 401 : 196 I. C. 779 : I.L.R. (1941) 1 Cal. 477 : 45 C.W.N. 508, Mahesh Chandra v. Manindranath.

6. ('32) 19 A.I.R. 1932 All. 293 : 138 I. C. 465 : 54 All. 646 : 1932 A.L.J. 437 (F.B.), Siraj Fatima v. Mahmud Ali.

7. ('36) 23 A.I.R. 1936 Pat. 231 : 162 I.C. 235 : 14 Pat. 824 : 16 P.L.T. 484, Mathura Sing v. Rama Rudra Prashad.

8. ('20) 7 A. I. R. 1920 Lah. 417 : 55 I. C. 833 : 1 Lah. 27 : 84 P. L. R. 1920, Imam Din v. Puran Chand.

9. ('28) 15 A. I. R. 1928 Lah. 674 : 108 I. C. 63, Fazal Din v. Mohamed Shafi.

10. ('40) 27 A. I. R. 1940 Lah. 205 : 190 I. C. 648, Punnun Mal v. Bishambar Dayal.

11. ('95) 19 Bom. 571, Cursandas Nath v. Ladkavahu.

12. (1900) 24 Bom. 547 : 2 Bom. L. R. 478, Hanmantapa v. Jivubai.

13. ('38) 25 A.I.R. 1938 Bom. 206 : 174 I. C. 820 : 40 Bom. L. R. 127, Sureschandra v. Bai Iswari.

14. ('37) 24 A.I.R. 1937 Bom. 464 : 172 I. C. 300 : I. L. R (1937) Bom. 839 : 39 Bom. L. R. 925, Auraj Joharmal v. Dalpat Supadu.

15. ('39) 26 A. I. R. 1939 Bom. 66 : 180 I. C. 51 : I.L.R. (1939) Bom. 340 : 41 Bom.L.R. 59 (F. B.), Krishnadas Padmanabha Rao v. Vithoba Annappa.

In the present case the Subordinate Judge considered that 45 Mad. 425[1] had been overruled by the decision of the Privy Council in I.L.R. (1937) Mad. 263[16] and for this reason he held in favour of the defendants on the preliminary issue. The Subordinate Judge failed to appreciate the judgment of the Judicial Committee. It is manifest that it does not in any way affect the judgment in 45 Mad. 425.[1] In I.L.R. (1937) Mad. 263[16] the plaintiff sought a declaration that certain temples in the Guntur District were public temples and that certain lands formed their endowments. It was contended for the defendants that the doctrine of res judicata applied as the questions in issue had been raised and decided in a former suit. With a view to meeting this contention the plaintiffs pleaded that the plaintiffs in the former suit had been guilty of gross negligence. In the trial Court and in this Court the principles relating to negligent conduct in previous litigation by a guardian in the name of a minor were accepted as being applicable to a case in which the parties were litigating on behalf of a public institution, but the Judicial Committee held that these principles did not apply. After referring to 22 Cal. 8,[4] 45 Mad. 425,[1] 45 M. L. J. 324[2] and 47 M. L. J. 700,[17] Lord Thankerton in delivering the judgment of the Board observed :

" Their Lordships are not concerned to discuss the validity of these decisions, or the illusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in 45 M. L. J. 324[2] that the principle of S. 44, Evidence Act, can be extended to cases of gross negligence."

Their Lordships did not decide the question whether a person could rely on the gross negligence of his guardian-ad-litem in a previous suit when he ought to set aside the decree passed therein. They were merely considering whether the principle expressed in India should be extended to suits with regard to public religious trusts, and the answer was in the negative. Their Lordships did indicate that 45 M. L. J. 324[2] certainly went too far, but they did not go beyond this. In I.L.R. (1939) Bom. 340,[15] the Full Bench which decided that appeal also held that the Privy Council in I.L.R. (1937) Mad. 263[16] had not determined this question. The Calcutta High Court in 45 C. W. N. 508[5] has read the judgment of the Judicial Committee as indicating that a minor is in a special position and as affirming 45 Mad. 425[1] and 22 Cal. 8.[4] In A.I.R. 1940 Lah. 205[10] the Lahore High Court also agreed that the judgment of the Privy Council in I.L.R. (1937) Mad. 263[16] does not effect any change in the law. As in our opinion this is undoubtedly the case this appeal will be allowed and the suit remanded to the trial Court to hear and determine the remaining issues. The appellant is entitled to his costs in this Court. The costs in the trial Court will abide the further hearing. The appellant is also entitled to a refund of the court-fee paid on the memorandum of appeal.

C.R.K./G.N. *Appeal allowed.*

16. ('37) 24 A.I.R. 1937 P.C. 1 : 166 I.C. 1 : I.L.R. (1937) Mad. 263 : 64 I. A. 17 (P. C.), Venkataseshayya v. Kotiswara Rao.

17. ('25) 12 A.I.R. 1925 Mad. 258 : 85 I. C. 812 : 47 M. L. J. 700, Ananda Rao v. Venkatadri Apparao.

C. P. C.—
('40) Chitaley, O. 32 R. 3 N. 5 Pt. 18.
('41) Mulla, P. 1022 Pt. (i).

A. I. R. (29) 1942 Madras 385

WADSWORTH AND PATANJALI SASTRI JJ.

Appala Subbaramiah — Petitioner

v.

Kotha Gurumma and others —

Respondents.

Civil Revn. Petn. No. 1783 of 1939 and Appeal No. 394 of 1939, Decided on 9th December 1941, to revise order of Sub-Judge, Nellore, D/- 25th March 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 4 (g) — Security bond in favour of Hindu widow's husband's family — Family assigning bond to widow in lieu of maintenance—Debtor's liability does not become one in respect of maintenance within S. 4 (g).

Where a security bond is executed in favour of the family of a Hindu widow's husband, the mere fact that it is assigned by the family to the widow in lieu of maintenance will not make the liability of the debtor a liability in respect of maintenance protected under S. 4 (g). Hence the decree obtained by the widow against the debtor on the basis of the bond can be scaled down under the Act. [P 385 C 2]

K. Umamaheswaram — for Petitioner.

Ch. Raghava Rao and K. Kuppuswami — for Respondents.

WADSWORTH J.—The petitioner in the revision petition (who is also the appellant) was defendant 3 in a suit brought by the plaintiff to enforce her right to maintenance by the realization of the amount due under a security bond, executed by defendant 3 to the family of the plaintiff's husband and assigned by that family to the plaintiff in lieu of maintenance. Defendant 3 did not contest the suit; in fact he could not contest the suit, for the amount due under the security bond was clearly payable and, by virtue of the assignment, it was payable to the plaintiff. Defendant 3's application to scale down the decree debt has been dismissed solely on the ground that the liability is one in respect of maintenance falling under S. 4 (g) of Act 4 of 1938. It seems to us that this decision is clearly wrong.

No doubt the plaintiff's claim was a claim based on her right to maintenance; but her right to recover from defendant 3 was not based on her right to maintenance. It was based purely on the assignment to her of defendant 3's security bond executed in favour of the plaintiff's brothers-in-law. The liability of defendant 3 had nothing to do with maintenance. It was a liability in respect of previous transactions between him and the members of the family of the plaintiff's husband. The mere fact that this asset of the family was assigned to the plaintiff in lieu of maintenance will not in our opinion make the liability of the debtor a liability in respect of maintenance protected by S. 4 (g) of the Act. We, therefore, allow the civil revision petition with costs and remand the application to the trial Court for disposal on the merits. The civil miscellaneous appeal does not lie and is dismissed. There will be no order as to costs.

C.R.K./G.N. *Petition allowed.*

A. I. R. (29) 1942 Madras 386

ABDUR RAHMAN J.

Peria Nagamam Sri Lakshmi Vilasa Draviya Sagaya Nidhi Ltd., by Secretary P. B. Subramania Chettiar — *Appellant*

v.

Varalakshmi Ammal — *Respondent.*

Second Appeal No. 483 of 1939, Decided on 29th August 1941, against decree of Sub-Judge, Coimbatore, in A. S. No. 85 of 1938.

(a) Limitation Act (1908)—Article of Limitation Act under which suit is alleged to be barred must be specified in written statement—Practice of not disclosing Article in written statement deprecated.

The provisions of Schedule 1 App. A, Civil P. C., requiring a party to specify the Article or Articles of the Limitation Act, under which the suit is according to him barred, is salutary and must be complied with as far as possible. The omission to mention the article may prevent the plaintiff at times from producing such oral or documentary evidence as he might have been capable of doing in answer to the objection raised by the defendant and in so far as the onus of proving limitation is on the plaintiff invariably, it may put him at a disadvantage if some evidence is led on behalf of the defendant, after the case on the plaintiff's side is closed which he would be ordinarily unable to rebut. At all events, this device enables a party to conceal his hand upto the time of final arguments and to spring a surprise on his opponent in a large number of cases. A practice like this cannot but be deprecated and must be discouraged. [P 387 C 1]

(b) Limitation Act (1908), Arts. 120, 89, 62, 145 and 48-A—Bank advancing loan to *A*—*A* executing pronote and lodging certain shares which he held in Bank as security for loan—After *A's* death Bank selling shares, adjusting amount due to them and keeping balance in suspense account—Notice of sale not given—Suit by *A's* wife against bank for accounts and for return of balance—Relation between *A* and bank held of pawnor and pawnee and not of principal and agent—Sale without notice held did not terminate relationship—Suit for accounts not being provided for by any other Article held governed by Art. 120—If suit were to recover shares in specie from bank or from their transferee Art. 145 or 48-A held would have applied.

A executed a pronote in favour of bank for the loan advanced to him by the bank and lodged certain shares which he had been holding in the bank as security for the loan under the pronote. After *A's* death the bank sold the shares and the money due to the bank was adjusted, the balance being kept in the suspense account to be paid to *A* or his heirs. No notice of sale was given and *A's* wife instituted a suit for accounts against the bank in respect of the bank shares which stood in the name of her husband and for payment of balance to her after debiting her with any liability incurred by her husband touching the shares :

Held that when the shares were being placed with the bank by way of security, *A's* position could not be of a principal and the bank's position that of agent. The position of *A* was that of the pawnor and of the bank that of a pawnee. When the bank sold the shares to realize their debt, they were not acting in the capacity of an agent but in that of a creditor entitled to recover his money by sale of the security under the terms of his contract. That they failed to give any notice to the owner of the shares before the sale did not in any way help them. They committed a grave irregularity in having failed to give a notice as required by S. 176, Contract Act, and could not by their action abridge the period of limitation or contend that it should be held to have started on the date of the sale of which the plaintiff had no knowledge. The contract of pledge could not be, in the absence of a reasonable notice, to sell, held to terminate the pledge or the relationship of pawnor and pawnee with the consequence that the money in the hands of the bank could not be held to have been received for the plaintiff's use at any rate when the sale was not recognized to be valid by the owner of the articles pledged by him. Article 89 therefore could have no application. In their capacity as bailees the bank were liable to render account to the plaintiff for the shares delivered to them by her husband. A suit for accounts must be in such circumstances, not being provided for by any other article, held to be governed by Art. 120 : ('21) 8 A.I.R. 1921 Mad. 362 and ('23) 10 A.I.R. 1923 Bom. 155 and 20 Cal. 51, *Expl.* [P 388 C 1]

Held further that had the suit been for the recovery of the bank shares in specie from the bank or from the person to whom they had been sold by the bank, Art. 145 or 48-A would have been applicable as *A* was a pawnor and the shares were lodged with the bank as security for the debt. [P 387 C 2]

(c) Limitation Act (1908), Art. 62 — Applicability—Defendant receiving money on his own account and not on behalf of plaintiff—Art. 62 does not apply.

Article 62 is applicable to cases where the defendant has received money which in justice and equity belongs to the plaintiff but in circumstances where the receipt by the defendant would be regarded in law as a receipt to the plaintiff's use. Where the receipt by the defendant is on his own account and is not or cannot be regarded to be on behalf of the plaintiff, Art. 62 would have no application. [P 387 C 2]

B. V. Viswanatha Iyer — for Appellant.

K. V. Ramachandra Ayyar and S. Thyagaraja Ayyar—for Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for taking an account from the defendant bank in respect of the 20 bank shares of the value of Rs. 500 which stood in the name of the plaintiff's husband, A. Gopalkrishna Chettiar and to pass a decree against the bank for payment of the balance that may be found due to her after giving her credit for the yearly dividends on those shares on the one side and after debiting her with any liability incurred by her husband touching these shares on the other. The defendant bank denied the claim and contended inter alia that the suit was barred by limitation. It is this plea with which I am concerned in the present second appeal. The suit was decreed by both the lower Courts and was held to be within time. The bank appeals.

Although no article of the Limitation Act was referred to by the defendant bank in their written statement as required by the forms of general defences given in the Civil Procedure Code (Sch. 1, App. A) and their counsel in the trial and in the lower appellate Courts have been vacillating in consequence from one to the other, their learned counsel has finally chosen to depend on Arts. 62 and 89 in this Court and pleads that the suit is barred by

either the one or the other. The provisions requiring a party to specify the article or articles of the Limitation Act, under which the suit is according to him barred, is salutary and must be complied with as far as possible. The omission to mention the article may prevent the plaintiff at times from producing such oral or documentary evidence as he might have been capable of doing in answer to the objection raised by the defendant and in so far as the onus of proving limitation is on the plaintiff invariably, it may put him at a disadvantage if some evidence is led on behalf of the defendant, after the case on the plaintiff's side is closed which he would be ordinarily unable to rebut. At all events, this device enables a party to conceal his hand up to the time of final arguments and to spring a surprise on his opponent in a large number of cases. A practice like this cannot but be deprecated and must be discouraged.

In order to appreciate the contentions advanced on behalf of the parties, the facts that have given rise to this litigation may be briefly stated. An application was made by the plaintiff's husband to the bank on 2nd January 1931 asking for a loan of Rs. 200 (Ex. 6). This was accepted. The plaintiff's husband got the loan on the next day and executed a promissory note in favour of the bank for Rs. 200 (Ex. 5). On that date, he lodged 20 bank shares that he had been holding in the defendant bank and on each of which a sum of Rs. 25 had been paid by him by way of security for the debt advanced to him under the promissory note Ex. 5. The plaintiff's husband died on 19th August 1931. The shares were sold by the bank on 2nd June 1933 for Rs. 530 inclusive of dividend and the money due to the bank was adjusted—the balance of Rs. 264 being kept by them in the suspense account for payment to the plaintiff's husband or to his heirs. It may be mentioned here that before this sale no notice was given by the bank to the plaintiff or to any other claimant. A notice appears to have been sent by them in the name of the plaintiff's husband on 17th March 1933, but that was obviously of no use. The plaintiff served the defendant bank with a notice on 24th April 1935 (Ex. B) in which she asked them for particulars of the shares standing in the name of her husband in the bank and in regard to the dividends that had been due under those shares. There was no reference in this notice to any loan advanced by the defendant bank to the plaintiff's husband or even to the deposit of the shares by him with the bank. To this notice the bank sent a reply on 30th April 1935 (Ex. B-1) in which they agreed that they would pay the amount to her if she produced a succession certificate. The information that the bank shares were sold by the defendant bank on 2nd June 1933 in auction under R. 85 of the bank rules was conveyed by this letter. This led the plaintiff to institute the suit on 1st October 1936. I have already referred to the articles of the Limitation Act on which reliance has been placed on behalf of the appellant bank in this Court. The contention advanced on their behalf is that since the shares deposited by the plaintiff's husband with the bank were sold by them, the present claim must be regarded to be in the nature of a suit for, what will in English law form the basis for an action for money had and received and ought to be therefore governed by Art. 62. In the alternative, it was urged that the relationship between the bank and the plaintiff's husband being, with reference to the shares in the custody of the bank, that of a principal and an agent, the suit would be governed by Art. 89 and in so far as that relationship came to an end on the death of the plaintiff's husband, this suit would be, having been brought long after three years of the termination of that relationship, barred by time.

As to the first contention, Art. 62 is applicable to cases where the defendant has received money which in justice and equity belongs to the plaintiff but in circumstances where the receipt by the defendant would be regarded in law as a receipt to the plaintiff's use. Where the receipt by the defendant is on his own account and is not or cannot be regarded to be on behalf of the plaintiff this article would have no application. Reliance was placed in this connexion on the decision in 44 Mad. 823.[1] But the defence raised by the railway in that case was that the suit would be governed by Art. 30 or Art. 31, Limitation Act, and was barred by time. The plaintiff denied the applicability of those articles and urged that it would be governed by the three years rule under Art. 62, Limitation Act. It would be noticed that the applicability of Art. 62 was not denied although the contention was that Art. 30 or Art. 31 would apply in preference. The learned Judges repelled the defendant's contention and held that the case was not governed by Art. 30 or Art. 31, Limitation Act. It is true that they agreed with the plaintiff's contention, which was not denied on behalf of the defendant company that the suit would fall under Art. 62; but in doing so, they did not consider the question whether the Railway Company were selling the goods for their own benefit or for the benefit of the plaintiff consignor or partly for their own benefit and partly for the benefit of the consignor. There is no discussion in that case in regard to the type of cases to which Art. 62 would apply and in the absence of any discussion, the judgment cannot be of any great value. The defendant company were apparently acting as carrying agents on behalf of the plaintiff and since the decision turned on the effect of the directions as to the disposal of the sale proceeds in S. 56, Railways Act, that case can have no application to the present one. Learned counsel for the appellant also relied on 24 Bom. L. R. 513[2] but in that case the learned Judges were of opinion that the suit was governed by Art. 48, Limitation Act, although they added that if that article was not held to apply, it might be governed by Art. 62 under either of which the suit was within time. Had the present suit been for the recovery of the bank shares in specie from the bank or from the person to whom they had been sold by the bank, Art. 145 or 48-A would have been applicable as the plaintiff's husband was undoubtedly, as I would try to show later, a pawnor and the shares were lodged with the bank as security for the debt. But the suit is not for the recovery of the bank shares or for compensation for wrongful taking or detaining the same although the allegation in para. 7 of the plaint tend to bring it very much within the ambit of the latter portion of Art. 48. In a suit brought for the residue of the sale proceeds of an estate sold under the provisions of the Revenue Sale Law, Act 11 of 1859, against the Secretary of State for India in Council the defence was raised that it was barred under Art. 62, Limitation Act; but the objection was overruled by the Full Bench of five learned Judges and the case was held to be governed by Art. 120 of the Act, 20 Cal. 51.[3]

1. ('21) 8 A.I.R. 1921 Mad. 362 : 62 I.C. 742 : 44 Mad. 823 : 41 M.L.J. 205, Tarachand v. M. S. M. Ry. Co.
2. ('23) 10 A. I. R. 1923 Bom. 155 : 67 I. C. 761 : 24 Bom. L. R. 513, Bank of Bombay v. Fazulbhoy Ebrahim.
3. ('93) 20 Cal. 51, Secretary of State v. Guru Prochad Dhur.

The present suit is, however, for accounts and not for recovery of money merely.

If a suit for accounts is maintainable as this has been found to be and does not fall within Arts. 64 or 89 or 106, Limitation Act, it would have to be governed by Art. 120 of that Act. That it is governed by Arts. 64 or 106 has not been contended. The question is whether it is governed by Art. 89 of the Act. Now, in order to ascertain whether this article in the Limitation Act applies, the relationship of the parties to the suit or rather of the plaintiff's husband by whom these shares were given in security and of the bank must be ascertained. The plaintiff's husband had gone to the bank to take a loan. The bank had agreed to advance it. When the loan was advanced the bank became a creditor and the plaintiff's husband a debtor. When the shares were being placed with the bank by way of security, the plaintiff's husband's position could not have been of a principal and the bank's position that of an agent as urged by learned counsel for the appellant. The bank was not being asked to do anything by the plaintiff's husband on his behalf. He was depositing the shares with the bank by way of security. He was, therefore, a pawnor and the bank a pawnee. When the bank sold the shares to realise their debt, they were not acting in the capacity of an agent but in that of a creditor entitled to recover his money by sale of the security under the terms of his contract. That they failed to give any notice to the owner of the shares before the sale does not in any way help them. They committed a grave irregularity in having failed to give a notice as required by S. 176, Contract Act, and cannot, by their action abridge the period of limitation or contend that it should be held to have started on the date of the sale of which the plaintiff had no knowledge as is clear from the notices Exs. B and B-1 that passed between the parties in April 1935. The contract of pledge cannot be, in the absence of a reasonable notice, to sell, held to terminate the pledge or the relationship of pawnor and pawnee with the consequence that the money in the hands of the bank cannot be held to have been received for the plaintiff's use at any rate when the sale was not recognized to be valid by the owner of the articles pledged by him. Article 89 can thus have no application. The defendant bank may not have been trustees for a specific purpose and S. 10, Limitation Act, may not apply but in their capacity as bailees they were liable to render account to the plaintiff for the shares delivered to them by her husband. A suit for accounts must be in such circumstances, not being provided for by any other article, held to be governed by Art. 120, Limitation Act. The suit instituted by the plaintiff must therefore be held to be well within time. For the above reasons, the appeal fails and is dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

C. P. C. —

(a) ('40) Chitaley, O. 8 R. 2, N. 5 Pt. 2.
('41) Mulla, O. 8 R. 2 P. 618, Note: 'Limitation'.

Limitation Act —

(b) ('42) Chitaley, Art. 120, N. 15 Pt. 1; Art. 89, N. 7 Pt. 14; Art. 145, N. 4 Pt. 1.
('38) Rustomji, Art. 120 P. 1038 Pt. 2; Art. 145 P. 1513 Pt. 3.

(c) ('42) Chitaley, Art. 62, N. 2 Pt. 1, N. 7 Pt. 1.
('38) Rustomji, Art. 62, P. 744 Pt. 1.

A. I. R. (29) 1942 Madras 388

WADSWORTH AND PATANJALI SASTRI JJ.

Rangaswami Pillai alias Rama Pillai and others — Petitioners

v.

Vasu Ammal alias Srinivasa Ammal — Respondent.

Civil Revn. Petn. No. 320 of 1940, Decided on 14th October 1941, to revise order of Dist. Munsif, Kulitalai, D/- 14th November 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 23 and 4 (h) — Decree-holder woman — Another mortgage debt in her name — It is open to her to adduce evidence that she is only benamidar.

On an application under S. 23 by the debtor, the decree-holder who is a woman is entitled to the exemption under S. 4 (h) unless she is disqualified as being the owner of any other property. And if another mortgage stands in her name, it is open to her to raise a plea of benamidar and adduce evidenee that though the mortgage stands in her name, her son is really entitled to the proceeds thereof and she is not beneficially interested therein: ('41) 28 A.I.R. 1941 Mad. 321 and ('41) 28 A. I. R. 1941 Mad. 596, *Expl. and Disting.*; ('35) 22 A. I. R. 1935 Mad. 181 (F.B.), *Ref.* [P 389 C 1]

K. G. Srinivasa Ayyar — for Petitioners.

K. S. Desikan — for Respondent.

WADSWORTH J.—This case raises a question relating to the admissibility of a plea of benami in a matter arising under S. 4 (h) of Act 4 of 1938. The petitioners here were the judgment-debtors who filed an application under S. 23 of the Act to which the respondent, the decree-holder, pleaded that she came within the exemption of S. 4 (h). As against this plea, it was urged that she was entitled to a mortgage debt evidenced by Ex. A, a bond of the year 1920 for a sum of Rs. 4500. She met this contention by adducing evidence that she was not the owner of the mortgage bond but a benamidar for her adopted son. This evidence has been accepted by the Court below and the only question arising in revision is whether the lower Court was entitled to go into such a contention. We have no doubt held in cases falling under the explanation to S. 8 that it is not open to the Court to entertain evidence that some one other than the creditor in the document is, in fact, the owner of the debt so as to make him the creditor for the purpose of renewals. This decision, (1940) 2 M. L. J. 664,[1] was based on the definition of the term creditor which does not include a person beneficially entitled to the proceeds of the debt. One of us had to deal in (1941) 1 M. L. J. 313[2] with a case in which there was a decree on a promissory note and the decree-holder endeavoured to adduce evidence that the debt was really due not to himself but to a woman entitled to plead the exemption in S. 4 (h). It was held that, whatever be the liability of the decree-holder to other persons, the liability of the judgment-debtor is to the decree-holder and nobody else and the Court could not go into the question of the real ownership of the proceeds of the decree.

1. ('41) 28 A. I. R. 1941 Mad. 321 : 195 I. C. 776 : I. L. R. (1941) Mad. 248 : (1940) 2 M. L. J. 664, Varadarajam Pillai v. Krishnamurthi Pillai.
2. ('41) 28 A.I.R. 1941 Mad. 596: (1941) 1 M. L. J. 313, Subbareddi v. Venkatappa Reddi.

We are however in the present case not concerned with the question who is the creditor or who is the decree-holder. There is no doubt in the present case that the decree-holder is a woman and that she is entitled to the exemption of S. 4 (h) unless she is disqualified as being the owner of the debt evidenced by Ex. A. The question is not therefore whether she is a creditor under Ex. A, having regard to the definition of creditor in this Act, or whether she is the person entitled to sue on Ex. A, but whether she is, in fact the owner of the proceeds of that debt whenever it may be collected. This is a pure question of ownership to which the ordinary law applies and we can see no reason why it should not be open to the lady in question to adduce evidence that, though the mortgage stands in her name, her son is really entitled to the proceeds thereof and she is not beneficially interested therein. We may also refer to the decision of the Full Bench in 58 Mad. 693.[3] The result therefore is that the civil revision petition is dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

3. ('35) 22 A.I.R. 1935 Mad. 181: 153 I. C. 944: 58 Mad. 693 : 68 M. L. J. 81 (F. B.), Venkatarama Reddi v. Valli Akkal.

A. I. R. (29) 1942 Madras 389

KING AND LAKSHMANA RAO JJ.

Budi Gaddennaidu and another — *Appellants*

v.

Chintalapudi China Ramanna — *Respondent.*

Appeal No. 70 of 1940, Decided on 8th October 1941, against order of Sub-Judge, Vizagapatam, D/- 4th August 1939.

Madras Debt Conciliation Act (11 of 1936), S. 25—S. 25 only necessitates stay of execution proceedings — It does not prohibit executing Court from passing order under O. 21, R. 40(2), Civil P. C.

The judgment-debtor informed the Court that he had made an application to the Debt Conciliation Board and had applied for two reliefs : (i) that the execution proceedings against him might be stayed in accordance with the provisions of S. 25, Debt Conciliation Act, and (ii) that he might be released from custody. The Court passed orders granting stay and granting release from custody upon the production by the judgment-debtor of security for his appearance. The surety executed the necessary bond and the judgment-debtor was accordingly released. It was contended that the order calling upon the judgment-debtor to furnish security for his appearance was ultra vires of the executing Court as (1) the stay order was not unconditional and (2) S. 25 prohibited such an order being passed :

Held that the Court's order granting stay was not conditional : ('40) 27 A.I.R. 1940 Mad. 917, *Disting.* [P 389 C 2]

Held further that S. 25 necessitates only that execution proceedings should be stayed and can have no prohibitive effect upon the power of the Court to make provision for continuing execution proceedings in case necessity should arise in the future. The Court must be able to appoint a date for further proceedings, should they become necessary. And the Court must be able to take such action as R. 40 of O. 21, Civil P. C., contemplates in order to dispose of the urgent question whether the judgment-debtor shall remain in custody or be released. Therefore an order of the Court passed under R. 40, sub-r. (2) is inno sense prohibited by S. 25, Debt Conciliation Act. And the power of the Court to order the release of the judgment-debtor necessarily involves the power of the Court to call upon him to furnish security. [P 389 C 2; P 390 C 1]

Y. Suryanarayana — for Appellants.

V. Govindarajachari — for Respondent.

KING J.—This is an appeal filed jointly by the judgment-debtor in O. S. No. 61 of 1936 and a surety who gave a bond for his appearance on 4th October 1939. The facts of the case are that on 1st August 1939 the judgment-debtor was arrested in execution of the decree in O. S. No. 61 of 1936 and was brought before the Court which had given him time for three days for making some attempt at paying off part of the decree. The inquiry contemplated by O. 21, R. 40 was adjourned for those three days. On 2nd August, the judgment-debtor informed the Court that he had made an application to the Debt Conciliation Board and applied for two reliefs : (i) that the execution proceedings against him might be stayed in accordance with the provisions of S. 25, Debt Conciliation Act, and (ii) that he might be released from custody. On 4th August, the Court passed orders granting stay and granting release from custody upon the production by the judgment-debtor of security for his appearance on 4th October. As already stated, the second appellant, the surety executed a bond pledging himself that the judgment-debtor would appear on that date. The judgment-debtor was accordingly released.

In this appeal it is argued that the order calling upon the judgment-debtor to furnish security for his appearance was ultra vires of the executing Court. It is argued that, under S. 25, Debt Conciliation Act, stay of proceedings must be unconditional and that, in the present case, the fact that two orders were passed on the same day, one granting stay and the other calling for security meant in effect that the stay granted was not unconditional. On that assumption with regard to the facts, our attention was directed to a judgment of Horwill J. reported in (1940) 2 M. L. J. 322,[1] in which the learned Judge has pointed out that when a conditional order of stay is passed that necessarily involves the power of the Court to refuse a stay in case the condition is not satisfied, and therefore, it must be directly contrary to the provisions of S. 25 of the Act which peremptorily directs that stay shall be granted. We are of opinion that this decision has no bearing upon the facts of the present case however, as there is no sign here in the Court's order of the grant of stay being conditional.

It was however argued further that, when an application is made under S. 25 of the Act to the Court to stay proceedings, the Court has no power to pass any order whatever. From the moment it is apprised of the application to the Debt Conciliation Board, its powers are completely paralysed. We are not prepared to accept that argument and indeed would point out that, if it were accepted, it amounts to this : that the appellant is contending that the very orders which procured his release were ultra vires of the Court. We consider that S. 25 necessitates only that execution proceedings should be stayed and can have no prohibitive effect upon the

1. ('40) 27 A.I.R. 1940 Mad. 917 : 192 I. C. 409 : (1940) 2 M.L.J. 322, Sundaralingam v. Venkataramayya.

power of the Court to make provision for continuing execution proceedings in case necessity should arise in the future. The Court must be able to appoint a date for further proceedings, should they become necessary. And we think the Court must be able to take such action as R. 40 contemplates in order to dispose of the urgent question whether the judgment-debtor shall remain in custody or be released. If the argument of the appellant is pushed to its logical conclusion, it can only mean this : that when a judgment-debtor is under arrest according to the provisions of R. 40 and brings to the notice of the Court, the fact that he has applied to the Debt Conciliation Board, he must remain under arrest inevitably until the Debt Conciliation Board has finished with his application. We think that an order of the Court passed under R. 40, sub-r. (2) is in no sense prohibited by S. 25, Debt Conciliation Act. And if that is so, the power of the Court to order the release of the judgment-debtor necessarily involves the power of the Court to call upon him to furnish security. We see no reason, therefore, to interfere with the order of the learned Subordinate Judge and dismiss this appeal with costs.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 390

VENKATARAMANA RAO J.

In re Sv. Rm. Ar. Ramanathan Chettiar — Petitioner.

S. R. No. 16499 of 1941, Decided on 8th September 1941, to revise order of Sub-Judge, Coimbatore, D/- 14th February 1941.

Court-fees Act (1870 as amended in Madras), Sch. 2, Art. 1 (d) (i) — "Suit or proceeding"— Meaning of, explained—Suit includes execution proceedings and proceedings in appeal — Proceeding also bears same meaning.

The meaning to be attributed to the word "suit" or "proceeding" must depend upon the scope of the enactment wherein the said expressions are used and with reference to the particular context wherein they occur. Having regard to the context the words "suit or proceeding" in Sch. 2, Art. 1 (d) (i) do not comprehend the same thing. Having regard to the object of the enactment the word "proceeding" is used as meaning a proceeding in the nature of a suit, and both the words are used as comprising the entire litigation commencing with the filing of a plaint or a petition or an application in the trial Court down to the stage when ultimate decision is reached in the final Court of appeal or revision. In this view the word "suit" will include execution proceedings and proceedings in appeal and the word "proceeding" will also bear the same connotation. Therefore, when a revision petition is presented to the High Court against the order of a subordinate Court, the question to be considered is, what is the value of the suit or the main proceeding wherein the order was made? The expression "to which the order relates" has reference to the suit or proceeding and not to the application in the suit or proceeding on which the order which is sought to be revised was passed. [P 390 C 2; P 391 C 1]

K. S. Ramabhadra Iyer — for Petitioner.

ORDER. — The question referred to me for decision is whether the court-fee paid by the petitioner on the memorandum of the civil revision petition presented to this Court against the order made by the learned Subordinate Judge of Coimbatore in E. A. No. 444 of 1940 is correct. The application out of which this civil revision petition arises was made to direct respondent 1 to refund a sum of Rs. 987-3-11 being the amount which he received at a rateable distribution of the sale-proceeds of the property of the common judgment-debtor in excess of the amount which he was legitimately entitled to. The petitioner paid a court-fee of Rs. 5 on the memorandum of the petition, but the office brings to my notice that the value of the suit wherein the sale proceeds were realised in execution of the decree is above the value of Rs. 1000 and therefore a court-fee of Rs. 10 ought to be paid. Mr. Ramabhadra Iyer on behalf of the petitioner contends that the value of the proceeding to which the order relates and which is sought to be revised is less than Rupees 1000 and that therefore a court-fee of Rs. 5 alone is leviable. The provision in the Court-fees Act relating to this matter is Art. 1 (d) (i) of Sch. 2, Madras Court-fees (Amendment) Act which runs thus:

"When presented to a High Court under S. 115, Civil P. C., 1908, for revision of an order : (a) when the value of the suit or proceeding to which the order relates does not exceed Rs. 1000 . . . . . Rs. 5; (b) when the value of the suit or proceeding exceeds Rs. 1000 . . . . . Rs. 10."

The words "suit or proceeding" have been interpreted in various senses in different statutes according to the intent and scope of the statute, sometimes in a narrow sense and sometimes in a wide sense. The word "suit" in a narrow sense is confined to a litigation initiated in a trial Court and ending with a decree or a final order passed by it. In this sense it would not include execution proceedings or proceedings in appeal. But, in a wide sense, it has been interpreted as comprehending the entire litigation commencing from the initiation of the litigation in the trial Court upto the stage when the ultimate decision is reached in the final Court of appeal or revision. In this view, it would include execution proceedings and proceedings in appeal as continuation of the suit. The word "proceeding" has been similarly interpreted. In its narrow sense, it is a step in any action or in an independent proceeding analogous to an action by which a litigation is initiated. In a wide sense, it has been interpreted if used in juxtaposition with a suit, to include any proceeding in the nature of a suit. Even in this view, having regard to the context it is sometimes limited only to the stage of litigation commenced by filing a petition or application in the trial Court and ending with an order or decree passed by this Court. In another view it is meant to indicate all the applications in execution of a decree or order passed in the main proceeding and also all proceedings in appeal as continuation of the proceeding. The word "proceeding" used alone has been interpreted to mean all judicial proceedings and when applied to suits to mean the suit as a whole. Therefore, the meaning to be attributed to the word "suit" or "proceeding" must depend upon the scope of the enactment wherein the said expressions are used and with reference to the particular context wherein they occur.

The words "suit or proceeding" in the present case occur in the Madras Court-fees Amending Act and the intention of the Legislature was to provide a fixed court-fee for all revision petitions filed against the orders of the subordinate Courts whether passed in a suit or an original proceeding such as probate or guardianship or in appeals from decrees or orders therefrom or in any interlocutory applications made in the said suit or proceeding or in appeals from orders passed on such applications, whatever the nature of the order is. Having regard to the context it is obvious that the words "suit or proceeding" do

not comprehend the same thing. Having regard to the object of the enactment it seems to me that the word "proceeding" is used as meaning a proceeding in the nature of a suit, and both the words are used as comprising the entire litigation commencing with the filing of a plaint or a petition or an application in the trial Court down to the stage when ultimate decision is reached in the final Court of appeal or revision. In this view the word "suit" will include execution proceedings and proceedings in appeal and the word "proceeding" will also bear the same connotation. Therefore, when a revision petition is presented to the High Court against the order of a subordinate Court, the question to be considered is, what is the value of the suit or the main proceeding wherein the order was made? The expression "to which the order relates" has reference to the suit or proceeding and not to the application in the suit or proceeding on which the order which is sought to be revised was passed. I am therefore of the opinion that the proper stamp duty that is leviable on the revision petition in question is a sum of Rs. 10 and not Rs. 5. The petitioner is accordingly directed to pay an additional court-fee of Rs. 5 within two weeks from to-day.

C.R.K./K.S. *Order accordingly.*

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* A. I. R. (29) 1942 Madras 391

KUNHI RAMAN J.

Dupagunta Subramaniam — Petitioner

v.

Govinda Petar Satyanadham and another — Respondents.

Civil Revn. Petn. No. 418 of 1941, Decided on 18th December 1941, to revise order of Sub-Judge, Bezwada, D/- 31st October 1940.

*** Civil P. C. (1908), S. 60 (1) (i) — Protection is based on public policy and cannot be waived —Agreement by person getting salary of Rs. 100 that creditor may take certain sum out of his salary is not enforceable in law.**

The provisions of S. 60 which are imperative, are intended to give protection to persons on grounds of public policy and not merely to confer a personal benefit upon them, and therefore that protection cannot be waived. Hence an agreement by a person getting a salary of Rs. 100 that his creditor who has obtained a decree against him may take a certain sum per month out of his salary in satisfaction of the decree, is not enforceable in law : ('41) 28 A.I.R. 1941 Bom. 389, *Foll.*; *Case law referred.* [P 391 C 1; P 392 C 1, 2]

M. Appa Rao — for Petitioner.

D. R. Krishna Rao, Amicus curiæ — for Respondents.

ORDER. — An interesting question of law under S. 60, Civil P. C., arises for determination in this civil revision petition. Since the respondent was not represented by advocate, Mr. Krishna Rao was asked to assist the Court by appearing as amicus curiæ and he has very kindly placed before the Court all the authorities relevant to the point involved in the case. The question which the Court below had to decide was, whether an arrangement made by an employee of the Bezwada Municipality, who was drawing a salary of Rs. 100 a month that his creditor who had obtained a decree against him may take Rs. 15 per month out of his salary in satisfaction of the decree, is enforceable in law. The agreement between the parties was reduced to writing and Ex. A is the document that was relied on in the Court below. It professes to be a salary assignment deed which prima facie is opposed to the provisions of S. 6, T. P. Act, which prohibits assignment of salary or pension. In the body of the document, as already indicated, the creditor was given the power of collecting Rs. 15 a month out of the debtor's salary. To enforce this agreement, an execution petition was filed in the lower Court by the petitioner here, who is the decree-holder, for attaching Rs. 15 per month out of the salary of the judgment-debtor who is the respondent here. Although notice was served on the judgment-debtor, he did not choose to appear in the Court below. The learned Subordinate Judge however has held that although the agreement was proved, the object of the agreement was opposed to public policy inasmuch as the provisions of S. 60, Civil P. C., which prohibit attachment of salary of persons getting a salary of Rs. 100 and less than Rs. 100 a month, are based upon public policy and therefore an agreement in contravention of these provisions cannot be upheld by a Court of law.

The decree-holder has filed this petition for revising the order and his learned counsel, Mr. Appa Rao argues that it is open to a judgment-debtor in the position of the defendant to waive the right conferred on him by S. 60 and that therefore the agreement, Ex. A, is strictly enforceable in law. In support of this contention he relies upon two decisions of the Lahore High Court. The first is reported in A.I.R. 1939 Lah. 539[1] and it was followed by a later decision reported in A. I. R. 1940 Lah. 65.[2] Both these decisions are of single Judges of that High Court who have followed the principle recognized in an earlier decision of the same High Court reported in A.I.R. 1935 Lah. 164[3] which is a decision of a Bench of two Judges. That decision, however, related to agricultural land which was sought to be attached and sold contrary to the provisions of S. 60 of the Code. The view taken in Lahore is that S. 60 imposes a prohibition against forcible attachment of property and that it is open to a person who has obtained the consent of the party for whose protection provision is made in S. 60 to effect an attachment, contrary to the provisions of the section. Mr. Krishna Rao, the learned counsel who appears as amicus curiae invites the attention of the Court to a recent decision of a Bench of the Bombay High Court reported in I.L.R. (1941) Bom. 415[4] in which the question has been fully considered and the view taken by the Lahore High Court has been dissented from. In the leading judgment reliance was placed upon a passage in Halsbury's Laws of England, Hailsham Edition, Vol. 4, p. 471, S. 869 :

"There are some choses in action which have never been assignable; and, broadly speaking, it may be said that the ground of their non-assignability is denoted by that comprehensive expression 'public policy.' Thus public policy forbids that effect should be given to assignments of pensions and salaries of public officers payable to them for the purpose of maintaining the dignity of their office or to assure a due discharge of its duties."

The judgment goes on to state as follows :

"The question then is whether it is open to a

1. ('39) 26 A.I.R. 1939 Lah. 539 : 185 I.C. 317 : 41 P.L.R. 631, Jagannath v. Allah Dad.
2. ('40) 27 A.I.R. 1940 Lah. 65 : 188 I. C. 639 : 41 P. L. R. 834, Rajindar Kumar v. Chetanlal.
3. ('35) 22 A. I. R. 1935 Lah. 164, Chittar Mal v. Mt. Ram Devi.
4. ('41) 28 A. I. R. 1941 Bom. 389 : 197 I. C. 462 : I. L. R. (1941) Bom. 415 : 43 Bom.L.R. 758, Postmaster General, Bombay v. Chenmal Mayachand.

person to contract himself out of these provisions or to waive their benefit. It is no doubt a general rule that anyone may renounce a law introduced for his own benefit. But that rule applies only to rights and benefits of a personal and private nature created under an agreement or granted by law. There is a clear distinction between a contractual or a statutory right created in favour of a person for his own benefit and a right which is created on the ground of public interest and policy. The rule of waiver cannot apply to a prohibition based on public policy."

Broomfield J. in his concurring judgment says :

"If the privilege is purely personal, if the interests of third parties are not affected and in particular if there is no question of public interest or policy, no doubt the maxim *quilibet potest renunciare juri pro se introducto* is good law. But where a privilege is conferred for reasons of public policy, it is very well settled that it cannot be waived."

In a case which arose under the Presidency Towns Insolvency Act, 1941 M. W. N. 899[5] at p. 900 in dealing with the question whether the Official Assignee can intercept the salary of an official who draws a salary below the limit prescribed by S. 60 of the Code, Krishnaswami Iyengar J. states as follows :

"I doubt whether the law will permit him to do so, for it seems to me that it is against the fundamental principle underlying S. 60, Insolvency Act, and S. 60, Civil P. C., to allow him to seize any portion of an insolvent's salary which is below the attachable limit, as such a limit appears to my mind to have been fixed on public grounds to ensure the proper and efficient discharge of duty by a public servant."

In the case reported in 35 Cal. 61[6] Mukerjee J. observes as follows at page 74 :

"When the object of the statute has been determined, if the statutory provision is not based on grounds of public policy, and is intended only for the benefit of a particular person or class of persons, the conditions prescribed by the statute are not considered as indispensable and may be waived, because every one has a right to waive, and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, and which may be dispensed with without infringement of any public right or policy. This rule is expressed by the maxim of law, *quilibet potest renunciare juri pro se introducto*; (Anyone can renounce a law introdnced for his own benefit) . . . . As was pointed out by Lord Westbury in (1861-62) 4 De. G. F. & J. 221,[7] the words "*pro se*" were introduced into the maxim, to show that no man can renounce a right of which his duty to the public and the claims of society forbid the renunciation."

In Mulla's Commentaries on S. 6 (f), T. P. Act, (Edn. II, p. 66) the learned author says :

"It is opposed to public policy that a public officer should transfer the salary of his office, for the salary is given for the purpose of upholding its dignity and the proper performance of its duties."

Then the case in (1840) 2 Beav. 544[8] is referred to and the following observations of Lord Langdale are quoted:

"There are various cases in which public duties are concerned, in which it may be against public policy, that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them."

A similar question relating to the provisions of Ss. 86 and 87, Civil P. C., came up before the Judicial Committee of the Privy Council in I.L.R. (1938) All. 601.[9] There the question was whether H. H. the Gaekwar of Baroda could be said to have waived the provisions of these sections, because there was no objection taken at the trial to the absence of a certificate signed by a secretary to the Government of India in token of the consent given by His Excellency the Governor-General. The suit was actually defended on the merits in the trial Court and evidence adduced on behalf of the Manager and Engineer in Chief of the State Railway but not on behalf of H. H. the Gaekwar of Baroda who was the party against whom the suit was filed in reality though not in form. At p. 613 of the judgment their Lordships state as follows in dealing with the contention that the objection must be deemed to have been waived:

"No one purported to appear in the suit on behalf of H. H. the Gaekwar of Baroda and there is no ground for saying that he waived his privilege. Further, as already pointed out, the provisions relating to this matter are statutory. They are contained in Ss. 86 and 87, Civil P. C., they are imperative and having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court."

The provisions of S. 60, Civil P. C., which are also imperative are intended to give protection to persons in the position of the respondent in the present case on grounds of public policy and not merely to confer a personal benefit upon them. I have no hesitation in following the decision of the Bombay High Court referred to above which is consistent with the principle laid down by their Lordships of the Privy Council in I.L.R. 1938 All. 601.[9] In this view the finding of the Court below that the execution petition for attaching Rs. 15, out of the salary of the respondent should not be granted is correct and this civil revision petition must be dismissed.

C.R.K./K.S. *Petition dismissed.*

5. ('41) 28 A.I.R. 1941 Mad. 906 : (1941) 2 M.L.J. 591 : I.L.R. (1942) Mad. 199 : 1941 M. W. N. 899, Official Assignee of Madras v. E. V. D. Silva.
6. ('08) 35 Cal. 61 : 6 C.L.J. 320 : 11 C.W.N. 1011 (F.B.), Ashutosh Sikar v. Beharilal Kirtania.
7. (1861-62) 4 De. G. F. & J. 221 : 31 L. J. Ch. 161 : 8 Jur (NS) 85 : 5 L. T. (NS) 778 : 10 W. R. 215 : 135 R. R. 106, Hunt v. Hunt.
8. (1840) 2 Beav. 544 : 50 R. R. 279, Grenfell v. Dean and Canons of Windsor.
9. ('38) 25 A.I.R. 1938 P. C. 165 : 174 I. C. 551 65 I.A. 182 : I.L.R. (1938) All. 601 : 32 S.L.R. 531 (P.C.), Gaekwar Baroda State Railway v. Hafiz Hubibul Huq.

C. P. C. —
('40) Chitaley, S. 60, N. 16.
('41) Mulla, S. 60 p. 246 Note 'Waiver'.

A. I. R. (29) 1942 Madras 392

ABDUR RAHMAN J.

Subba Nayakkar and another — *Appellants*

v.

Akkammal — *Respondent.*

Second Appeal No. 154 of 1938, Decided on 4th March 1941, against decree of Sub-Judge, Dindigul, in A. S. No. 46 of 1937.

(a) Easement — Claim to both ownership and easement in regard to same plots though inconsistent may yet be put forward.

The Civil Procedure Code permits inconsistent pleas to be raised. Claims both to ownership and in the alternative to easement in regard to the same plots, though inconsistent are yet capable of being put forward : ('26) 13 A.I.R. 1926 Mad. 728 (F. B.), *Rel. on.* [P 393 C 2]

(b) Easement — Right of easement over plot not matured — Assertion of ownership involves loss of right of easement.

If a person begins to assert that he is the owner of a plot over which his right of easement has not matured, he may not succeed in establishing ownership but would, nonetheless, lose, on account of his claim, the right of easement for which he was prescribing, because he cannot hold the property both adversely as a complete owner and as the holder of a dominant tenement where he claims only certain limited rights by way of an easement and recognises the proprietary rights of the servient owner in the tenement : ('26) 13 A. I. R. 1926 Mad. 728 (F. B.) and (1914) 3 K. B. 911, *Rel. on.* [P 393 C 2]

(c) Easement — Finding that plaintiff had exercised right of way on plot for over statutory period before assertion of his ownership of that plot is of fact and binding in second appeal.

A finding that the plaintiff had been exercising his right of way on the plot in dispute for over the statutory period (about 24 years) before the letters and petitions containing the plaintiff's assertion of ownership were written and made is a finding of fact and must be accepted in second appeal. [P 394 C 1]

(d) Easement—Right maturing into easement — Subsequent assertion of ownership cannot destroy easement—Nor can subsequent allegation that right was enjoyed as public right or right in gross do so.

When a person claims a right in a property by way of an easement, he is claiming a much lesser right than ownership. If the right of easement is acquired, the dominant owner becomes entitled to certain rights only and the remaining rights still continue to vest in the servient owner. There is nothing to prevent the dominant owner from acquiring the rest of the rights for instance by adverse possession. Nor can his attempt to claim the rest of the rights be held to extinguish the rights which had been already acquired. These could only be lost by surrender, abandonment, etc., and the attempt to get more is not one of the recognized methods by which the rights already acquired could cease to exist. Consequently, an assertion of ownership, after the period of user has matured into an easement cannot deprive the right already acquired, and the allegation that it was being enjoyed as a public right or a right in gross after the easement had been acquired cannot equally do so. It cannot stand in a worse position than that of the claim of ownership : ('26) 13 A. I. R. 1926 Mad. 728 (F. B.), *Expl.* [P 394 C 1, 2]

(e) Easements Act (1882), S. 15 — No license or agreement — Plaintiff using way over defendant's land openly peaceably and as of right for over statutory period—Plaintiff must be held to have acquired easement— In absence of license or agreement during that period his user must be regarded as with animus of enjoying easement.

In the absence of any allegation as to any license or agreement, if the plaintiff is found to have been using a way over the defendant's land, openly, peaceably and as of right for over the statutory period, he must be held to have acquired an easement in respect of that right. In the absence of any allegation of ownership during that period, his user must be regarded to have been with the animus of enjoying the easement as such in the defendant's land. [P 394 C 2]

(f) Ownership — Right in gross—Distinction.

A right in gross is claimed by a person irrespective of any land of which he is possessed, but contains no claim of ownership in the corpus of the property. It cannot therefore be treated in the same manner as a claim of the ownership. [P 394 C 2]

B. Sitarama Rao and P. N. Appuswami Ayyar — for Appellants.

T. V. Muthukrishna Iyer — for Respondent.

JUDGMENT. — The other claims made in the suit, out of which this appeal arises, having been decided against the plaintiff, the only point to decide now is whether the plaintiff has succeeded in establishing her right to easement on the western space lying to the north of the defendant's house and abutting on the Union lane near the line marked AG in the plan Ex. K-1. The plaintiff's suit was totally dismissed by the District Munsif of Palni but an appeal to the Subordinate Judge of Dindigul was partially allowed and the plaintiff was found to have established her right of way in regard to the plot indicated above. The defendant appeals and contends that the decision of the learned Subordinate Judge decreeing the plaintiff's right of easement to the disputed plot is incorrect. The question to decide is whether it is so.

It is undoubtedly true that the plaintiff came to the Court with two inconsistent allegations claiming both ownership and, in the alternative, easement in regard to the same plots. That they were inconsistent yet capable of being put forward, may be, in view of the decision of the Full Bench of this Court in 49 Mad. 820[1] taken as no longer open to question. The Code of Civil Procedure permits inconsistent pleas to be raised after all. It has been equally settled that if a person begins to assert that he is the owner of a plot over which his right of easement has not matured, he may not succeed in establishing ownership but would, nonetheless, lose, on account of his claim, the right of easement for which he was prescribing. And this because he could not hold the property both adversely as a complete owner and as the holder of a dominant tenement where he claims only certain limited rights by way of an easement and recognises the proprietary rights of the survient owner in the tenement. In delivering the judgment of the Court, Sir Murray Coutts-Trotter C. J. observed as follows :

"The learned Judges in 38 Mad. 1,[2] seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo egerit*, to what purported character are the acts of user to be ascribed is one which the Court must answer."

1. ('26) 13 A. I. R. 1926 Mad. 728 : 96 I. C. 968 : 49 Mad. 820 (F.B.), Subba Rao v. Lakshmana Rao
2. ('16) 3 A. I. R. 1916 Mad. 718 : 17 I.C. 112 : 38 Mad. 1, Konda Reddi v. Ramaswami Reddi.

They followed the decision in (1914) 3 K. B. 911[3] which laid down that : "Acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement." Nothing was said by the learned Chief Justice in the above mentioned case that might lead to the conclusion that an assertion of ownership, after the period of user has matured into an easement, would be fatal to the right already acquired. Learned counsel for the appellant contends that the claim as to ownership of the plot in dispute was not only made by the plaintiff for the first time in her plaint presented in March 1936 but that she had been doing so since June 1935 and this would be sufficient to extinguish her claim in regard to easement. The lower appellate Court finds as a fact that the plaintiff had been exercising her right of way on the plot in dispute for about 24 years before the letters and petitions containing the plaintiff's assertion of ownership were written and made. This is a finding of fact, which the lower Court was entitled to arrive at and must be accepted by me in second appeal. Whether the claim made in 1935 can be destructive of the easement, if one had been already acquired by the plaintiff as the lower appellate Court finds it to have been done, is the next question which deserves consideration.

When a person claims a right in a property by way of an easement, he is claiming a much lesser right than ownership. If the right of easement is acquired, the dominant owner becomes entitled to certain rights only and the remaining rights still continue to vest in the servient owner. What prevents the dominant owner from acquiring the rest of the rights by adverse possession for instance, I am unable to follow. Nor can I see why should his attempt to claim the rest of the rights *nec vi nec clam nec precario* (which may also involve the assertion that he is holding them in his own right) necessarily lead one to conclude that the rights previously acquired have, by his subsequent conduct in attempting to acquire more, come to an end. Whatever was already acquired would remain his—what remained to be acquired may not be his at any time. But an attempt to get the remaining rights cannot be held to extinguish the rights which had been already acquired. These could only be lost by surrender, abandonment, etc., and the attempt to get more is not one of the recognised methods by which the rights already acquired could cease to exist. I must, therefore, hold that a mere claim to hold the property as an owner cannot result in the plaintiff being deprived of her existing rights.

It was disputed at the bar that there was no proof that the plaintiff had been exercising her right of way on the western plot, as required by S. 15, Easements Act, with the intention of acquiring an easement and that if the property was being enjoyed by her either in the assertion of ownership or even on the basis of a general public right she could not be held to have exercised her right of way as an easement, that is, with the intention of acquiring it by way of an easement. As already stated, if the plaintiff could be shown to have been exercising her right of way from 1911 to 1935 as an owner, her claim to an easement should have failed. There is no proof, however, of that fact. Relying on the documents Exs. B, C, D and E, it was claimed that the same consequences should follow if a person is found to have been exercising a right of way on the basis of a general public right and not in the exercise of the private right which she now claimed. There is again no proof of the fact that she had exercised the right of way between 1911 and 1935 on that basis and not on the ground of easement. There is nothing in the record to show that she ever asserted a general public right before 1935. In the absence of any allegation as to any license or agreement, if the plaintiff is found to have been using a way over the plaintiff's land, openly, peaceably and as of right for over the statutory period as she is found to have been, she must be held to have acquired an easement in respect of that right. In the absence of any allegation of ownership during that period, her user must be regarded to have been with the animus of enjoying the easement as such in the defendant's land.

Even in the letters to which reference was made by learned counsel for the appellant, the right was claimed by virtue of being a dominant owner in respect of the servient tenement belonging to the defendant and not independently of it; that is to say, it was not being claimed as a right in gross but as an easement. This is very different from the claim of ownership. A right in gross is claimed by a person irrespective of any land of which he is possessed, but contains no claim of ownership in the corpus of the property. It cannot therefore be treated in the same manner as a claim of ownership has been. But even if it were otherwise, when I have found that the allegation of ownership after the right had matured into an easement would be insufficient to destroy the easement, the allegation that it was being enjoyed as a public right or a right in gross after the easement had been acquired could not equally do so. It cannot stand in a worse position than that of the claim of ownership. The lower appellate Court has, after a full consideration of all the evidence and circumstances, found that "the said portion (referring to the plot now in dispute) was being used as a pathway for over 20 years prior to the suit and even prior to 1935" and that "inmates of the plaintiff's house were going along the western arm in the Union lane." I take that finding to imply that the right of way over the defendant's property was being exercised by the inmates of the plaintiff's house for its beneficient enjoyment with the animus of acquiring a right over the defendant's property. In this view the decision of the lower appellate Court is right and must be upheld. The appeal consequently fails and is dismissed with costs. I may in the end add that the gate constructed by the defendant was not ordered by the lower appellate Court to be closed. Nothing in this judgment should be construed to imply that I have done so. It will remain but will not affect the plaintiff's right of way over the plot now in dispute. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

[3] (1914) 3 K.B. 911 : 84 L.J.K.B. 251 : 30 T.L.R. 630, Lyell v. Hothfield.

C. P. C. —
(a) ('40) Chitaley, O. 6 R. 2, N. 5 Pt. 8.
('41) Mulla, O. 6 R. 2 Page 575 Pts. (m) & (w).
(c) ('40) Chitaley, S. 100, N. 50 Pt. 1, N. 52 Pt. 1.
('41) Mulla, S. 100 Page 366 Pt. (a).
Limitation Act —
(a) ('42) Chitaley, S. 26, N. 17 Pt. 2.
('38) Rustomji, S. 26 Page 502 Pt. 11.
(b) ('42) Chitaley, S. 26, N. 12 P. 1, N. 17 P. 3.
('38) Rustomji, S. 26 Page 503 Pts. 2 to 4.

A. I. R. (29) 1942 Madras 395

LEACH C. J. AND KUPPUSWAMI AYYAR J.

China Ana Muthuvayyangar

v.

Thiruvangadammal and others.

Appeal No. 246 of 1939, Decided on 8th January 1942, against decree of Sub-Judge, Ramnad at Madura, in O. S. No. 25 of 1937.

(a) Hindu law — Adoption — Boy given and taken during husband's lifetime — Widow can complete adoption by performing datta homam after husband's death.

When there was a giving and a taking of the boy during the lifetime of the husband his widow has the right of completing the adoption by the performance of the datta homam ceremony after his death : ('26) 13 A. I. R. 1926 Mad. 1184, *Rel. on.* [P 395 C 1]

(b) Hindu law—Adoption—Formal ceremony when boy is given and accepted is not necessary — Essentials of valid adoption stated.

The Hindu law does not require that there shall be a formal ceremony when the boy is given and accepted. The utterance of the words used by Baudhayana is not necessary. For a valid adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, that the boy shall be handed over and taken for this purpose and that the adoption ceremony shall be performed when the parties belong to the twice born class : 6 Cal. 381 (P. C.); ('15) 2 A. I. R. 1915 Mad. 1221; 11 Mad. 5 (F.B.) and ('31) 18 A.I.R. 1931 P. C. 109, *Expl.* [P 396 C 1]

K.V. Sesha Ayyangar and T. Thyagaraja Ayyar — for Appellant.

K. Rajah Ayyar — for Respondents.

LEACH C. J.—In this appeal the Court is called upon to decide whether respondent 2 is the adopted son of one G. Srinivasa Ayyangar, who died on 27th February 1937. The suit was brought by the appellant as the nearest reversioner to the deceased's estate for a declaration that respondent 2 had no interest therein, in other words that he had not been adopted to Srinivasa Ayyangar. The Subordinate Judge held that during the lifetime of Srinivasa Ayyangar the natural father of respondent 2 had agreed to give his son to him in adoption and that Srinivasa Ayyangar took the boy with that intention. Therefore the condition imposed by Hindu law that there should be a giving and a taking had been fulfilled during the lifetime of the adoptive father. It is common ground that the datta homam ceremony was performed by Srinivasa Ayyangar's widow, respondent 1, on 10th March 1937, that is twelve years after the death of her husband. In these circumstances the Subordinate Judge considered that respondent 2 had been lawfully adopted to Srinivasa Ayyangar. He also held that the deceased had given his widow oral authority to adopt and further that the authority could be implied from the surrounding circumstances. The widow claimed that she had received authority under a will executed by her husband, but the Subordinate Judge refused to accept the document as being a valid will. On behalf of the appellant it has been conceded that if there was a giving and a taking of the boy during the lifetime of Srinivasa Ayyangar his widow would have the right of completing the adoption by the performance of the datta homam ceremony after his death. That this is so is to be gathered from the decision of this Court in 49 Mad. 969.[1]

It is common ground that the boy left the house of his natural father six years before Srinivasa Ayyangar's death and that during the whole of this period he lived with Srinivasa Ayyangar and his wife who treated him as a son in every respect. Learned counsel for the appellant accepts it as being true that Srinivasa Ayyangar throughout had the intention of adopting respondent 2 and that the reason why the adoption ceremony was postponed was that he desired it to take place when the boy was of more mature age and, therefore, not so likely to fall into pollution. There is evidence that Srinivasa Ayyangar intended the adoption to take place after the expiry of the year Dhatu which came to an end in April 1937. All are agreed that the year Dhatu is looked upon as an unfortunate period because in that year of the last cycle there was a terrible famine in this province. It may be taken that it was the intention of Srinivasa Ayyangar to perform the datta homam ceremony after the year Dhatu had expired. Death prevented him carrying out his intention. The evidence of what transpired when respondent 2 was taken into Srinivasa Ayyangar's household consists of the testimony of the widow and of his natural father. In the course of her evidence the widow said:

"My husband and myself went and brought Raman to our house when he was five years old in order to adopt him so as to perpetuate our lineage. We asked Pichu Ayyangar that he should give Raman to us so that we might have him as our son. Then we got his tonsure ceremony performed at our cost in the Vettai Venkatesa Perumal Sannadhi and also gave him Aksharabyasam."

The natural father stated that Srinivasa Ayyangar told him and the boy's mother that he was going to adopt the boy and he asked for their permission to do so. The witness was not actually asked whether he gave his consent but there can be no doubt that he did, because Srinivasa Ayyangar and his wife took the boy away with them there and then and thereafter brought him up. In these circumstances it cannot be doubted that Srinivasa Ayyangar asked the natural father to give the boy to him in adoption, that the father consented and that he handed over the boy to him to be taken in adoption. Mr. Sesha Ayyangar, on behalf of the appellant, says that this is not sufficient. According to him there must be a formal ceremony and the words mentioned by Baudhayana uttered. The passage from Baudhayana relied on is reproduced in Mayne, Edn. 10, page 251 and reads as follows :

"One should go to the giver of the child, and ask him, saying 'give me thy son.' The other answers 'I give him.' He receives him with these words, 'I take thee for the fulfilment of my religious duties. I take thee to continue the line of my ancestors.'"

It is said that unless these words or words very similar are actually used there can be no giving and taking within the meaning of the Hindu law. In this connexion Mr. Sesha Ayyangar has referred us to 6 Cal. 381,[2] 18 M. L. T. 434,[3] 11 Mad. 5[4] and 54

1. ('26) 13 A.I.R. 1926 Mad. 1184: 97 I.C. 615 : 49 Mad. 969 : 51 M. L. J. 466, Seetharamamma v. Suryanarayana.
2. ('81) 6 Cal. 381 : 7 I. A. 250 : 7 C. L. R. 313 : 4 Sar. 191 (P.C.), Shoshinath Ghose v. Krishna Sundari Dasi.
3. ('15) 2 A.I.R. 1915 Mad. 1221 : 31 I.C. 855 : 18 M. L. T. 434, Kuppuswami v. Venkatalakshmi.
4. ('88) 11 Mad. 5 (F. B.), Govind Ayyar v. Doraiswami.

Mad. 440[5] but none of these cases goes to the length which he asks the Court to go. In 6 Cal. 381,[2] the Privy Council had to consider whether there was a valid adoption when there had been no actual giving and taking of the boy but the mere exchange of deeds of gift and acceptance. Their Lordships held that this was not sufficient. The judgment concludes with this statement :

"It would seem, therefore, that according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption."

In making these observations the Board was considering whether the exchange of the deeds was sufficient and they were of the opinion that it was not. They were not laying down the proposition that the utterance of the words used by Baudhayana was necessary. They were indicating that the essentials for a valid adoption were the handing over of the boy by his father for this purpose and the acceptance by the adoptive parent. Whether there has been a giving and a taking are questions of fact which can be proved by evidence of what is said and what happens on the occasion. 18 M.L.T. 434[3] emphasised the necessity of corporal delivery and acceptance of the child. In 11 Mad. 5,[4] the question was whether the ceremony of datta homam was essential to a valid adoption among Brahmans in Southern India when the adoptive father and the son belonged to the same gotra, and it was held that it was not. The decision in 6 Cal. 381[2] was considered but the judgment of the Full Bench does not indicate a different interpretation of the judgment of the Judicial Committee from that which we place upon it. In 54 Mad 440[5] a mere declaration by the adoptive father to the effect that he had adopted a son was held not to be sufficient because there had been no evidence of the giving and taking.

We hold that the Hindu law does not require that there shall be formal ceremony when the boy is given and accepted. For a valid adoption all that the law requires is that the natural father shall be asked by the adoptive parent to give his son in adoption, that the boy shall be handed over and taken for this purpose and that the adoption ceremony shall be performed when the parties belong to the twice born class. As we have already indicated, in our opinion, the evidence here proves beyond doubt that there was a giving and a taking of respondent 2 in the lifetime of Srinivasa Ayyangar. This being so and it being accepted that the datta homam ceremony could be lawfully performed by the widow after her husband's death, we concur in the decision of the Subordinate Judge that respondent 2 is the lawfully adopted son of Srinivasa Ayyangar. In these circumstances it is not necessary for us to consider whether the will is genuine or whether the widow had oral or implied authority to adopt. The appeal fails and will be dismissed with costs, one set.

C.R.K./G.N. *Appeal dismissed.*

5. ('31) 18 A.I.R. 1931 P. C. 109 : 131 I. C. 318 : 54 Mad. 440 : 58 I. A. 148 (P. C.), Krishna Rao v. Sundara Siva Rao.

Hindu law —
(a) ('40) Mulla, Page 545 Pt. (b).
('38) Gour, Page 228, N. 639.
(b) ('40) Mulla, Page 544 Pt. (p).
('38) Gour, Page 225 Pt. 16.

A. I. R. (29) 1942 Madras 396

WADSWORTH J.

G. Narappa Naidu — Appellant

v.

Thummalur Chinna Asethu Reddi and another—Respondents.

Second Appeals Nos. 606 and 789 of 1938 and Civil Mic. Petns. Nos. 1969 and 1970 of 1941, Decided on 16th July 1941, against decrees of Dist. Court, Cuddappah, in A. S. Nos. 50 and 49 of 1936.

Civil P. C. (1908), S. 51 — Appointment of receiver in execution without prior attachment is not bad.

The present Civil Proceedure Code does not appear to contemplate an attachment as a necessary preliminary to the appointment of a receiver in execution. After all there is no practical reason to attach property before appointing a receiver. An appointment of a receiver is in itself a form of attachment. Instead of signifying the Court's custody by merely affixing process to the property or serving it on the owner, an officer of the Court is sent to take charge of that property, realise the income and utilise it under the directions of the Court. Therefore an appointment of a receiver in execution is not bad merely because there has been no prior attachment: ('25) 12 A.I.R. 1925 P.C. 176, *Rel. on*; ('17) 4 A. I. R. 1917 Mad. 79, *Expl.*

[P 396 C 2; P 397 C 1]

T. K. Srinivasathathachariar — for Appellant.

B. V. Narasu—for Respondents.

JUDGMENT.—In both these appeals the appellant is the purchaser from a mortgagor and the suit was filed by a receiver appointed to collect the mortgage debt and apply the proceeds towards the discharge of the debt due by the mortgagee in that suit. The only contention of law urged in these appeals is that the appointment of the receiver was invalid without the prior attachment of the mortgage debt and that therefore the receiver was not entitled to get a decree on the mortgage. Assuming that this is a contention open to the defendant in the mortgage suit, it seems to me that it is a contention which is devoid of substance. It is based on certain observations in 40 Mad. 302[1] at p. 306 where it is stated that the Court cannot appoint a receiver except when it has seisin of the property either by a suit being pending or by proceeding in execution of a decree made in a suit being pending and attachment having been made. These observations seem to be based on the wording of the old Civil Procedure Code, although they were made in a case arising out of an execution of 1912. The present Civil Procedure Code does not appear to contemplate an attachment as a necessary preliminary to the appointment of a receiver in execution and the Privy Council in 49 M. L. J. 244[2] clearly distinguish between cases in which execution has to be carried out by attachment and sale and those cases in which execution has to be carried out by the appointment of a receiver. After all there is no practical reason to attach property before appointing a receiver. An appointment of a receiver is in itself a form of

1. ('17) 4 A. I. R. 1917 Mad. 79 : 34 I. C. 381 : 40 Mad. 302 : 30 M. L. J. 361, Palikandy Mammad v. Krishnan Naidu.

2. ('25) 12 A.I.R. 1925 P. C. 176 : 87 I. C. 295 : 47 All. 385 : 52 I. A. 262 : 49 M. L. J. 244 (P.C.), Rajendra Narain Singh v. Mt. Sundar Bibi.

attachment. Instead of signifying the Court's custody by merely affixing process to the property or serving it on the owner, an officer of the Court is sent to take charge of that property, realise the income and utilise it under the directions of the Court. I am clearly of opinion that an appointment of a receiver in execution is not bad merely because there has been no prior attachment. The appellant has in each of these cases filed a petition under Madras Act 4 of 1938 praying that any decree to be passed against him may be scaled down in accordance with the provisions of that Act. These two petitions will be enquired into by the District Munsif of Prodattur and the decree in these appeals will if necessary be modified in accordance with the decision on these petitions. Subject to these modifications the two appeals are dismissed with costs, one set.

C.R.K./K.S. *Appeals dismissed.*

C. P. C.—
('40) Chitaley, S. 51, N. 6.
('41) Mulla, P. 217 Note 'Receiver in execution proceedings'.

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* A. I. R. (29) 1942 Madras 397

SOMAYYA J.

D. Gopalaswami Mudaliar — Appellant

v.

Subramanya Pillai and another — Respondents.

Second Appeal No. 770 of 1939, Decided on 9th January 1942, against decree of Court of Small Causes, Trichinopoly, D/- 29th November 1938.

*** Trusts—Trustees—Powers of—Majority of trustees cannot elect one of them as managing trustee so as to oust minority from taking part in management.**

Each and every trustee is responsible for the acts of his co-trustees and he is liable for any acts of misfeasance or negligence committed by the other co-trustees. This involves the position that each trustee is entitled to take part in the management of the trust estate. If he voluntarily agrees to an arrangement by which one of them is to manage either by turns or for a particular period, it might be that he is bound by the result of his action. But the majority cannot claim that one of them shall have all the rights of management and prevent the others, i. e., the minority from taking part in the management : ('36) 23 A. I. R. 1936 Mad. 14 and ('32) 19 A.I.R. 1932 Mad. 658, *Expl.* [P 397 C 2]

A. V. Narayanaswami Iyer — for Appellant.

K. V. Sesha Ayyangar — for Respondents.

JUDGMENT. — The defendant appeals against the decree of the Subordinate Judge of Trichinopoly passed in A. S. No. 32 of 1939. The respondent, filed the suit for a declaration that the appellant should be restrained by an injunction from collecting the rent of the B schedule property from the tenants and from interfering with the collection of the same by the plaintiff. The plaintiff says that he was elected the managing trustee by a majority of the trustees of the suit charity and that the defendant has therefore no right to interfere with the management of the managing trustee. The first question is whether a majority of the trustees have a right to elect one of them as the managing trustee so as to oust the minority trustees from taking part in the management. It is true that the trustees acting together can come to an arrangement by which they may provide for the management of the trust properties and, provided that the arrangement is in the interests of the institution, it will govern the relations between the parties. But the question is whether three out of five trustees can elect one of the three as the managing trustee and seek to prevent the other two trustees from interfering with the management of the trustee elected by them. Each and every trustee is responsible for the acts of his co-trustees and he is liable for any acts of misfeasance or negligence committed by the other co-trustees. This involves the position that each trustee is entitled to take part in the management of the trust estate. If he voluntarily agrees to an arrangement by which one of them is to manage either by turns or for a particular period, it might be that he is bound by the result of his action. But without authority I am not prepared to consent to the proposition that the majority can claim that one of them shall have all the rights of management and prevent the others from taking part in the management.

In 70 M.L.J. 262[1] the Court enforced an arrangement which was entered into by all the parties and said that it was valid until it was set aside by agreement or until it was set aside by Court. In 36 M.L.W. 669,[2] Wallace J. assumed that it is within the powers of the majority of trustees to elect one of them as the managing trustee and that this act of the majority would bind the minority trustees. But the question did not arise before the learned Judge. The case before him arose out of a scheme decree in which there was a provision for the election of a managing trustee. The question was whether the consent of the majority was substantial compliance with the clause in the decree in the scheme suit. The learned Judge held that it was substantial compliance with the scheme. At p. 671 the learned Judge observed : "The purpose of cl. 4 has been substantially complied with, that being, as I read it, that for the appointment of executive trustee a majority of the trustees should consent." So ultimately the decision was rested on the learned Judge's view of the clause in the decree and he held that the terms of that clause were substantially complied with by the majority of the trustees consenting to the appointment of one of them as the executive trustee. In a prior part of the judgment the learned Judge said :

"Any body of trustees can by resolution in the ordinary way appoint any one of their number as the managing or executive trustee, and if the clause was designed not to express but to curtail this right, I should expect it to have been expressed in very different terms, such as that no executive trustees shall be appointed except with the express consent in writing of all the trustees."

The learned Judge has not given any authority in support of this statement and, as I said the judgment ultimately turned on what he considered to be the true construction of the particular clause in the scheme decree. The reason of the rule laying down that each and every trustee is responsible for the mismanagement and negligence of the other trustees requires that each trustee should be free to take part in the management along with the other trustees. If the proposition contended for by the respondent's learned advocate is accepted, while con-

1. ('36) 23 A.I.R. 1936 Mad. 14 : 160 I. C. 511 : 70 M.L.J. 262, Nilamani Poricha v. Appanna Poricha.
2. ('32) 19 A.I.R. 1932 Mad. 658 : 140 I. C. 443 : 36 M.L.W. 669, Shanmugha Mudali v. Arunagiri Mudali.

tinuing to be responsible for the mismanagement of the other trustees, the minority trustee would be powerless to interfere in time and prevent mismanagement. I do not think this position can be accepted. I therefore hold that the plaintiff was not validly appointed as the executive trustee. This is enough to dispose of the appeal and I do not think it is necessary to go into the question what exactly was the position of the defendant who claims a much larger right than that of an ordinary trustee. The second appeal is allowed and the suit is dismissed. The appellant will have his costs throughout from the trust estate. The respondent will bear his own costs. Leave refused.

C.R.K./K.S. *Appeal allowed.*

A. I. R. (29) 1942 Madras 398 (1)

HORWILL J.

T. K. Sambanda Chetty — Petitioner

v.

Muthu Chettiar — Respondent.

Civil Revn. Petn. No. 2685 and Civ. Misc. Petns. Nos. 7194 and 7435 of 1941, Decided on 7th January 1942, to revise order of Dist. Munsif, Trivellore, D/- 26th November 1941.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 20—Judgment-debtor can make application at any stage—Court has no discretion to reject it on ground that judgment-debtor had ample opportunities earlier to do so.

The Act does not compel a judgment-debtor to make an application at an early stage and so he cannot be deemed to have waived his rights because he did not do so. He can make his application at any stage and even though it be not made in good faith, the terms of S. 20 leave no discretion to the Court to reject it. The right the petitioner has to have the execution stayed pending the filing of an application under S. 19 he possesses at all times and under all circumstances. The only modification of that rule is where the application under S. 19 has been disposed of or where an application under S. 19 is not made within sixty days of the application for stay. In such cases, the Court may proceed with the execution. [P 398 C 1, 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 20—Section does not permit passing of conditional order.

Section 20 does not permit of a conditional order being made ; for if the condition is not fulfilled, S. 20 still makes it peremptory to stay. So the imposing of a condition would be infructuous. [P 398 C 2]

V. C. Viraraghavan — for Petitioner.

K. Ramaswamy Iyengar — for Respondent.

JUDGMENT.—When C. M. P. No. 7194 of 1941 was posted for disposal I found it easier to hear the civil revision petition and dispose of that than to pass suitable orders on the interlocutory applications pending disposal of the civil revision petition at some future date. I have therefore heard arguments in the main application, C. R. P. No. 2685 of 1941. The petitioner put in an application under S. 20 of Madras Act 4 of 1938 asking the Court to stay execution as he was desirous of filing an application under S. 19 of the Act to scale down the decree. The learned Munsif said that the petitioner had ample opportunities in a prior application to make such a request and that he must be considered to have waived his rights. He therefore dismissed the petitioner's application. The Act does not however compel a judgment-debtor to make an application at an early stage and so he cannot be deemed to have waived his rights because he did not do so. He can make his application at any stage and even though it be not made in good faith, the terms of S. 20 leave no discretion to the Court to reject it. The right the petitioner has to have the execution stayed pending the filing of an application under S. 19 he possesses at all times and under all circumstances. Section 20 says that "the Court executing the decree shall on application stay the proceedings until the Court which passed the decree has passed orders on an application made or to be made under S. 19." The only modification of that rule is where the application under S. 19 has been disposed of or where an application under S. 19 is not made within sixty days of the application for stay. In such cases, the Court may proceed with the execution.

It has been argued for the respondent that the order might be made conditional but S. 20 does not permit of a conditional order being made; for if the condition is not fulfilled, S. 20 still makes it peremptory to stay. So the imposing of a condition would be infructuous. The best that can be done for the respondent under the circumstances is to direct the District Munsif to dispose of the application under S. 19, which I understand was made yesterday, as expeditiously as possible. This civil revision petition is therefore allowed with costs. No orders are necessary on C. M. P. Nos. 7194 and 7435 of 1941.

C.R.K./K.S. *Petition allowed.*

A. I. R. (29) 1942 Madras 398 (2)

SOMAYYA J.

Raja Sir Annamalai Chettiar by agent K. Ponnusami Iyer — Appellant

v.

Kadiyala Pedda Genganna and others — Respondents.

Second Appeals Nos. 369 and 370 of 1940, Decided on 27th January 1942, against decrees of Sub-Judge, Chittoor, in A. S. Nos. 19 and 20 of 1939.

(a) Madras Estates Land Act (1 of 1908), S. 112—Suit in revenue Court—Costs therein cannot be recovered under S. 112.

Under S. 112 it is only the arrear of rent, the interest and costs of the sale that can be recovered and nothing more. If the suit is filed in the revenue Court for arrears, apparently, the costs awarded by the decree cannot be recovered under Section 112. [P 399 C 1]

(b) Madras Estates Land Act (1 of 1908), Ss. 111, 112—Applicability.

Sections 111 and 112 are not applicable to a case of execution of a rent decree passed by a revenue Court. [P 399 C 1]

N. Suryanarayana — for Appellant.

Kasturi Seshagiri Rao and D. Munuswamy — for Respondents.

JUDGMENT. — The plaintiff-appellant filed two suits out of which these second appeals arise for possession on the foot of sales held in execution of rent decrees obtained by him in the revenue Court. The contesting defendant in each suit is the former ryot against whom suits for arrears of rent were filed in the revenue Court. Decrees were obtained and in execution of these decrees, the

holdings were brought to sale and were purchased a by the plaintiff himself. The present suits are filed for possession on foot of those sales. The lower appellate Court dismissed the suits on the ground that the notice under S. 112 was not given to the ryot. The Subordinate Judge held that S. 132, Estates Land Act, makes S. 112 of that Act applicable to sales held under the decrees of revenue Courts and that as the notice under S. 112 was not given, the sales are bad. I do not agree with the above conclusion. Section 132 provides this :

"The provisions of this Chapter (Chap. 6) shall be applicable as far as may be, to the execution by a revenue Court of any decree for arrears of rent."

It will be noticed that S. 112, which occurs in the same Chapter provides for the issue of notice by the landholder in a case where he intends to avail himself of the powers given by the last preceding section, i. e., S. 111. Section 111 provides that :

b "Where an arrear is not paid within the revenue year in which it accrued due, it shall be lawful for the landholder to sell the holding or any part thereof in the manner hereinafter provided, in satisfaction of the arrear and of interest thereon and of costs, if any, of the sale."

Then S. 112 provides that :

"When the landholder to whom an arrear is due intends to avail himself of the powers given by the last preceding section, he shall serve on the defaulter through the Collector a written notice stating the amount due for arrears, interest and costs, if any, the period for which and the holding in respect of which it is due, and informing him that if he does not pay the amount or institute a suit before the Collector contesting the right of sale within thirty days from the date of service of the notice, the said holding or any part thereof speci-

c fied in the said notice will be sold. Such notice shall be delivered to the Collector within one year from the end of the revenue year for which the arrear is due."

It will be noticed that in this section it is only the arrear of rent, the interest and costs of the sale that can be recovered and nothing more. If the suit is filed in the revenue Court for arrears apparently, the costs awarded by the decree cannot be recovered under S. 112. Another point is that the notice under S. 112 must be "delivered to the Collector within one year from the end of the revenue year for which the arrear is due." In the case of a suit for recovery of arrears of rent, the Estates Land Act provides a period of three years within which the suit may be filed. So, in respect of a suit say for fasli 1330, the suit may be filed within three years thereafter and it may take a

d year or two for the decree to be passed. If, afterwards, the landholder wishes to execute that decree, it is impossible for him to comply with the last portion of S. 112, para. (1) just set out, viz., to deliver to the Collector notice within one year from the end of 1330, which is the revenue year for which the arrear became due. The very reading of Ss. 111 and 112 shows, to my mind that it is absurd to talk of these sections being applicable to a case of execution of a rent decree passed by a revenue Court. Section 113 goes with S. 112. Then S. 114 refers to the amount specified in the notice under S. 112 not being paid and no suit contesting the right of sale having been instituted, or the suit having been instituted and being decided adversely to the ryot. This again cannot possibly apply to execution of decrees by revenue Courts of their own decrees for rent. Then S. 115 again cannot possibly apply because it says that :

"If no suit has been instituted, such application shall be made within fortyfive days of the posting e by the Collector of intimation of service under Section 113."

And cl. 2 of the section says :

"If a suit has been instituted and it has been disposed of against the defaulter or withdrawn, such application shall be made within thirty days of the date of the disposal or withdrawal."

These two clauses of S. 115 again cannot possibly apply to a case of execution of the decrees of revenue Courts. It is very doubtful whether S. 116 again applies because it says :

"On receipt of such application, the Collector shall issue notice to the parties and after hearing such of them as appear shall determine the extent of land to be sold, the lots if any in which it shall be sold, the order in which the lots shall be sold and the estimated value of each lot and shall order the sale, appoint an officer to conduct the sale, f draw up the proclamation of sale . . . . ."

But assuming it is applicable in this case, as the lower Courts have pointed out, the Collector did issue notice to the parties and he determined the various matters provided under S. 116. The proclamation also seems to have been settled. It is said that the Deputy Tahsildar of Puttur was appointed the Officer to conduct the sale under S. 116 and that that Officer did not fix the date, time and place of the sale. It is said that there are further irregularities in the sale. The Subordinate Judge has not dealt with these irregularities and has not given his findings. In one sentence he says that the existence of the irregularities was not denied and then declined to go in detail into those defects because he held that the omission to issue a notice under S. 112 was fatal to the plaintiff's case. I have held that S. 112 is inappli- g cable to a case of this kind and therefore the decree of the Subordinate Judge cannot be sustained. I do not desire to go into the other irregularities alleged nor do I express any opinion as to whether the irregularities, if they exist, are sufficient to non-suit the plaintiff. These and other questions must be decided by the Subordinate Judge. I am not satisfied about the correctness of the statement that the existence of the other irregularities was not denied. It will be open to the plaintiff to dispute the existence of the other irregularities alleged by the defendants and the whole question will be open to the lower appellate Court. The only question which I decided is that S. 112 is inapplicable to cases of this kind. I accordingly set aside the decrees of the lower appellate Court in both the second appeals and remand the appeals for fresh disposal according to law. Costs will abide h and be provided for in the revised decrees. The court-fee paid on the memorandum of second appeals will be refunded. No leave to appeal.

C.R.K./K.S. *Case remanded.*

A. I. R. (29) 1942 Madras 399

WADSWORTH J.

Ukkali alias Ammu alias Amma Nethyar and another — Petitioners

v.

Pudumana Parambath Kelu Nayar — Respondent.

Civil Revn. Petn. No. 131 of 1940, Decided on 16th January 1942, to revise order of District Munsif, Ottapalam, D/- 11th August 1939.

Civil P. C. (1908), O. 21, Rr. 18 and 19 — Cross-decrees—Fact that holder of lesser decree cannot execute it until greater decree is satisfied does not render amount decreed to him as amount not due—Until holder of greater decree actually executes and sets off amount due from him lesser decree can become effective if greater decree is satisfied in some other way — Suit for redemption of kanom — Decree not drawn up according to S. 6, Malabar Compensation for Tenants' Improvements Act—Decree taking form of two decrees one in favour of plaintiff for rent and other in favour of defendant for kanom amount and value of improvements — Decree becoming final—Arrears of rent in lesser decree in plaintiff's favour cannot be said to have been wiped out by greater decree in defendant's favour and hence are liable to be scaled down under S. 15 (4), Madras Agriculturists Relief Act—Decree cannot be rectified or treated as one passed according to S. 6 Malabar Compensation for Tenants' Improvements Act in proceedings under Madras Agriculturists Relief Act.

When there are two cross-decrees the lesser of which cannot be executed so long as the greater decree remains unsatisfied, having regard to the provisions of O. 21, Rr. 18 and 19, the fact that the holder of the lesser decree cannot execute will not render the amount decreed to him an amount which is not due. The effect of the passing of the greater decree upon the lesser decree is no doubt to ear-mark the lesser decree for the satisfaction of the greater. But, until the holder of the greater decree actually executes and sets off the amount due from him to the holder of the lesser decree, the latter still has a decree which is unsatisfied and which might become effective if the greater decree were satisfied in some other way. [P 400 C 2]

Consequently, where the decree in a suit by a jenmi for redemption of a kanom has become final and has not been drawn up in accordance with S. 6, Malabar Compensation for Tenants' Improvements Act, but really takes the form of two separate decrees, one in favour of the plaintiff for rent and the other in favour of the defendants for the kanom amount and value of improvements, together with a declaration that the plaintiff can redeem the properties on payment of the amount due from him with liberty in future for the plaintiff to set off the arrears of rent, the lesser decree for arrears of rent in such a case cannot be said to have been wiped out by the greater decree for kanom amount and value of improvements and therefore the arrears of rent are liable to be scaled down under S. 15 (4), Madras Agriculturists Relief Act. It is not open to the Court in proceedings under the Madras Agriculturists Relief Act to rectify the decree or to treat it as one drawn in accordance with S. 6, Malabar Compensation for Tenants' Improvements Act : ('42) 29 A.I.R. 1942 Mad. 307, *Disting.* [P 401 C 1]

C. Unnikanda Menon — for Petitioners.

D. A. Krishna Variar — for Respondent.

ORDER. — The petitioner here was the decree-holder in a suit for redemption of a kanom. The decree which was passed in 1936 took the form of declaring firstly, the amounts due to the tenants defendants, for improvements and for the kanom amount and declaring secondly, that on the deposit by the plaintiff of these amounts the defendants should hand over the property and the documents to the plaintiff. Then followed a series of clauses specifying the amount due from the defendants to the plaintiff, viz., for arrears of rent, for costs, commission fee and also the rate at which the future rent was payable and the decree provides that "set off is allowed." While this decree was still unsatisfied, the tenants, defendants, preferred an application under S. 15 (4) of the Madras Act 4 of 1938 praying that the deposit towards the arrears of rent for faslis 1347 and 1346 might be taken into consideration and the arrears for the earlier faslis scaled down. This application was opposed by the decree-holder because, by reason of the provisions for set off in the decree, no rent was outstanding when Madras Act 4 of 1938 came into force. The lower Court rejected this contention and hence the present revision petition. An attempt has been made to argue on behalf of the jenmi that this is really a case of two cross-decrees and that the lesser decree must be deemed to be merged in the greater decree. It seems to me quite clear that when there are two cross-decrees the lesser of which cannot be executed so long as the greater decree remains unsatisfied, having regard to the provisions of O. 21, Rr. 18 and 19, Civil P. C., the fact that the holder of the lesser decree cannot execute will not render the amount decreed to him an amount which is not due. The effect of the passing of the greater decree upon the lesser decree is no doubt to ear-mark the lesser decree for the satisfaction of the greater. But until the holder of the greater decree actually executes and sets off the amount due from him to the holder of the lesser decree, the latter still has a decree which is unsatisfied and which might become effective if the greater decree were satisfied in some other way.

The appellant, however, relies very strongly on an unreported decision of a Bench in A. S. No. 437 of 1938 with the connected C. M. P. No. 5946 of 1941[1] the facts of which bear a considerable resemblance to those with which we are now concerned. In that case, there was, as here, a suit for redemption of a kanom and a claim for a set off of arrears of rent due to the landlord. That claim was, however, based on a barred decree and the trial Court held that in such circumstances there could be no set off and granted the decree for redemption on payment of the full value of the improvements and the kanom amount. The learned Judges who heard the appeal disagreed with the lower Court and held that though the decree for arrears of rent had become time barred, it could not be said that these arrears had ceased to be due and that by the statutory provisions of the Malabar Compensation for Tenants' Improvements Act, it was incumbent upon the Court to set off the amount of rent due against the value of improvements and pass a decree for redemption on payment of the balance and a direction was given that such a decree should be prepared. Thereafter, when dealing with an application filed in the appeal to scale down the arrears of rent under S. 15 of the Madras Act 4 of 1938, the learned Judges took the view that the decree passed in appeal was a decree for redemption on the payment of an amount reduced by the amount of rent and that there was no subsisting claim for rent at the time when Act 4 came into force, the appellate decree being regarded merely as a rectification of the trial Court's decree by the reduction of the amount due for improvements. On this reasoning, the learned Judges declined to allow the tenants to scale down the claim for arrears of rent which was set off against the claim for improvements. There is

1. ('42) 29 A.I.R. 1942 Mad. 307 : (1942) 1 M.L.J. 166, Elatath v. Chathukutti Nayar.

to my mind a clear difference between the facts with which those learned Judges had to deal and the facts which are now before me. In the case just cited, the whole decree was before the Court, the Court modified the decree by giving a set off which ought to have been given in the trial Court and, on this rectification of the decree, the learned Judges declined to treat the arrears of rent as having been due during the period intervening between the trial Court's decree and that of the Court of appeal.

In present case, the decree in the redemption suit has become final. It was not drawn up in the manner contemplated in S. 6 (2), Malabar Compensation for Tenants' Improvements Act. Under that provision, the Court should itself have set off the amount due by the defendants to the plaintiff for rent against the amount due by the plaintiff to the defendants for improvements etc., and should have passed a decree declaring as the amount payable to the defendants on ejectment only the balance after such set off. No doubt in the present case, that which had to be set off was not merely the arrears of rent but also future rent. But there would have been no difficulty in drafting the decree declaring (1) the kanom amount and the value of improvements and (2) the amount due for arrears of rent etc., and directing that the defendants should put the plaintiff into possession on payment of a specified sum, equal to the balance after subtracting the amount due from the defendants from the amount payable by the plaintiff and giving the plaintiff the right in future to set off any further rents which might be due to him before the redemption was completed. Had such a decree been drawn on the reasoning of the unreported case cited above, it would necessarily have to be held that the claim for arrears of rent was wiped out by the passing of the decree and could not be treated as rent due when Act 4 of 1938 came into force. But the decree which has actually been passed really takes the form of two separate decrees, one in favour of the plaintiff for rent, the other in favour of the defendants for the kanom amount and value of improvements, together with a declaration that the plaintiff can redeem the properties on payment of the amount due from him with liberty in future for the plaintiff to set off the arrears of rent.

The decree having been drawn in this way and no appeal having been preferred against that decree, I do not think that one is entitled in these proceedings to rectify the decree or treat it as one drawn in accordance with the procedure prescribed in S. 6, Tenants' Improvements Act. That being so, it seems to me that the arrears of rent were due when Act 4 of 1938 came into force and were therefore liable to be scaled down. The revision petition is therefore dismissd with costs.

C.R.K./G.N. *Petition dismissed.*

C. P. C. —
('40) Chitaley, O. 21 R. 18, N. 9.
('41) Mulla, Page 779, Note "Application of the rule" Page 780 Pt. (d).

A. I. R. (29) 1942 Madras 401

KING AND HAPPELL JJ.

Yekkala Venkataramayya — Appellant

v.

Achugatla Baba Sahib — Respondent.

Appeal No. 124 of 1940, Decided on 17th December 1941, against order of Commissioner for Workmen's compensation, Madras, D/- 21st December 1939.

Workmen's Compensation Act (1923, as amended in 1933), S. 2 (1) (d) and (2) — Father must show that he was dependent wholly or partly on earnings of son at time of his death.

For the father of a deceased workman to be adjudicated a dependent, he must show under subs. (2) that he was wholly or in part dependent on the earnings of his son at the time of his death. Where the omission of the father to give this evidence is due not to any negligence on his part or any belief that the evidence was unnecessary, but to the fact that he could not have been in fact dependent upon his son's earnings it is not necessary for the High Court in appeal to call upon the Commissioner to hold any further enquiry into the question whether the father satisfied the definition "dependent" as contained within the Act. [P 401 C 2; P 402 C 1]

E. Vinayaka Rao — for Appellant.

JUDGMENT. — This is an appeal against an order of the Commissioner for Workmen's Compensation awarding a sum of Rs. 550 to the father of one Hajee Peera Sahib who was injured in an accident arising out of his employment by the appellant, on 8th February 1939. The injury was caused to his left hand, and from it he developed tetanus and died on 16th February. One point raised in the appeal is that the death of Hajee Peera was due to his own fault in not having his injury treated by a qualified medical man and that if that had been done, the injury could easily have been cured. It is unnecessary however for us to discuss this question as the appeal must in our opinion succeed upon another point. The point put simply is, that the respondent had no locus standi to make the application to the Commissioner. He is not a dependent of the deceased workman within the meaning of the definition of "dependent" in the Workmen's Compensation Act. This point, it may be mentioned, was made in the counter affidavit of the appellant to the respondent's claim. The Commissioner however has failed to appreciate the significance of this objection. In para. 2 of his order he states, as if the matter admitted of no argument, that "the applicant is a dependent of the deceased as defined in S. 2 (1) (d), Workmen's Compensation Act." He then goes on to say that "the questions, whether he was wholly or partly dependent on the earnings of his son at the time of his death and whether he is entitled to compensation, if awarded, do not arise now. They are matters for adjudication in distribution proceedings, which are different from the proceedings."

Apparently the Commissioner had in mind the possibility of rival claimants to the compensation, and other dependents of the deceased workman existing who might object to the whole of the compensation to be awarded to be paid to the respondent. The Commissioner has entirely failed to apply his mind to the definition of a "dependent" in S. 2 (1) (d) of the Act after the amendment of 1933. It is true that before 1933, any parent of a deceased workman was a dependent under the definition, whether he in fact relied upon the earnings of the workman for his maintenance or not. As amended however, the Act includes in the term "dependent" without any further qualification, only the wife, minor legitimate son, unmarried legitimate daughter or widowed mother. For the father of a deceased workman to be adjudicated a dependent, he must show under sub-s. (2) that he was wholly or in part dependent on the earnings of his son at the time of his death. On this point there is no evidence. As already stated, the Com-

missioner has not apparently devoted his attention to the point at all. The applicant gave evidence and did not say that he was wholly or in part dependent upon the earnings of his son; nor has any other witness given any evidence which could justify any such finding. It is unfortunate that in this appeal the respondent has chosen to remain ex parte. But we have no serious doubt that the omission of the respondent to give this evidence was due not to any negligence on his part or any belief that the evidence was unnecessary, but to the fact that he could not have been in fact dependent upon his son's earnings. In the circumstances of this case, we do not think it necessary to call upon the Commissioner to hold any further enquiry into this question whether the respondent satisfied the definition "dependent" as contained within the Act. We must allow the appeal and set aside the order of compensation as one which the Commissioner had no jurisdiction to pass on an application by the respondent. The money deposited by the appellant must therefore be returned to him. We make no order as to costs.

C.R.K./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Madras 402

WADSWORTH AND PATANJALI SASTRI JJ.

Singamsetti Sundaram and others — *Petitioners*

v.

Singamsetti Subba Rao—*Respondent.*

Civil Revn. Petn. No. 165 of 1940, Decided on 6th October 1941, to revise decree of Sub-Judge, Narasapur, D/- 17th July 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 6—Scope explained.

The scope of S. 6 must be confined to the position in which there is a major family unit which even after the application of the section still remains an agriculturist family and in such circumstances the scope of the section would be to exclude from the benefits of the Act any member of such an agriculturist family who was a non-agriculturist and his descendants in the male line. The section does not apply to a family which consists only of the father and sons: ('41) 28 A. I. R. 1941 Mad. 289, *Expl.*

[P 402 C 2]

G. Chandrasekhara Sastri — for Petitioners.

S. Venugopala Rao—for Respondent.

WADSWORTH J. — This civil revision petition raises a question of the interpretation of S. 6 of Act 4 of 1938. The facts as stated in the judgment of the lower Court are that the suit was based on a promissory note of 1933 made by defendant 1 in favour of the plaintiff, defendants 2 to 5 being impleaded as the joint sons of defendant 1. There was no oral evidence, but it appears from the decree that the suit debt relates back to prior transactions starting in 1922. The plaintiff produced a copy of an income-tax assessment order which showed that defendant 1 along with certain partners was assessed to income-tax for the financial year 1936-37 and on this ground it was held that neither he nor his sons, defendants 2 to 5, could claim the benefit of the Agriculturists' Relief Act. The petitioners rely on a decision of ours in (1940) 2 M.L.J. 817[1] where we held in a case under S. 19 when the sons of the deceased judgment-debtor sought to scale down decrees on joint family debts that it was necessary to investigate the question whether the income-tax assessment of the deceased judgment-debtor was in respect of the family income or in his individual capacity and the case was remanded to the lower Court for disposal after inquiring into this question. We did not actually decide that if the father was assessed to income-tax in his individual capacity the undivided sons would be able to claim the benefit of the Act. But the assumption that this is so is implicit in our judgment.

When that case was decided it was not argued that S. 6 of Act 4 of 1938 would bar the sons from claiming the benefit of the Act. That contention has now been put before us. Section 6 provides that "Where in an undivided Hindu family . . . . which is an 'agriculturist' within the meaning of S. 3 (ii), any member of the family is not an agriculturist, then, notwithstanding anything contained in S. 3 (ii), none of his sons and descendants in the male line shall be deemed to be an agriculturist for the purposes of Ss. 7 to 12 and 19 to 27 of this Act." Prima facie the section appears to contemplate the existence of a larger agriculturist unit consisting of a family of several branches, one branch of which is headed by the father who is disqualified from being an agriculturist under one or other of the provisos to S. 3, in which case his sons would be equally disqualified so long as they were joint. We are, however, confronted with the position in which there is no larger unit which can be said to be agriculturist. The family consists only of the father and the sons. If S. 6 applies, the effect would be that the whole family would be disqualified from being agriculturist; that is to say, the effect of the application of S. 6 would be to destroy the foundation for the application of S. 6. For S. 6 can only apply where in an agriculturist family one member is a non-agriculturist. We find it difficult to hold that this section can apply to the state of affairs in which its very application would destroy its applicability. Rather than come to this conclusion, we prefer to adhere to the plain language of the section and confine its scope to the position in which there is a major family unit which even after the application of the section still remains an agriculturist family and in such circumstances the scope of the section would be to exclude from the benefits of the Act any member of such an agriculturist family who was a non-agriculturist and his descendants in the male line. This view is also consistent with the assumption made in our decision quoted above.

The result therefore is that the decree so far as it concerns defendant 1, the father, must be confirmed and the petition of defendant 1 must be dismissed with costs. The petition so far as it relates to the other defendants is allowed and the case is remanded to the trial Court which will inquire, firstly, whether the assessment to income-tax of defefendant 1 was made in his individual capacity or as manager of the joint family of himself and his sons. If the former is the case, the lower Court will then inquire into the antecedent history of the debt for the purpose of ascertaining the relief to which the sons are entitled. As the contention upon which defendants 2 to 5 have succeeded in this Court is not expressly taken in the revision petition, we think it reasonable to require these petitioners to bear their own costs in revision.

C.R.K./K.S. *Case remanded.*

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1. ('41) 28 A. I. R. 1941 Mad. 289 : 193 I. C. 547 : (1940) 2 M.L.J. 817, Rajoo v. Palaniappa Chettiar.

a **A. I. R. (29) 1942 Madras 403**

WADSWORTH AND PATANJALI SASTRI JJ.

Gottimakkula Chetti Venkataraju — *Petitioner*

v.

Gottemakkula Ramabhaddirraju and others — *Respondents.*

Civil Misc. Petn. No. 7043 of 1941, Decided on 3rd December 1941, to excuse delay in filing and representing memorandum of cross-objections to appeal No. 129 of 1941.

(a) Civil P. C. (1908), O. 41-A (Madras) and O. 3, R. 5—O. 41-A is special provision and prevails over general provision — Service of notice of appeal by merely leaving in office of b **advocate is not service on party or his pleader.**

Order 3, R. 5 is a general provision covering all processes of civil Courts. O. 41-A is a special order relating to the procedure in appeals to the High Court from original decrees of Subordinate Courts. Therefore the special provisions of this order, in so far as they are in conflict with the provisions of the other parts of the Code, must prevail and must govern the procedure in preference to those general provisions. Since R. 6 of O. 41-A excludes a notice of appeal from the category of processes which can be properly served by being left at the address for service of the party to be served, such a notice must be served regularly either on the respondent or on his advocate and a service by merely leaving in the office of the advocate is not service on the party or his pleader, for purposes of limitation. [P 403 C 2]

c **(b) Civil P. C. (1908), O. 41, R. 22 — Limitation—Starting point—Service of notice on pleader's clerk is not correct starting point.**

Under O. 41, R. 22 the period of limitation is one month from the date of service on the respondent or his pleader of notice of the date fixed for hearing the appeal. The service of notice on the pleader's clerk cannot be regarded as the correct starting point for limitation in the absence of a special provision to that effect. [P 403 C 2]

P. Satyanarayana Rao, G. Chandrasekhara Sastri and S. Venugopala Rao — for Petitioner.

K. Venkatarama Raju — for Respondents.

WADSWORTH J.—This is an application to excuse the delay in filing and representing a memo-
d randum of cross-objections. The facts are that the memorandum of appeal was presented and admitted at the end of April 1941. There was a stay application which was heard by the vacation Court after notice to the respondent in which application the respondent was represented by his advocate. Stay was ordered and special arrangements were made to expedite the preparation of the appeal. Formal notice of the appeal was served, not on the respondent's advocate, but upon the clerk of that advocate. The clerk failed to communicate the fact of the service of this notice to the advocate himself. The advocate states on oath that he heard of the notice of the appeal only on 8th October 1941, he at once communicated with his client and on 16th October 1941, he filed the memorandum of cross-objections with a petition to excuse the delay. There was a delay of one month and twenty two days in presenting the memorandum from the date on which the appeal notice was served on the advocate's clerk and there was a further delay of seventeen days in re-
e presenting the memorandum after it was returned for a defect.

Now, it seems to us that there are no grounds upon which the delay in this case could be excused if it is necessary to excuse the delay. The advocate knew about the filing of the appeal as long ago as May of this year. He knew that special orders had been passed for expediting the appeal. In such circumstances, if the memorandum of cross-objections was necessary, there was no reason why funds should not have been obtained from the clients at once and arrangements made to file the memorandum in good time. It is, however, argued that in fact no notice of this appeal has yet been served either on the respondent or his advocate and that therefore there is no necessity to excuse the delay in presenting or re-presenting the memorandum of cross-objections. Order 41-A, R. 6, Civil P. C., provides that all notices other than a notice of f appeal shall be sufficiently served if left at the address for service of the party to be served. It is not disputed that the address for service of the party in this case is the address of his advocate. Order 3, R. 5 provides that any process served on the pleader of any party, or left at the office of such pleader, shall be presumed to be duly communicated and made known to the party whom the pleader represents and, unless the Court otherwise directs shall be as effectual for all purposes as if the same had been given to or served on the party in person. Order 3, R. 5 is a general provision covering all processes of civil Courts. Order 41-A is a special order relating to the procedure in appeals to the High Court from original decrees of Subordinate Courts. It must, we think, be inferred that the special provisions of this order, in so far as they are g in conflict with the provisions of the other parts of the Code, must prevail and must govern the procedure in preference to these general provisions. Seeing that R. 6 of O. 41-A excludes a notice of appeal from the category of processes which can be properly served by being left at the address for service of the party to be served, the inference is that such a notice must be served regularly either on the respondent or on his advocate and that service by merely leaving in the office of the advocate is not service on the party or his pleader, for purposes of limitation. It is urged that this view of the rules will result in inconvenience to practitioners and to Courts. The remedy in our view is not to read the rules so as to suit the convenience of parties but to modify the rules in such a manner as may be desirable.

We are dealing now with a question of limitation. h Under O. 41, R. 22 the period of limitation is one month from the date of service on the respondent or his pleader of notice of the date fixed for hearing the appeal. We cannot regard service of notice on the pleader's clerk as the correct starting point for limitation in the absence of a special provision to that effect. In the result therefore, we hold that the memorandum of cross-objections has been presented in time. The petition to excuse the delay is dismissed. No order as to costs.

C.R.K./K.S. *Order accordingly.*

C. P. C.—
(a) ('40) Chitaley, Preamble N. 7 Pt. 28.
(b) ('40) Chitaley, O. 41 R. 22 N. 19.

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* A. I. R. (29) 1942 Madras 404

HORWILL J.

Public Prosecutor — Appellant

v.

K. B. Kalkura — Respondent.

Criminal Appeal No. 413 of 1941, Decided on 19th December 1941, against acquittal by Sessions Judge, South Kanara Division, in Cri. App. No. 43 of 1940.

***Penal Code (1860), S. 294-A — "Drawing a lottery"—Meaning explained—Lucky numbers calculated arithmetically in lottery is no drawing.**

Section 294-A contemplates a physical drawing and the word "drawing" should be given its natural meaning i. e., lucky numbers being drawn out of an urn, box or other receptacle. It does not mean conb ducting. Therefore a person who conducts a lottery in which the lucky numbers are calculated arithmetically is not guilty under S. 294-A : *Case law referred.* [P 404 C 2 ; P 405 C 1]

Public Prosecutor in person.

Pais — for Respondent.

JUDGMENT.—The accused and another were running a lottery which was a gigantic swindle, in that the only substantial prize fell necessarily to the agent who sold the largest number of tickets. The ticket bearing the highest number among those sold by that agent was a number upon which all the other lucky numbers were based. The holders of those lucky numbers received a small prize of one rupee. The accused were tried by the joint Magistrate of Coondapur, who found that the appellant was conducting a lottery and was guilty of offences c punishable under both parts of S. 294-A, Penal Code. In appeal, the Sessions Judge of South Kanara held that although it was true that the appellant was conducting a lottery and had cheated the public on a large scale, he was not guilty under either part of S. 294-A, Penal Code; because he had not been keeping an office or place for the purpose of drawing a lottery and had not been publishing any proposal to pay any sum on any contingency relative to the drawing of any ticket, lot, number or figure in any such lottery. He therefore allowed the appeal and acquitted the appellant. The Crown has preferred the present appeal, contending that the joint Magistrate was right and the Sessions Judge wrong.

The learned joint Magistrate argued that one must not interpret the word "drawing" in S. 294-A, Penal Code, too strictly. He was of opinion that the d question "as to how exactly the winning ticket number was drawn or determined is immaterial so long as this was done or determined by the accused in a regular office kept by him for that particular purpose." He thought "the section really means that once the fact of the scheme being a lottery is accepted, the word "draw" signifies the manner in which the element of chance in it is determined by the act of the promoters of that lottery." If the learned Magistrate was right, this word "drawing" would have no significance at all and would be equivalent to "conducting". Both the learned Sessions Judge and the learned Magistrate, in analysing the cases bearing upon the subject, have discussed whether the section refers to a physical drawing or not; but it seems immaterial to me what sort of drawing it was, whether physical or otherwise, provided that there was a drawing. In the present case there admittedly was no drawing of any sort at all, whether physical or otherwise. There has been no decision of this High Court on the interpretation of the word "drawing" in S. 294-A; but the matter has received considerable attention at the hands e of Judges of other High Courts. The leading case on the subject is a judgment of Shadi Lal and Le-Rossignol JJ. in A. I. R. 1917 Lah. 93.[1] The same question arose there because in one of the lotteries under discussion there was no drawing, the lucky numbers being calculated arithmetically. The learned Judges remarked :

"The word 'drawing', we think, is used in the section in its physical sense, and when the section was enacted in 1870, it seems probable that the only form of lottery envisaged by the Legislature was a lottery run on the usual lines in which the winning numbers are actually drawn out of an urn, box, or other receptacle."

When something is made an offence which was not formerly an offence, men will naturally exercise their ingenuity in circumventing the law, and that is f no doubt a reason why so many ingenious methods of ascertaining lucky numbers have since the enactment of this section been devised. This case was followed in A.I.R. 1934 Lah. 840[2] by a single Judge of the Lahore High Court and considered and approved in 53 Bom. 57,[3] which was a decision of a Bench. There, a firm of cigarette vendors were anxious to advertise a new brand of cigarettes and published the fact that certain packets of cigarettes would each contain a five rupee note. They sent ten five rupee notes to the manufacturers to put in certain packets at random. The learned Judges approved of A. I. R. 1917 Lah. 93[1] and agreed that the section contemplated a physical drawing. That decision was also followed in an earlier Bombay case, A.I.R. 1925 Bom. 26.[4] The matter was also carefully considered in A.I.R. 1934 Sind. 149.[5] There is thus a g substantial consensus of opinion in two High Courts and a Chief Court that the word "drawing" in S. 294-A cannot be ignored and must be given its natural meaning. The learned Public Prosecutor has sought to draw some distinction between the first part of S. 294-A and the second part ; and points out that most of the decisions turned on the construction of the second part of S. 294-A, in which it is rather more clear than in the first part that the Legislature contemplated an actual drawing from some receptacle; for it speaks of the drawing of any ticket, lot, number or figure, while the first part refers to "drawing any lottery". "Drawing any lottery" is not a common expression ; but there is no reason to suppose that the Legislature were having regard in the second part of that section to an actual drawing from a receptacle and not in the first part. If "drawing" had a different meaning in h the first part to what it had in the second, then it would mean, as I have pointed out, merely "conducting" ; and there is no reason to think that the Legislature intended to give the word "drawing" any such comprehensive and unusual meaning. I

1. ('17) 4 A. I. R. 1917 Lah. 93 : 41 I. C. 144 : 35 P. R. 1917 Cr. : 18 Cr. L. J. 768, Emperor v. Mukandilal.
2. ('34) 21 A. I. R. 1934 Lah. 840 : 155 I. C. 590 : 36 Cr. L. J. 785 : 16 Lah. 51 : 35 P. L. R. 753, Emperor v. Gurbaksh Singh.
3. ('28) 15 A. I. R. 1928 Bom. 550 : 112 I. C. 777 : 30 Cr. L. J. 9 : 53 Bom. 57 : 30 Bom. L. R. 1426, Emperor v. Vazirally.
4. ('25) 12 A. I. R. 1925 Bom. 26 : 83 I. C. 1006 : 26 Cr. L. J. 222 : 26 Bom. L. R. 968, Emperor v. Rachappa Murugappa.
5. ('34) 21 A. I. R. 1934 Sind. 149 : 152 I. C. 911 : 36 Cr. L. J. 219, O. D. Harder v. Emperor.

hold therefore that the learned Sessions Judge was right in acquitting the accused, even though he was conducting a lottery. The appeal is dismissed.

C.R.K./K.S. *Appeal dismissed.*

Penal Code —
('36) Ratanlal, p. 664 Pt. 4.
('36) Gour, p. 928 Pt. 4.

A. I. R. (29) 1942 Madras 405 (1)

LEACH C. J. AND KUPPUSWAMI AYYAR J.

Sreekakulam Seshamma by power of Attorney Agent, Gunda Elliah — Petitioner

v.

Debt Conciliation Board, Nandyal and others — Respondents.

Civil Misc. Petn. No. 5781 of 1941, Decided on 8th December of 1941, to issue a writ of certiorari.

(a) Madras Debt Conciliation Act (11 of 1936), S. 9 (a)—Joint Hindu family — Application by member for settlement of his own debts dismissed under S. 9 (a) — Joint family is not precluded from applying for settlement of all family debts.

The dismissal of an application by a member of a joint Hindu family for the settlement of his own debts under S. 9 (a) on the ground that the Board did not consider it practicable to effect a settlement of the debts does not preclude the joint family from applying for a settlement of all the debts of the family. [P 405 C 1, 2]

(b) Madras Debt Conciliation Act (11 of 1936), Ss. 17 and 4 — Petition under S. 4 returned as not in order — Date of petition must be deemed to be date of representation.

Where a petition under S. 4 is returned as not being in order, the date of the petition must be deemed to be the date when the petition is represented. [P 405 C 2]

A. Bhujanga Rao and D. R. Krishna Rao — for Petitioner.

Government Pleader — for Respondents.

LEACH C. J. — On 11th June 1941, the respondent Board granted to respondents 2, 3 and 4 a certificate under S. 18, Madras Debt Conciliation Act, 1936, to the effect that the petitioner in the present proceedings had refused a reasonable offer by his debtors. The petitioner asks for the issue of a writ of certiorari quashing this order. He says that the petition which respondents 2, 3 and 4 filed for the settlement of their debts did not lie as a previous application had been dismissed, but that in any event the Board had no power to grant the certificate, because more than twelve months had elapsed after the date of the filing of the application. When the facts are investigated it is quite clear that the petitioner is not entitled to the order which he seeks. The application before the Board was for the settlement of the debts of the joint family of which respondents 2, 3 and 4 were members. There was a previous application and it was dismissed under S. 9 (a) on the ground that the Board did not consider it practicable to effect a settlement of the debts. This application was filed by respondent 4. It was not an application for the settlement of the debts of the family but for the settlement of his own debts. The dismissal of this application did not preclude the joint family applying for a settlement of all the debts of the family. This disposes of the first plea raised by the petitioner.

With regard to the second plea, the facts are not correctly stated in the affidavit which has been filed in support of the petition, but they are to be gathered from the affidavit filed in reply by the chairman of the Board and from the endorsements on the petition filed by respondents 2, 3 and 4 for the settlement of their debts. This petition is dated 3rd June 1940 and was actually presented to the chairman on that date. He directed it to be placed before the Board, which met the following day. It was then discovered that the father of the petitioners, who is joint with his sons, had not joined in the application and the petition was returned to those filing it in order that this omission might be rectified. The petition was re-presented to the Board on 14th June 1940. The certificate granted to respondents 2, 3 and 4 was issued on 11th June 1941, that is within twelve months of the date when the petition was re-presented to the Board. The learned advocate in support of the present petition says that as S. 17 speaks of the date of the application under S. 4 the twelve months must be deemed to have commenced from the date when it was first presented, namely, 3rd June 1940. It is said that that must be taken to be the actual date of the application. As the petition was not in order and had to be returned this argument cannot be accepted. In these circumstances the date of the application must be deemed to be the date when the petition was re-presented. The petition will be dismissed with costs in favour of respondent 1.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 405 (2)

PANDRANG ROW AND KING JJ.

Vedurumudi Rama Rao — Appellant

v.

National Assurance Co. Ltd., Vizianagaram, represented by liquidator, C. Prasadarao — Respondent.

Appeal No. 21 of 1940, Decided on 31st March 1941, against order of Sub-Judge, Vizagapatam, D/- 16th December 1939.

Companies Act (1913), Ss. 280, 202 — Order dismissing petition for taking security given under S. 280 is not appealable.

No appeal lies from an order dismissing a petition for taking security presented under S. 280 either under the Companies Act or the Civil P. C. Section 202 has no application because this is not an order passed in the matter of winding up of the company. [P 405 C 2; P 406 C 1]

P. Somasundaram — for Appellant.

S. Parthasarathy and V. K. Thiruvenkatachari — for Respondent.

JUDGMENT. — This is an appeal from the order of the Subordinate Judge of Vizagapatam dated 16th December 1939 dismissing a petition for taking security presented by the appellant under S. 280, Companies Act. A preliminary objection has been taken to this appeal on the ground that no appeal lies from an order of this kind. We think this objection is well founded. Section 202, Companies Act, which is relied upon has no application because this is not an order passed in the matter of winding up of the company and indeed the Subordinate Judge has no jurisdiction whatever to order winding up. So far as the Civil Procedure Code is concerned, obviously no appeal would lie from an

order of this kind. We therefore uphold the preliminary objection and dismiss the appeal as incompetent. The appellant will have to pay the costs of the respondent in this appeal.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 406 (1)

KING AND HAPPELL JJ.

P. V. Sreekanta Goundan — Appellant

v.

M. Javani alias Vella Amma and another — Respondents.

Appeal No. 468 of 1939, Decided on 8th January 1942, against order of Sub-Judge, South Malabar at Calicut, D/- 23rd February 1939.

Civil P. C. (1908), Ss. 47, 96 and 2 — Dispute between judgment-debtor and stranger auction purchaser regarding delivery treated and decided as one under S. 47 — Appeal from order thereon lies.

An appellant's right of appeal is governed by S. 96 and the definition of "decree" in S. 2; and under S. 2 a decree shall be deemed to include the determination of any question within S. 47. [P 406 C 1]

Hence where the lower Court has dealt and decided a question between a judgment-debtor and a stranger auction purchaser regarding delivery as one under S. 47, its decision is the determination of any question within S. 47 within the meaning of the definition of "decree" and is open to appeal : ('41) 28 A.I.R. 1941 Mad. 161 (F.B.), *Ref.* [P 406 C 1, 2]

P. Govinda Menon — for Appellant.

K. P. Raman Menon — for Respondents.

KING J. — This is an appeal by a judgment-debtor in regard to certain property which originally admittedly belonged to him and was delivered in execution of a decree against him to the respondent. After the sale, respondent 2 obtained delivery of 19.71 acres of land. According to the appellant, the property actually sold measured only 14.60 acres and therefore he claimed re-delivery of the excess 5.11 acres. The learned additional Subordinate Judge, Calicut, dismissed the appellant's application for re-delivery of this property and the appellant has accordingly appealed. A preliminary objection was taken on behalf of respondent 2 that no appeal lies. The argument was that a matter of this kind which is in dispute between a judgment-debtor and a stranger auction purchaser does not fall within S. 47 and therefore the decision of such a matter is one not open to appeal. That such a dispute does not fall within S. 47 is said to follow from the recent Full Bench decision of this Court reported in I.L.R. (1941) Mad. 438.[1] We do not think however that even if that be so, it necessarily follows that the appellant here has no right of appeal. His right of appeal is governed by S. 96 and the definition of "decree" in S. 2, Civil P. C. In S. 2 it is stated in the definition of a "decree" that a decree shall be deemed to include the determination of any question within S. 47. In the present case, it is beyond dispute that the learned Subordinate Judge himself took up this question as one under S. 47 and decided it under the impression that he was dealing with it under that section. It seems to us clear that his decision is the determination of any question within S. 47 within the meaning of the definition of "decree," and as no authority to the contrary has been cited before us, we have overruled the preliminary objection. (Their Lordships dealt with the merits of the case). The appeal must fail and is dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

1. ('41) 28 A. I. R. 1941 Mad. 161 : 196 I. C. 204 : I.L.R. 1941 Mad. 438 : (1941) 1 M.L.J. 45 (F.B.), Annamalai v. Ramaswami.

C. P. C. —

('40) Chitaley, S. 2 (2), N. 14, Pt. 1; S. 47, N. 84, Pt. 1.

('41) Mulla, Page 9, Note 'S. 47—Execution proceeding'; Page 198, Note 'Appeal.'

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* A. I. R. (29) 1942 Madras 406 (2)

LEACH C. J. AND BURN J.

Sri Rajah Saheb Meharban-I-Dostan Sri Rajah Ravu Venkata Kumara Mahipati Surya Rao Bahadur Garu Sirdar Rajahmundry Circar and Maharajah of Pittapuram — Appellant

v.

Secretary of State and others — Respondents.

Appeals Nos. 89 of 1937, 151 and 152 of 1938, Decided on 18th November 1941, against decrees of Sub-Judge, Cocanada, in O. S. Nos. 52, 53 and 54 of 1936, respectively.

*** Riparian rights—Common law rules are not applicable to rivers like Godavari in India—Bed of public navigable river is property of Government though banks may be subject of private ownership.**

Conditions in India are so dissimilar from those in Great Britain that it might well be that the English common law rule should not be applied without modification, and public rights should be recognised in the beds of rivers which are navigable but not tidal. The tide is not a factor in deciding the ownership of the bed of a public navigable river in India. The bed of a public navigable river in India like the Godavari is vested in the Crown though the banks may be the subject of private ownership : *Case law referred.* [P 408 C 1; P 409 C 1; P 410 C 1]

Advocate-General, Ch. Raghava Rao and K. Subramaniam — for Appellant.

Government Pleader, N. Srinivasa Ayyangar and A. Rama Rao — for Respondents.

LEACH C. J.—These three appeals arise out of separate suits instituted by the appellant with the object of establishing title to certain lankas, or alluvial islands, in the river Godavari. In O. S. No. 52 of 1936 out of which Appeal No. 89 of 1937 arises, the appellant claimed the ownership of eighteen lankas, but only succeeded in respect of two of them. The suits out of which Appeals Nos. 151 and 152 of 1938 arise were dismissed in their entirety. All the suits were tried together by the Subordinate Judge of Cocanada and were decided in one judgment. In Appeal No. 89 of 1937 the respondent has filed a memorandum of cross-objections which challenges the correctness of the Subordinate Judge's decision that the appellant had established ownership of two of the lankas. It is common ground that if the questions of law which arise in Appeal No. 89 of 1937 are decided against the appellant, Appeals Nos. 151 and 152 of 1938 must fail. In the circumstances this judg-

ment will be confined to the main appeal until all the questions arising therein have been dealt with.

The appellant is the proprietor of the ancient zamindari of Pithapuram in the Godavari District of the Madras Presidency. The zamindari was included in the permanent settlement of 1801, and on 5th May 1803 a sanad was issued by Lord Clive, the Governor in Council of Fort Saint George, confirming the holder's rights in the lands forming the estate. The document however did not define the lands, but it is conceded on behalf of the respondent that they must have included the lanka lands of the village of Mulakallanka which was, and still is, situate within the banks of the river. In 1861 the Revenue Department of the Government surveyed this part of the river, and the plan prepared as the result recognised that the appellant was the owner of certain of the lankas then in existence. It is common ground that the eighteen lankas in dispute in Appeal No. 89 of 1937 were not then in existence. They had however all appeared by 1901 when the River Conservancy authorities made a survey of the river. In a river like the Godavari, lankas sometimes appear suddenly, but whether the disputed lankas were formed suddenly or gradually is not to be gathered from the evidence. All that we have is that they were there in 1901. It is also common ground that after their formation the appellant took possession of them and leased to tenants those portions which were fit for cultivation. In 1921 the Lanka Inspector prepared a new plan, and as the result the appellant was called upon to show cause why he should not be proceeded against under Ss. 5 and 6 of the Madras Land Encroachment Act for unauthorised occupation of the disputed lankas. Lengthy correspondence followed between the appellant and the Collector of East Godavari without the appellant being able to convince the Government that his claims were well founded and on 14th February 1937 the Collector demanded the sum of Rupees 1,16,229-2-8 as the revenue assessed upon these lands for the years 1917 to 1926, and payment was enforced. On 26th June 1927, the appellant was called upon to vacate the disputed lankas and was informed that in default he would be summarily evicted. Thereupon, the appellant filed a suit claiming (1) a declaration of his title, (2) the refund of the Rs. 1,16,229-2-8, and (3) an injunction restraining the respondent from evicting him. The suit was originally filed in the Court of the District Judge of East Godavari and numbered O. S. No. 22 of 1927, but in 1929 it was transferred to the Court of the Subordinate Judge of Rajahmundry and in 1936 to the Court of the Subordinate Judge of Cocanada. The reason for the second transfer was that the principal Subordinate Judge of Rajahmundry had begun the hearing, but had not completed it before he himself was transferred to Cocanada. In the Cocanada Court the suit was re-numbered O. S. No. 52 of 1936.

In this part of the river, there is a large lanka known as the Pedda Lanka, the southern portion of which belongs to the zamindar of Pithapuram and the northern portion to another proprietor. This lanka was in existence in 1874 and in that year a dispute arose between the two proprietors with regard to the boundary. The dispute gave rise to a suit in the Court of the District Judge (O. S. No. 3 of 1874). The dispute was settled by the District Judge drawing a line between a point on the western bank and a point on the eastern bank. In 1896 there was a boundary dispute in respect of a lanka lying some distance south of the Pedda Lanka. On this occasion the disputants were the zamindar of Pithapuram and the Government. This dispute was settled by the Sub-Collector in a similar manner. The lankas now in suit lie within the lines drawn by the District Judge and the Sub-Collector. The appellant claims that he is entitled to all the lankas which fall within the area bounded on the north by the line drawn by the District Judge, in O. S. No. 3 of 1874, on the east by the eastern bank of the river, on the south by the line drawn by the Sub-Collector in 1896 and on the west by the western bank of the river. In the first place, the appellant bases his claim on the fact that he is the owner of the lands on both banks of the river, which is here non-tidal. He points to the fact that the common law only recognizes a right in the Crown to the bed of a river where it is both navigable and tidal. In the trial Court, the appellant contended that the river was not even navigable in this part, but the Subordinate Judge held that it was, and the appeal has proceeded on the basis that the Godavari is a public navigable river. In the second place, the appellant claims that by the sanad issued in 1803 the Government granted to the zamindari the bed of the river in so far as it lies within the area already mentioned. He also claims title to the disputed lankas on the ground that they represent lateral accretions to or reformations of lankas which are admittedly his. The respondent denies the validity of all these claims. The Subordinate Judge held that in India the bed of a public navigable river, whether tidal or not, is vested in the Crown, that the sanad confers on the appellant no title to the bed of the river, and that 16 of the 18 lankas represent formations unconnected with the lands of the appellant. Other questions were raised in the trial Court, but the appeal has been confined to those indicated. The question whether the bed of a public navigable river in India vests in the Crown involves the examination of a number of decisions of the Privy Council, but before entering upon this task, it will not be out of place to say something with regard to the nature of the Godavari river. In 1907 Mr. F. R. Hemingway, a member of the Indian Civil Service, compiled, at the instance of the Government, a Gazetteer of the Godavari District, and this contains much useful information. In the course of the description of the river, the author of the Gazetteer says (Page 4 of Godavari District Gazetteer) :

"Among the great rivers of India the Godavari takes rank next after the Ganges and Indus. It runs nearly across the peninsula, its course is 900 miles long, and it receives the drainage from 1,15,000 square miles, an area greater than that of England and Scotland combined. Its maximum discharge is calculated to be one and a half million cubic feet per second, more than two hundred times that of the Thames at Staines and about three times that of the Nile at Cairo."

After describing the river's course to the eastern ghats, through which it forces its way, the author proceeds : (p. 5 of Godavari District Gazetteer) :

"In flood time the water flows with terrific force . . . . Native boatmen are much afraid of navigating the river at such times . . . . so great is the action of the stream during floods that the rocky bed has been scoured out to depths popularly supposed to be unfathomable, but which really vary normally from 100 to nearly 200 feet. High floods rise quite 50 feet above the normal level, so that the gorge then encloses a torrent of waters from 150 to 250 feet in depth."

The Godavari flows into the Bay of Bengal and a few miles from the coast it has formed a delta. With regard to this part of the river, the author of

the Gazetteer says (Page 6 of Godavari District Gazetteer) :

"Seven traditional mouths are recognized as sacred by Hindus. The holy waters of the Godavari are said to have been brought from the head of Siva by the Saint Goutama, and the seven branches by which it is traditionally supposed to have reached the sea are said to have been made by seven great rishis. The mouths of these are considered especially holy, and to bathe in the sea at any one of them is considered an act of great religious efficacy."

The village of Mullakallanka is some 50 miles from the mouth of the river. It is impossible to compare a river like the Godavari with any river in England, and this is sufficient in itself to make one hesitate to apply to it common law rules with regard to riparian ownership. The great difference in conditions in India from those in England was referred to by J. G. Burn J. in 11 M.L.W. 256[1] where he observed that conditions in Madras are so dissimilar from those in Great Britain that it might well be that the English common law rule should not be applied without modification, and that public rights should be recognised in the beds of rivers which are navigable but not tidal. That this opinion is well founded appears to us to be clear from the judgment of the Privy Council in 22 Mad. 464,[2] 42 Cal. 489,[3] 26 C. L. J. 590,[4] 50 Cal. 446[5] and 69 M. L. J. 171.[6]

In 22 Mad 464,[2] the Judicial Committee were called upon to decide a case which also concerned newly formed land in the Godavari river. The plaintiff claimed the land as an accretion to a lanka belonging to her, but it was found that the accretion pertained to a lanka owned by the Government higher up the stream. In the course of the appeal the appellant endeavoured to set up a claim to the ownership of the river bed on the strength of being the owner of the land on both banks. This claim had not been suggested in the trial Court and the appellant was not allowed to raise it in the appeal. In the course of the judgment, the Privy Council considered that although there is not in Madras, as there is in Bengal, an express law embodying the principle that gradual alluvian enures to the land to which the accretion is made, the rule is equally well established in both the provinces. Their Lordships intimated, however, that they had grave doubts whether the presumption applicable to little English rivers applies to great Indian rivers such as the Godavari.

The Judicial Committee refused to apply the English Common law in 42 Cal. 489.[3] There the appellants claimed to be the proprietors of a fishery in the tidal waters of the Ganges in Eastern Bengal. As the result of a sudden change in the course of the river, the waters of the fishery flowed over private lands, and the respondents pleaded their right to fish in a portion of the channel of which they owned both the bed and the banks. The board held that the English Common law of waters could not be applied in its entirety and that where a right to fish had been granted by the Government the right continues notwithstanding that there is violent change in the course of the river which causes it to flow over private lands. It was pointed out that in the deltaic area of lower Bengal changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness. The judgment was delivered by Lord Sumner who inquired into the extent of the application of the English Common law in the United States of America and his investigations showed that some of the States had refused to follow it because it was inapplicable to conditions there. In this connexion, Lord Sumner said :

"The question how far a rule established in this country can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different states of the United States of America. Navigability affects both rights in the waters of a river, whether of passing or repassing or of fishing, and the rights of riparian owners, whether as entitled to make structures on their soil which affect the river's flow, or as suffering in respect of their soil quasi-servitudes of towing, anchoring, or landing in favour of the common people. The Courts of the different States, minded alike to follow the Common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth centuries constrained by physical and geographical conditions to treat it differently. In Mussachusetts, Connecticut, New Hampshire, and Vermont, where the rivers approximated in size and type to the rivers of this country, the English Common law rule was followed, that tidality decided the point at which the ownership of the bed and the right to fish should be public on the one side and private on the other. Other States, though possibly for other reasons since they possessed rivers very different in character from those of England, namely, Virginia, Ohio, Illionois, and Indiana followed the same rule. But in Pensylvania, North Carolina, Iowa, Missouri, Tennessee, and Alabama, this rule was disregarded, and the test adopted was that of navigability in fact, the Courts thus approximating to the practice of Western Europe."

Lord Sumner went on to add :

"The reasoning has been put pointedly in Pensylvania. Tilghaman C. J. says in (1810) 2 Binney 477,[7] 'the Common law principle concerning rivers' (*viz.*, that rivers, where the tide does not ebb and flow, belong to the owners of adjoining lands on either side), 'even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England no such law would ever have been applied to it'."

The present case is concerned with an Indian river more than three miles wide in the relevant area and one which flows through a rich sub-continent for 900 miles. Lord Buckmaster in delivering

1. ('20) 7 A.I.R. 1920 Mad. 295 : 58 I. C. 689 : 11 M. L. W. 256, Secretary of State v. Venkatanarasimha Naidu.
2. ('99) 22 Mad. 464: 26 I.A. 107:7 Sar. 534 (P.C.), Sri Balasu Ramalakshmamma v. Collector of East Godaveri.
3. ('14) 1 A. I. R. 1914 P. C. 48 : 25 I. C. 467 : 42 Cal. 489 : 41 I.A. 221 (P.C.), Srinath Ray v. Dinabandhu Sen.
4. ('17) 4 A. I. R. 1917 P. C. 86 : 43 I. C. 361 : 26 C. L. J. 590 (P. C.), Haradas Acharya Chowdhuri v. Secretary of State.
5. ('23) 10 A.I.R. 1923 P. C. 1 : 77 I. C. 1048 : 50 Cal. 446 : 50 I.A. 121 (P.C.), Naresh Narayan Ray v. Secretary of State.
6. ('35) 22 A.I. R. 1935 P. C. 125 : 156 I. C. 548 : 69 M.L.J. 171 (P. C.), Tharakdas Acharjee Chowdhury v. Secretary of State.
7. (1810) 2 Benney 477 : 4 Am. Dec. 463, Carson v. Blazer.

the judgment of the Privy Council in 26 C. L. J. 590[4] said :

"The river Ganges in its course through the district of Dacca rests so uneasily in its bed that its boundaries can never at any moment be defined with the certainty that their limitation will be long observed. Frequently the river leaves its course, flows over large tracts of land, leaving other areas bare, and then again its waters recede, giving back the lands submerged in whole or in part to use and cultivation. It is obvious that difficulties as to ownership must arise in these circumstances, and of the extent and complication of these difficulties the present case affords an excellent illustration. The general law that is applicable is free from doubt. The bed of a public ngvigable river is the property of the Government though the banks may be the subject of private ownership. If there be slow accretion to the land on either side, due for instance to the gradual accumulation of silt, this forms part of the estate of the riparian owner to whose bank the accretion has been made. (*See* Regulation 11 of 1825). If private property be submerged and subsequently again left bare by the water, it belongs to the original owner."

In that case the plaintiffs claimed that a large tract of land formerly under the river Ganges formed part of a permanently settled zamindari in Dacca District of Bengal. The passage extracted from the judgment in 26 C. L. J. 590[4] was quoted by Lord Phillimore in 50 Cal. 446[5] and was referred to as stating the principles upon which a tribunal should act in a claim of that kind. The latest pronouncement of the Privy Council is that contained in 69 M. L. J. 171[6] which also referred to the ownership of large tracts of land formed by the recession of the Ganges in the Dacca district of Bengal. In this case their Lordships observed :

"It is beyond question that the bed of a public navigable river, and the river Ganges undoubtedly belongs to that category, is presumed to be the property of the Government, and not that of a private person."

Neither in this case nor in 26 C. L. J. 590[4] was any suggestion made that the tide is a factor in deciding the ownership of the bed of a public navigable river in India. The judgments in these cases would appear to put it beyond doubt that the bed of a public navigable river in India is vested in the Crown, but on behalf of the appellants it has been suggested that they should be ignored by reason of the observations made in the judgments of the Privy Council in 55 Mad. 268[8] and 9 Rang. 122.[9] The first of these two cases concerned the interpretation of S. 1, Madras Irrigation Cess Act, 1865. That section states that whenever water is supplied or used for purposes of irrigation from a river, stream, channel, tank, or work belonging to, or constructed by, Government, it shall, subject to a proviso, be lawful for the Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for the water. The plaintiff owned about twelve acres of land under an inam granted by a zamindar. The land was bounded by a tidal channel, which was connected with one of the branches by which the river Godavari then reached the sea. The plaintiff took water from this channel for irrigating his land and in consequence the Government levied a water cess. The suit was filed to recover the money which the plaintiff had been compelled to pay. The question was whether the river was one "belonging to" the Government for the purposes of the section and it was held that a river belonged to the Government when it is the proprietor of the land abutting on the river on both sides, or when the river is tidal and navigable. Their Lordships were not called upon in that case to consider the question whether the bed of a public navigable river in India can be deemed to be owned by the riparian owners when the river is non-tidal. We consider that the judgment should be read as applying only to the particular question raised in that case.

In 9 Rang. 122,[9] the plaintiff, who was the proprietor of a saw-mill, constructed on his land a pond in which he proposed to float logs from a creek into which the tidal waters of the Rangoon river flowed. The defendant, who claimed to own the soil of the upper part of the creek, planted piles opposite to the entrance to the plaintiff's pond in order to prevent the passage of logs. Thereupon the plaintiff sued for an injunction directing the removal of the obstruction. He alleged that the creek was a public waterway. The evidence showed that at certain periods of the month the tide reached the most remote part of the creek, but usually the upper part was dry, except for a few hours on five to ten days in each month when there was sufficient water to float ordinary teak logs to the end. It was held that the evidence did not establish that the upper part of the creek was a public waterway. Sir George Lowndes in delivering the judgment of the Board said that in India it had long been recognised that the beds or channels of tidal navigable waters are the property of the Government in right of the Crown, and went on to observe :

"The principle of the English rule is stated by Lord Cranworth to be that it is only within these limits that the bed can be regarded as in the nature of unappropriated soil, not capable of ordinary cultivation and occupation. Their Lordships think that this principle is equally applicable to Indian waters, and that the same rule should be applied. The public right of navigation or waterway can only be co-extensive with the right of the Crown or the Government in the bed, and their Lordships are therefore of opinion that the right claimed by the respondent in the present case over the creek cannot extend beyond the limits of ordinary high tides in the sense defined above."

Their Lordships were here concerned with the question whether a small creek was a public waterway and were not considering to what extent the rules of the English common law can legitimately be applied to a river like the Godavari. After an examination of the questions raised in 55 Mad 268[8] and 9 Rang. 122,[9] we cannot regard the judgments in those cases as governing the question under discussion. On the other hand, we ar eof opinion that the judgments of the Judicial Committee to which reference was first made give clear indication of the answer which should be given here. The Court is not bound to apply the principles of the English law when they are manifestly unsuited to the occasion, and the principle relied upon by the appellant is unsuitable here. The Godavari is a gigantic river of supreme importance to millions of people, its waters are regarded as sacred by all Hindus and there is a right in the public to navigate the river. In these circumstances and having regard to the

8. ('32) 19 A.I.R. 1932 P.C. 46 : 136 I. C. 413 : 55 Mad. 268 : 59 I.A. 56 (P. C.), Secretary of State v. Subbarayadu.
9. ('31) 18 A. I. R. 1931 P.C. 72 : 131 I.C. 777 : 9 Rang. 122 : 58 I. A. 80 (P. C.), Dawood Hashim Esoof v. Tuck Shein.

pronouncements of the Privy Council in the cases first mentioned we hold that the Subordinate Judge was fully justified in refusing to recognise by virtue of riparian ownership a right in the appellant to the bed of that part of the Godavari river which flows through his zamindari.

The appellant's claim that the sanad issued in 1803 can be read as a grant to him of the bed of the river in this area does not call for lengthy discussion. There is nothing in the document itself, which indicates that the Government intended to vest the bed of the river in the holder of the zamindari, but the appellant says that this should be inferred because in 1861 the Government recognized in him the ownership of certain lankas and until 1921 it made no claim to the lankas which were formed between 1861 and 1901 and are now in dispute. It is not suggested that the appellant has established a claim to any of these lankas by reason of adverse possession and the fact that the officials of the Revenue Department of the Government allowed the holder of the zamindari to take possession of new formations without objection cannot in itself affect the rights of the Crown. It may be that their inaction can be attributed to negligence or connivance. The deciding factor here is the plan prepared by the Revenue Department in 1861. This plan admittedly shows that there were then in the area now claimed by the appellant two lankas which belonged to the Government and lanka lands of considerable extent which belonged to private proprietors other than the zamindar of Pithapuram. The plan shows towards the eastern bank a lanka known as the Bobbar lanka and on the western bank a lanka called the Kundevan lanka. Both these lands were in 1861 the property of the Government and they still remain its property. On the eastern side of the river there is a lanka called the Katavaram lanka and another on the western side one called the Chidippi lanka. These lankas appear on the plan of 1861 and it cannot be disputed that they have always belonged to other zamindars. In addition the plan shows between the banks of the river in this part lanka lands belonging to the villages of Torredu, Bobvar lanka, Jaliludi and Katavaram in which the zamindar of Pithapuram has never had any interest. In these circumstances the appellant's claim to a grant of the river bed must be rejected. The wording of the sanad lends no support to his claim and the admitted facts negative any inference being drawn in his favour.

We will now deal with the evidence which relates to the contentions of the appellant that the disputed lankas must be regarded as accretions to lankas admittedly his or reformations of lankas which had belonged to him. We will for convenience refer to them by the Roman numerals which they bear in plan Ex. VI-A. Lankas Nos. IV, V, VI, VII and VIII can be dealt with together, as can XI to XVI and XIX, XIX-a and XIX-b. In the course of the hearing the appellant withdrew his appeal so far as lanka No. XXIV is concerned and the only other lanka which the appellant claims in this appeal is No. XXII, which stands alone.

* * * *

The Government has filed cross-objections with regard to Nos. XX-A and XXIII which the Subordinate Judge found to be the property of the appellant. In this Court the Government has accepted the finding with regard to No. XX-A, and on behalf of the appellant the claim to No. XXIII has been given up. No. XXIII is not a lanka; it is a shoal covered by water except in the dry weather. As the result of the finding that Lankas Nos. IV and V belong to the appellant, he is entitled to a proportionate refund of the Rs. 1,16,229-2-8. Learned counsel have agreed that the sum involvod is Rupees 6885-11-8. Therefore the decree of the trial Court in O. S. No. 52 of 1936 will be amended to provide for this. In other respects the decree of the trial Court will stand. In this Court the parties will pay and receive proportionate costs, but in view of the importance of the case the respondent will be allowed additional costs in the sum of Rs. 1000. In accordance with the provisions of S. 82, Civil P. C., the Government will be allowed three months time in which to make the refund. As the legal issues arising in the main appeal have been decided against the appellant, Appeals Nos. 151 and 152 of 1938 will be dismissed with costs.

The long course which this litigation has taken is a matter for regret. As already indicated the main suit was filed on 4th July 1927, but no evidence was recorded until 4th February 1936. The judgment was delivered on 14th January 1937. The memorandum of appeal was filed on 30th March 1937, but the appeal was not called for hearing until 3rd November 1941, more than 14 years after the institution of the suit. The congestion of cases in the Courts of this Province cannot be made the excuse for this regrettable state of affairs. One has only to glance at the case diary in the trial Court to learn that the parties themselves are largely to blame for the leisurely progress which this suit has made. If they had been as diligent as they should have been, the questions raised would have been decided long ago. We attach no blame to the Subordinate Judge who tried the case. On the other hand we consider that he has dealt with all the questions arising in the suit in a very able manner.

After this judgment had been delivered, the learned Government Pleader informed the Court that the appellant owned no lands on the western bank of the river in this area and not all the lands on the eastern bank. This was admitted to be the case by Mr. Raghava Rao who has appeared with the learned Advocate-General for the appellant. When the appellant's case was argued by the learned Advocate-General, we understood the argument to be based on the ownership by the appellant of the lands on both the banks of the river, and we also understood this to be accepted by the learned Government Pleader, although we gathered that the Government claimed to be the owner of land immediately beneath the banks. The position now disclosed does not affect our conclusions on the question involved in the appeal whether of law or of fact, but if it had been disclosed during the arguments it would have simplified matters in some respects.

C.R.K./K.S. *Order accordingly.*

A. I. R. (29) 1942 Madras 410

WADSWORTH AND PATANJALI SASTRI JJ.

Gogineni Venkatappayya and another—*Petitioners*

v.

Mallampati Mallayya—*Respondent.*

Civil Revn. Petn. No. 1805 of 1941, Decided on 22nd January 1942, to revise order of Dist. Munsif, Guntur, D/- 31st August 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) Proviso (c)—"Is" must be read as "was."

The verb "is" in the final clause must be read as being equivalent to "was" and the period during which the rental value is to be not less than Rs. 600 must be the same two years within which the assessment is to disqualify the person who claims to be an agriculturist. [P 411 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) Proviso (c)—Property in municipal register in third person's name — Tax held recovered from real owners.

The agriculturists owned the property during the whole of the relevant period. They regarded themselves as responsible for the tax. The tax was demanded from them. On their representation the assessment was reduced and they actually paid the tax :

Held that the persons were assessed to property tax in respect of this property, even though the municipal demand register had not been brought upto date by the substitution of their names for that of some former owner. [P 411 C 2; P 412 C 1]

V. Rangachari—for Petitioners.

K. Kotayya—for Respondent.

WADSWORTH J. — This civil revision petition raises questions relating to proviso (c) to S. 3(ii) Madras Agriculturists Relief Act. The petitioners applied under S. 19 to scale down a decree. It was held that they were not agriculturists by reason of their having been assessed within the two years preceding 1st October 1937 to property tax in respect of buildings of an annual rental value exceeding Rs. 600. The facts established are that at the beginning of 1936, the petitioners were the owners of properties which stood in the name of somebody else in the municipal register and were valued at Rs. 15,000, which according to the method of calculation laid down in the Act would imply a rental value of Rs. 750. On the basis of this valuation, tax was actually demanded from the petitioners for the second half year of 1935-36. The petitioners filed an application Ex. C, dated 15th February 1936 wherein they prayed the Commissioner to cancel the tax on the ground that two of the buildings were unoccupied. On 20th May 1936, no orders having apparently been passed on Ex. C, the petitioners paid the tax at the rate demanded. On 15th June 1936, the Commissioner appears to have inspected the premises; at any rate he passed an order on Ex. C directing the re-valuation of the properties at a rate which would bring down the capital value to Rs. 4500 and the rental value to Rs. 135. For the rest of the period contemplated in proviso (c) the petitioners paid property tax on this reduced valuation. The only arguments of substance which have been placed before us relate firstly to the date with effect from which the rental value is to be calculated under proviso C and secondly to the question whether the petitioners can be said to have been assessed when the properties stood in the municipal register in the name of somebody else.

The first argument is based on the precise language of proviso C. This proviso excludes a person from the category of an "agriculturist" if he has within the two years immediately preceding 1st October 1937 been assessed to property or house tax provided that the aggregate annual rental value of such buildings and lands is not less than Rs. 600. Emphasis is laid on the tense of the verb "is" in the subordinate clause and we are asked to hold that this valuation relates not to the period covered by the assessments in question, but to the date when the Act came into force, namely, 22nd March 1938. It is no doubt possible to read the clause in this way and perhaps it may be said that a purist in the English language would so read it. When main verb is in the past and the verb in the subordinate clause is in the present, a strict grammatical interpretation of the subordinate clause would relate to the subordinate verb to the time at which the writer is actually writing. But it cannot be denied that the tenses in subordinate clauses in English are frequently used otherwise than according to the strictest rules of grammer and it seems to us that to apply the strict grammatical interpretation to proviso C would make proviso C mean something which clearly the legislature never intended. Each of the provisos A, B and C relates to the exclusion from the category of agriculturists of persons who pay some form of taxation during the period immediately preceding the time when this Act was under discussion, the rate at which the tax was paid indicating that the payer is a person of some wealth apart from his agricultural income.

Clause A relates to the payment of income-tax in either of the two financial years ending 31st March 1938, which tax would be estimated on the basis of the income for the years ending 31st March 1937. Clause B is based on the payment of profession tax within the two years preceding 1st October 1937 on the basis of an income above a certain specified rate. Clause C also appears to be based on assessment to property or house tax within the same two years and it seems to us reasonable to conclude that when the legislature laid down a minimum rental value, on the basis of which the property was assessed, as disqualifying the person assessed from claiming to be an agriculturist, they had reference to the period for which the tax was imposed and not to some subsequent date outside the period of the assessment. If the view contended for were accepted, it would result in the position that a person, whose assessment was on a very low rental value during the whole of the two years, might be disqualified by the subsequent construction of an elaborate building on his property for which he never paid tax at all. Surely, if the legislature had intended the criterion to be the mere possession of house property of a certain value at the time when the Act came into force, it would not have cumbered the clause by reference to the assessment during the two years preceding 1st October 1937. We are therefore of opinion that the verb "is" in the final clause must be read as being equivalent to "was" and that the period during which the rental value is to be not less than Rs. 600 must be the same two years within which the assessment is to disqualify the person who claims to be an agriculturist. Seeing that in this case there was an assessment during the first half year of this period on a rental value exceeding Rs. 600, prima facie it would seem that the petitioners are disqualified.

It is, however, contended that the petitioners are not so disqualified because the property stood in the municipal registers in the name of one Venkatappayya. It is admitted that the petitioners owned the property during the whole of the relevant period, that they regarded themselves as responsible for the tax, that the tax was demanded from them, that on their representation the assessment was reduced and that they are the persons who actually paid the tax. On such admitted facts it seems to us impossible to hold that the petitioners are not the persons who were assessed to property tax in respect of this property, even though the municipal demand register had not been brought upto date by the substitution of their names for

that of some former owner. The petition is therefore dismissed with costs.

C.R.K./R.K. *Petition dismissed.*

A. I. R. (29) 1942 Madras 412

WADSWORTH AND PATANJALI SASTRI JJ.

P. K. L. S. Nachiappa Chettiar and another — Plaintiffs — Appellants

v.

Marappa Goundan and another — Defendants — Respondents.

Appeal No. 320 and Civil Revn. Petn. No. 2486 of 1939, Decided on 13th October 1941, against decree of Sub-Judge, Coimbatore, in O. S. N. 5 of 1936.

Madras Agriculturists Relief Act (4 of 1938), S. 8 — Bond charging lands executed in discharge of promissory notes — Lands purchased with liability to pay amount due under bond — Purchaser cannot scale down debt with reference to promissory notes.

When a purchaser seeks to scale down what has been referred to as a "property liability" under a mortgage, he can go back to an antecedent mortgage by the same mortgagor over the same properties, the date of the property liability being regarded as the date when the property originally became bound by the antecedent debt. The position is, however, quite different when the mortgage which binds the property is traced back not to any antecedent mortgage on the same property, but to a simple money debt due from the mortgagor. That money debt cannot in any sense be regarded as binding the property purchased by the purchaser and it is clearly a debt due from somebody other than the person who claims to scale down the suit liability. Hence a purchaser of the lands subject to liability to pay amount due under a bond charging such lands, in discharge of promissory notes cannot claim that his liability is a renewal of the previous money debt due from his mortgagor and is not entitled to scale down his debt with reference to the antecedent promissory notes. ('39) 26 A.I.R. 1939 Mad. 186, *Ref.*; ('41) 28 A.I.R. 1941 Mad. 62, *Expl.* [P 412 C 2]

S. Panchapagesa Sastri and P. S. Ramchandran — for Appellants.

P. Govinda Menon — for Respondents.

WADSWORTH J. — This appeal, to which the civil revision petition is filed as an alternative, arises out of an amended decree passed on an application under S. 19 of Act IV of 1938. The suit was filed on a security bond executed by defendant 1 for Rs. 5000. The debt covered by the bond had its origin in two earlier promissory notes, a matter of some importance, since the bond itself is dated 21st December 1932, i.e., after the date specified in S. 8 of Act 4 of 1938. Defendent 6 in 1935 purchased the lands covered by the bond, undertaking to pay a sum of Rs. 8500 towards the bond, but he paid nothing. The decree was passed in 1936 and after the Act came into force defendant 6 filed an application to scale down the decree.

The only contentions which seem to have been pressed in the lower Court related to the question whether the Act was ultra vires and whether the decree against defendant 6 was one which could not be scaled down with reference to S. 10 (2) (ii) of the Act. Both these points were also taken in the appeal and both are covered by authorities adverse to the plaintiff-appellant. The appellants have, however, in the arguments before us raised two contentions which are not mentioned in the memorandum of appeal and are not dealt with in the lower Court's order. The first contention is, that although on the authority in I.L.R. (1939) Mad. 218,[1] defendant 6 may be deemed to be under a property liability, the date of which is fixed with reference to the date of the original bond, defendant 6 had nothing to do with the antecedent promissory notes nor had the property which he purchased anything to do with those notes and therefore, defendant 6 is only entitled to scale down the decree with reference to the suit bond and cannot go behind it. We had to deal in (1940) 2 M.L.J. 685[2] with a case in which the purcharer of property bound by a mortgage successfully claimed the right to scale down his debt, not merely with reference to the actual suit mortgage, but also with reference to an earlier mortgage on the same property by the same mortgagor, discharged by the later mortgage on which the suit was filed. But the decision in that case is only authority for the position that when a purchaser seeks to scale down what has been referred to as a "property liability" under a mortgage, he can go back to an antecedent mortgage by the same mortgagor over the same properties, the date of the property liability being regarded as the date when the property originally became bound by the antecedent debt. The position is, however, quite different when the mortgage which binds the property is traced back not to any antecedent mortgage on the same property, but to a simple money debt due from the mortgagor. That money debt cannot in any sense be regarded as binding the property purchased by the appellant and it is clearly a debt due from somebody other than the person who claims to scale down the suit liability.

In our view, defendant 6 in the present case cannot claim that his liability is a renewal of the previous money debt due from his mortgagor. It follows, therefore, that the lower Court is wrong in scaling down this debt with reference to the antecedent promissory notes. The plaintiff is therefore entitled to a decree for the principal amount of the bond Rs. 5000 with interest at five per cent. under S. 9 of the Act from the date of the bond 21st December 1932 to 22nd March 1938, the date of the commencement of the Act and thereafter at six per cent. There is a further point which has been argued though not raised in the memorandum of appeal. It appears from the calculation memoranda filed by both sides that the plaintiff has, since the suit was filed, made two payments one of Rs. 44-7-3 and the other of Rs. 156-2-2 in discharge of a liability due from the mortgagor on account of land improvements loans taken from the Government. The joint memo of calculation filed in the lower Court specifically includes the loans paid by the plaintiff in the amount which the plaintiff shall be entitled to recover. By some oversight, these two payments have been omitted from the lower Court's decree. The deree will, therefore, be amended by the addition of these two amounts with interest at five per cent. from the date on which they were paid to 22nd March 1938 and thereafter at six per cent. It is represented that the plaintiff has made further payments towards these loans in order to preserve the

1. ('39) 26 A.I.R. 1939 Mad. 186 : 182 I.C. 879 ; (1938) 2 M.L.J. 1068 : I.L.R. (1939) Mad. 218, Perianna Goundan v. Sellappa Goundan.
2. ('41) 28 A.I.R. 1941 Mad. 62 : (1940) 2 M.L.J. 685, Venkatammal v. Ramaswami Iyer.

property from sale at the instance of the Government. We cannot go into the question of these further payments about which we have no information and which are not covered by the joint memo in the lower Court. The plaintiff must seek his remedy separately with reference to these amounts. In the matter of costs in the appeal, the appellant has succeeded only to a fraction of the extent covered by his appeal and his success has been on points which he did not raise in his memorandum of appeal and of which the respondent had little notice. In these circumstances, we think it proper to order that the appellant shall pay to the respondent costs proportionate to the extent of his failure in this appeal and shall bear his own costs. The civil revision petition is dismissed. No order for costs therein.

C.R.K./K.S. *Appeal partly allowed.*

A. I. R. (29) 1942 Madras 413 (1)

SOMAYYA J.

Sri Raghava Dass Jee Varu —

Appellant

v.

Minor Sarju Bayamma — *Respondent.*

Second Appeal No. 18 of 1941, Decided on 11th December 1941, against decree of Sub-Judge, Chittoor, in A. S. No. 57 of 1939.

(a) Hindu law—Marriage—Byragis—Marriage between, is valid.

The Byragi sect is one to which the members of the various castes—Brahmins, Sudras, Vaisyas and Kshatriyas —all may be admitted. There are no special ceremonies for such admission and once a person becomes a Byragi, he ceases to belong to the caste to which he originally belonged. Hence a marriage between Byragis is valid even if the parties to the marriage originally belong to different castes : ('30) 17 A. I. R. 1930 Cal. 57, *Rel. on.*

[P 413 C 1]

(b) Civil P. C. (1908), O. 8, R. 5 — Assertion in plaint not denied in written statement—Effect stated.

When a plaintiff describes herself as a Byragi and that statement is not denied by the defendant, it is enough to sustain the finding of the lower appellate Court that the plaintiff also is a Byragi.

[P 413 C 2]

A. Viswanatha Iyer and A. Ramaswami Iyer — for Appellant.

K. Rajah Ayyar and V. Seshadri — for Respondent.

JUDGMENT. — The finding of the learned District Judge is that both the plaintiff and the defendant are Byragis. As explained in A. I. R. 1930 Cal. 57,[1] at page 58 the Byragi sect is one to which the members of the various castes—Brahmins, Sudras, Vaisyas and Kshatriyas—all may be admitted. There are no special ceremonies for such admission and once a person becomes a Byragi, he ceases to belong to the caste to which he originally belonged. Cuming and Pearson JJ. dealing with a case of Byragis in the case just referred to say this :

"The presumption is always in favour of the legality of a marriage and it has not been shown to my satisfaction that a formal admittance to the sect is a necessary preliminary on the part of the woman to constitute a legal marriage among the Byragis."

They also held that the marriage of a Byragi with a female of another sect cannot be annulled and that it cannot be held to be invalid. They referred to an earlier case where it was held that a Byragi may marry an agriculturist woman and that the minor restrictions of Hindu law as to the classes with which a Byragi may or may not marry cannot with propriety be applied in the absence of proof of special custom. They say :

"Further bearing in mind that the Bairagi as a sect appears to repudiate ceremonies and forms as much as possible this would be probably unlikely ..... Strictly speaking a Bairagi is vowed to a life of celibacy though that does not necessarily make the marriage illegal. Sir Guroo Das Banerji in his Tagore Lecture (page 249) said that owing to their belief in the inefficacy of ritual observances choice in matrimony among the Bairagis is very little fettered."

In this case having regard to the fact that both the plaintiff and the defendant are Byragis, the further question whether a marriage of a male belonging to a higher caste with a woman of a lower caste is valid or not does not arise. It is argued by Mr. Viswanatha Ayyar that the finding that the plaintiff was a Byragi is not based upon any evidence. The plaintiff describes herself as a Byragi in the plaint. In the written statement beyond stating that she was the offspring of a Byragi male with a Sudra woman, there is no statement made that she is not a Byragi. What exactly are the rules governing the question whether a particular person is or is not a Byragi are not stated and it is not clear that the daughter of a Byragi by a Sudra woman could not be a Byragi herself. When a plaintiff describes herself as a Byragi and that statement is not denied by the defendant, it is enough to sustain the finding of the lower appellate Court that the plaintiff also is a Byragi. The second appeal is accordingly dismissed with costs. Leave refused.

C.R.K./K.S. *Appeal dismissed.*

1. ('30) 17 A. I. R. 1930 Cal. 57 : 121 I. C. 413 : 33 C. W. N. 967, Adwaita Das v. Lalit Mohan.

Hindu Law —
(a) ('40) Mulla, Page 504, N. 435.
('38) Gour, Page 62, N. 213.
C. P. C. —
(b) ('40) Chitaley, O. 8 R. 5, N. 1 Pt. 5.
('41) Mulla, Page 619 Pt. (f).

A. I. R. (29) 1942 Madras 413 (2)

WADSWORTH AND PATANJALI SASTRI JJ.

Vadakkunnadhan Devaswam Utama, His Highness the Maharaja of Cochin, by recognised agent the Secretary to the Government of Cochin—Appellant

v.

Perali Kunnath Tarwad Karnavan and Manager Madhava Menon —

Respondent.

Appeal No. 220 of 1939, Decided on 21st January 1942, against appellate order of Dist. Court, South Malabar, in A. S. No. 343 of 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 15—Procedure for amendment or discharge of rent decree is not execution proceeding and no appeal lies.

A proceeding under S. 15 for the amendment or discharge of a decree for rent is not a proceeding in execution but a special proceeding under a special statute, and in the absence of any provision for a right of appeal, no appeal lies. [P 414 C 2]

(b) Civil P. C. (1908), S. 115—Interference—View of lower Court, though not the only view, not unreasonable—No interference.

Where the Courts below have taken a view of the effect of the instrument which certainly cannot be deemed to be unreasonable, although it is perhaps, not the only view which might be taken and there is no error relating to jurisdiction, there is no ground for interference. [P 415 C 1]

T. R. Venkatarama Sastri and T. V. Rajagopalan—for Appellant.

C. Unikanda Menon—for Respondent.

WADSWORTH J. — The appellant is the Secretary to the Government of Cochin in his capacity as jenmi of certain lands in British India. For these lands he obtained a decree for rent for the period from 1930 to 1935. The tenant filed two applications under Madras Act 4 of 1938, one purporting to be under Ss. 15 and 16 of the Act praying the Court to receive a deposit of the last two years' rent and cancel the arrears embodied in the decree and the other purporting to be under S. 19 of the Act to record satisfaction of the decree by reason of the discharge to be ordered under the connected petition. The trial Court held that the deposit made fully discharged the arrears of rent for the two prescribed faslis and having accepted the deposit, it directed full satisfaction of the decree to be recorded. Against this latter order, an appeal was filed before the learned District Judge who took the same view of the kanam document as that taken by the trial Court and dismissed the appeal. A second appeal has been preferred as against the appellate order under S. 47, Civil P. C., and a preliminary objection has been taken that no appeal lies.

The Full Bench in I.L.R. (1941) Mad. 261[1] were concerned with an appeal from an order under S. 19 of the Act relating to a decree for a debt. The learned Judges held that the rule providing an appeal was ultra vires and that the decision in (1940) 1 M.L.J. 422[2] was right in so far as it holds that an order under S. 19, Madras Agriculturists Relief Act, is not appealable under S. 47, Civil P. C., even though an execution application be pending at the time. It was pointed out that when dealing with applications under S. 19 the Court was not acting in execution, its function being merely to apply the provisions of the Act to decrees against persons who are entitled to relief under the Act. It has been argued by Mr. Venkatarama Sastriar for the appellant that this decision has no application to the present case. We have on several occasions pointed out that S. 19 in terms applies only to a decree for the repayment of a debt and this does not having regard to the definition of "debt" in the Act include a decree for rent. We pointed out, however, in (1940) 2 M. L. J. 825[3] that a procedure analogous to that laid down in S. 19 has necessarily to be applied to decrees for rent in order to give effect to the provisions of S. 15 (1) of the Act which requires that on the performance of certain acts rents outstanding on the date of the commencement of the Act shall be deemed to be discharged whether the rent be due as such or whether a decree has been obtained therefor. One of us sitting separately has in (1941) 2 M. L. J. 655,[4] following this decision held that an application for relief under S. 15 by the amendment or discharge of a decree for rent has to be made to the Court which passed the decree, as is the case with an application under S. 19. Another of us in an unreported case, A. A. O. No. 298 of 1940 has applied the principle of the Full Bench decision that the proceedings under S. 19 are not proceedings in execution covered by S. 47, Civil P. C., to proceedings under S. 15 with the consequence that no appeal lies from an order refusing relief under that section in the case of a decree.

Mr. Venkatarama Sastriar has argued that, whereas in respect of a decree for a debt a special procedure is laid down in S. 19 for the amendment or satisfaction of that decree in accordance with the provisions of Act 4, no such procedure is laid down for a similar process in connexion with decrees for rent in S. 15. He concedes that when under S. 19 a procedure has been laid down without any right of appeal, it would be wrong, as the Full Bench has held, to graft a right of appeal on to that procedure either by rule or by treating the special procedure as one in execution. He contends, however, that under S. 15 the right is given but no procedure for implementing that right in the case of decrees is laid down, so that an aggrieved party is necessarily thrown back upon the ordinary procedure, which is the procedure in execution and therefore he must necessarily get the executing Court to record satisfaction of the decree which is deemed to be discharged by the process contemplated in S. 15 of Act 4. That no doubt is a very arguable point of view, but it seems to us to run contrary to the line of decided cases relating to this Act. The view taken by the Full Bench clearly is that the statutory procedure for the amendment of a decree in order to give effect to the scaling down provisions is not a procedure in execution at all and that proceedings under the Madras Agriculturists Relief Act for the amendment of a decree or recording satisfaction of a decree are independent proceedings to which S. 47, Civil P. C., can have no application. It would, in our opinion, be anomalous to hold that when the procedure explicitly laid down for decrees for debts is not a procedure in execution, the analogous procedure which we have approved for decrees for rent is a procedure in execution and to hold so would, of course, involve the consequence that the procedure in each case would have to be worked out not by the Court which passed the decree but by the executing Court which is not the process contemplated by S. 19. Having regard to the cases cited, while recognising the possibility that a different view might have been taken from that which the Courts have taken, we feel constrained to hold that a proceeding under S. 15 for the amendment or discharge of a decree for rent is not a proceeding in execution but a special proceeding under a special statute, and that, in the absence of any provision for a right of appeal, no appeal lies. We have been asked to treat this appeal as a revision petition, but in our opinion there are no grounds for interference in revision. The Courts below have taken a view of the effect of

1. ('41) 28 A. I. R. 1941 Mad. 235 : 198 I. C. 760 : I.L.R. (1941) 1 M.L.J. 164 : I. L. R. (1941) Mad. 261 (F.B.), Nagappa Chettiar v. Annapooraniachi.
2. ('40) 27 A. I. R. 1940 Mad. 418 : 194 I. C. 607 : (1940) 1 M. L. J. 422, Mohammad Tharaganar v. Syed Sahib.
3. ('41) 28 A.I.R. 1941 Mad. 116 : (1940) 2 M.L.J. 825, Ramadass Reddiar v. Munuswami Reddiar.
4. ('42) 29 A.I.R. 1942 Mad. 78 : (1941) 2 M. L. J. 655, Venkata Rajagopala Krishna Yachendra Bahadur Varu v. Venkata Seshacharlu.

the instrument which certainly cannot be deemed to be unreasonable, although it is, perhaps, not the only view which might be taken. But there is no error relating to jurisdiction. The appeal is therefore dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

C. P. C. —
(b) ('40) Chitaley, S. 115, N. 13 Pt. 9.
('41) Mulla, S. 115 Page 420 Pt. (d).

A. I. R. (29) 1942 Madras 415 (1)

LEACH C. J. AND KUPPUSWAMI AYYAR J.

Karamsetti Guravaiah — Appellant

v.

V. Rangiah, Official Receiver, Nellore and others — Respondents.

Letters Patent Appeal No. 16 of 1940, Decided on 16th December 1941, against order of King J., in A. A. A. O. No. 153 of 1938, D/- 22nd April 1940.

(a) Civil P. C. (1908), S. 47—Question between decree-holder auction-purchaser and Official Receiver on insolvency of judgment-debtor falls within S. 47—Second appeal is competent.

A question between the decree-holder auction-purchaser and the Official Receiver on insolvency of judgment-debtor regarding the sale is one falling within the purview of S. 47 and a second appeal is competent : ('17) 4 A. I. R. 1917 Mad. 924, *Foll.*; ('35) 22 A.I.R. 1935 Cal. 503, *Rel. on.* [P 415 C 2]

(b) Provincial Insolvency Act (1920), S. 51 (3) —Applicability.

Sub-section (3) of S. 51 only applies to sales which have taken place before the order of adjudication : ('38) 25 A.I.R. 1938 Mad. 449, *Foll.*; ('17) 4 A.I.R. 1917 Mad. 924, *Rel. on*; ('36) 23 A.I.R. 1936 Mad. 819, *Expl.* [P 415 C 2]

K. Umamaheswaram — for Appellant.

K. Kuppuswami and R. Ramamurthi Ayyar — for Respondents.

LEACH C. J. — This is an appeal under the Letters Patent from a decision of King J. dismissing an appeal which the appellant had filed challenging the correctness of an order passed by the District Judge of Nellore. The respondent, who is the Official Receiver of Nellore, says that no appeal lay to this Court from the order of the District Judge and this question has been argued first. On 15th January 1935 the appellant obtained a final decree for sale in a suit which he had filed against respondent 2 to enforce a mortgage. In the month of August in that year respondent 2 was adjudicated an insolvent. The appellant, who says he had no knowledge of the adjudication, proceeded to execute his decree, and on 17th August 1936 the property was sold by the Court. The appellant was the purchaser. On 16th September 1936 respondent 1 filed an application under O. 21, R. 90, Civil P. C., in which he asked for an order setting aside the sale on the ground that he had received no notice of it and also because the sale had resulted in substantial loss to him as the representative of the estate of the judgment-debtor. The execution proceedings had taken place in the Court of the District Munsif of Kanigiri and consequently respondent 1's application was made in that Court. The District Munsif held that the Official Receiver, was not a necessary party to the proceedings and that there had been no substantial injury caused by the sale. Respondent 1 appealed to the District Judge, who reversed both the findings of the District Munsif.

Respondent 1 says that no appeal lies from the decision of the District Judge by reason of sub-s. (2) of S. 104, Civil P. C., the appeal to him being from an order which fell within O. 43, R. 1 (j). The questions between the appellant and respondent 1 were, however, questions which also fell within the purview of S. 47 of the Code. There was the decree-holder on the one side and the Official Receiver, representing the judgment-debtor on the other. In these circumstances the appellant claims the right of a second appeal. That a second appeal does arise in such circumstances was recognized by a Bench of this Court in 30 M.L.J. 611[1] and a similar decision has been given by the Calcutta High Court, *see* 62 Cal. 457.[2] The judgment in 30 M. L. J. 611[1] is binding on us and decides against him the preliminary objection taken by respondent 1. The decision of King J. dismissing the second appeal was based on the judgment of this Court in I.L.R. 1938 Mad. 1063,[3] where it was held that sub-s. (3) of S. 51, Provincial Insolvency Act, only applies to sales which have taken place before the order of adjudication. Learned counsel for the appellant admits that this decision is against him, as is also the decision of another Bench of this Court, namely that given in 30 M. L. J. 611.[1] He says, however, that a contrary opinion was expressed by Venkatasubba Rao J. sitting with Cornish J. in 59 Mad. 928[4] and in these circumstances he asks that the question be referred to a Full Bench. The judgment of Venkatasubba Rao J. in 59 Mad. 928[4] in so far as it deals with the question now under discussion, was entirely obiter, and the observations of Venkatasubba Rao J. were fully discussed in the judgment of Burn J. in I.L.R. (1938) Mad. 1063.[3] We see no necessity for a reference to a Full Bench, especially as the last mentioned case is supported by the judgment of this Court in 30 M. L. J. 611.[1] The appeal fails and will be dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

1. ('17) 4 A. I. R. 1917 Mad. 924 : 34 I. C. 829 : 30 M. L. J. 611, Anantharama Iyer v. Kuttimalu Kovilamma.
2. ('35) 22 A.I.R. 1935 Cal. 503 : 157 I. C. 862 : 39 C. W. N. 424 : 62 Cal. 457, Dineshchandra Roy v. Jahanali Biswas.
3. ('38) 25 A. I. R. 1938 Mad. 449 : 178 I. C. 135 : I. L. R. (1938) Mad. 1063 : (1938) 1 M. L. J. 471, Mallikarjuna v. Official Receiver, Kistna.
4. ('36) 23 A.I.R. 1936 Mad. 819 : 170 I. C. 510 : 59 Mad. 928 : 71 M. L. J. 170, Muthan Chettiar v. Venkataswami Naicker.

C. P. C.—
(a) ('40) Chitaley, S. 47, N. 23 & N. 84.
('41) Mulla, Page 198 N. 'Appeal'.

A. I. R. (29) 1942 Madras 415 (2)

HORWILL J.

Public Prosecutor — Petitioner

v.

Madathi — Respondent.

Criminal Revn. Case No. 899 of 1941 (Criminal Revn. Petn. No. 846 of 1941), Decided on 7th January 1942, to revise order of Addl. Sess. Judge, Tinnevelly Division, D/- 22nd and 30th August 1941.

(a) Penal Code (1860), Ss. 323, 326, 302 and 304 — Offence held one under S. 304.

The accused struck her daughter with a very heavy piece of wood whereupon she fell down and never stirred and everybody took her as dead. She was then hung to a beam so as to make it appear that she had committed suicide :

Held that in the absence of a post-mortem certificate it was not easy to say that the accused must have had the requisite knowledge and intention for a conviction under S. 302. Under the circumstances of the case there was no reason to think that the deceased did not die immediately and the accused therefore committed at least an offence punishable under S. 304. [P 416 C 2]

Held further that even if the offence might have been one of a minor nature punishable under S. 323 and the girl might have died subsequently after she had been hung to a beam, the accused would still be guilty of an offence punishable under S. 326. [P 416 C 2]

(b) Criminal P. C. (1898), S. 562 — Applicability — Offence under S. 304, Penal Code.

The application of S. 562, Criminal P. C. is not illegal to an offence punishable only under S. 304 (2), Penal Code; but that section is ordinarily intended for persons led astray for the first time by force of circumstances or by bad company or evil influence ; and is not ordinarily to be applied to such offences. [P 416 C 2]

(c) Criminal P. C. (1898), S. 439—Interference with sentence.

In revision though the High Court is very reluctant to interfere with the discretion of a Judge as to the sentence it will not allow a very inappropriate order to stand. [P 416 C 2]

A. S. Sivakaminathan — for Petitioner.

M. C. Sridharan — for Respondent.

ORDER. — The evidence in this case discloses that the deceased girl, who was about 16 or 17 years of age had been talking to a cousin of hers in the village on several occasions and that on that account people had been gossiping about her. Accused 3 told accused 1, the mother of the girl, about this ; and she became very incensed with her daughter and took away her jewels, which made the girl sulky and disobedient. The same night she and another daughter, accused 2, dragged the girl towards an empty house with the intention of shutting her up there for the night. When the girl resisted accused 1 took up a heavy piece of wood and struck the deceased a blow on the head which caused the girl to fall to the ground at once. Accused 1 exclaimed that her daughter was dead. Just then, accused 3, who is the husband of accused 2, came in. Upon hearing what had happened, he advised the other two accused to hang the girl up to a beam of the house so as to make it appear that she had committed suicide. They accepted his suggestion and accused 3 tied her up to a beam. Persons were called in and told that the girl had committed suicide. Within a short time the girl was cremated ; so that it was impossible to know precisely the proximate cause of death. On this evidence the learned Additional Sessions Judge of Tinnevelly found that accused 1 killed her daughter and must have known that the blow was likely to cause her daughter's death ; but he considered that the mother was "acting under grave and continuing provocation, brought to a sudden head by the refusal of the girl to go into the house." He therefore found her guilty under S. 304 (2), Penal Code ; and instead of sentencing her to imprisonment, he treated her as a first offender and bound her over under S. 562, Criminal P. C. He found accused 2 guilty under section 323, Penal Code, read with S. 109, Penal Code and bound her over similarly. Accused 3 he found guilty under S. 201 (2), Penal Code, and sentenced him to one year's rigorous imprisonment. The Crown preferred an appeal against the acquittal of accused 1 of the charge under S. 302, Penal Code, and also a criminal revision petition for an enhancement of the sentence for the offence of which this accused was convicted.

There can be no doubt that the offence was committed under the circumstances set out above. It is argued by Mr. Sridharan that the offence might have been one of a minor nature punishable under S. 323, Penal Code, or so. Even if it be true, as Mr. Sridharan suggested, that the girl might have died subsequently after she had been hung to a beam, accused 1 would still be guilty of an offence punishable under S. 326, Penal Code. The weapon was a very heavy piece of wood and there can be no doubt that the injury caused was a grievous one. If accused 1 was guilty under S. 326, Penal Code, S. 562, Criminal P. C., would not apply ; because that offence is punishable with transportation for life. The offence may of course have been murder ; but I rejected the appeal of the Crown at the admission stage ; because in the absence of a post-mortem certificate it is not easy to say that accused 1 must have had the requisite knowledge and intention for a conviction under S. 302, Penal Code. As the deceased fell down immediately and never stirred, everybody there took her as dead, and there is no reason to think that she did not die immediately. Accused 1 therefore committed at least an offence punishable under S. 304, Penal Code.

It is true that the application of S. 562, Criminal P. C., was not illegal if the offence was one punishable only under S. 304 (2) ; but it seems very inappropriate to a case like this. It is ordinarily intended for persons led astray for the first time by force of circumstances or by bad company or evil influence ; and in my experience it has rarely been applied to offences punishable under S. 304, Penal Code. Accused 1 seems to have shown no regret at all for her act. She was not, as one might have expected of a mother who kills her child, overcome by grief and contrition. She readily acquiesced in the suggestion of accused 3 that they should pretend that the girl had committed suicide. From the evidence of P. W. 12 it is clear that the mother walked to the cremation ground without a tear in her eye. The learned Sessions Judge thought that the accused merely exceeded her right to chastise her refractory child ; but the conduct of the accused seems to me as unnatural and unmotherly as it was savage. Although I am very reluctant to interfere with the discretion of a Judge as to the sentence, I do not think that I can allow this very inappropriate order to stand. It is therefore set aside and accused 1 sentenced to five years rigorous imprisonment. I would have awarded a heavier sentence had she not been an old woman.

C.R.K./K.S. *Order accordingly.*

Penal Code —
(a) ('38) Ratanlal, Page 709, Pts. 6-8.
('36) Gour, Page 1115, Pt. 6.
Cr. P. C. —
(b) ('41) Chitaley, S. 562, N. 4, Pt. 2.
('41) Mitra, Page 1809, N. 1434.
(c) ('41) Chitaley, S. 439, N. 29 Pts. 3 and 5.
('41) Mitra, Page 1448 N. 1216.

A. I. R. (29) 1942 Madras 417

HORWILL J.

In re E. S. Ganapatisubramanya Iyer
Petitioner.

Criminal Revn. Case No. 811 of 1941 (Criminal Revn. Petn. No. 762 of 1941), Decided on 23rd October 1941, to revise judgment of Court of Sessions, Coimbatore division, in C. A. No. 60 of 1941.

(a) Defence of India Act (1939), S. 2, Rules under, R. 121—Accused organizing meetings at which intending satyagrahis made anti-war speeches — Accused introducing satyagrahis to audiences and appreciating their speeches at end of meetings — Accused held guilty under Rule 121.

The charge against the accused was that he organized meetings at which intending Satyagrahis made anti-war speeches, introduced them to the audiences, made appreciative references to their speeches at the close of the meetings, and thereby abetted the Satyagrahis in infringing the Defence of India Act. It was argued that as the principal offender had determined to commit an offence under the Defence of India Act, the accused committed no offence in merely announcing to the public that the principal offender intended to commit an offence:

Held that the offence of which the principal was convicted could not, however, be committed in the absence of the public; for the offence related to an act calculated to cause a certain effect in the minds of the public. In order, therefore, that the accused should commit an offence, it was necessary that a section of the public should be gathered there. By bringing the principal, who intended to commit an offence punishable under the Defence of India Rules, into contact with the public, which was necessary for the commission of the offence, the accused himself committed the offence of abetment within the meaning of R. 121. [P 417 C 2; P 418 C 1]

(b) Criminal P. C. (1898), S. 225 — Charge sheet filed by police relating to offence on 18th May 1941 — Charge itself relating primarily to incident on 26th March 1941 — Sub-Inspector only witness in case referring to incidents other than that on 18th May 1941 one of them being that of 26th March 1941 — Accused questioned particularly with regard to incident of 26th March 1941—Accused pleading guilty—Accused held not prejudiced by difference in charge and charge sheet.

The charge sheet filed by the police related to an offence committed on 18th May 1941, whereas the charge itself related primarily to an incident of 26th March 1941. The evidence of the Sub-Inspector the only witness in the case, mentioned incidents other than that of 18th May 1941, and one of them was that of 26th March 1941. The accused himself did not say that he was prejudiced by the sudden and unexpected charge. He was particularly questioned with regard to the incident of 26th March 1941 and pleaded guilty. In the lower appellate Court, the point that the accused was prejudiced was not taken and the difference between the charge sheet and the charge was discovered only during the researches by the accused's counsel into the records in the case at the time of revision:

Held that under the circumstances the accused was not prejudiced. [P 418 C 1]

(c) Defence of India Act (1939), S. 2, Rules under, R. 121 — Under R. 121 person cannot be punished for abetting in general — He must be charged with abetment of particular offence — Ordinary rule of joinder of charges applies — Misjoinder of charges held did not prejudice accused.

Rule 121 makes punishable the abetment of a particular offence and a person cannot be punished for abetting in general. He has to be charged with the abetment of a particular offence; so that the ordinary rules of joinder must apply to offences punishable under R. 121 read with the other provisions of the Defence of India Rules just as in an ordinary charge under Penal Code. [P 418 C 1]

The charge mentioned incidents on three dates in addition to the principal one of 26th March 1941. The attention of the accused was drawn primarily to the offence of 26th March 1941 and accused pleaded guilty :

Held that strictly speaking if the charge was read as being on four counts, then the charge would be illegal, because there would be a joinder of more than three offences. But since the accused had realized the nature of the charge and pleaded guilty he could not be said to have been prejudiced by any misjoinder of charges. [P 418 C 1]

K. Bhashyam Ayyangar for K. Desikachari and R. Gundappa Rao — for Petitioner.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER. — The petitioner was convicted by the Sub-divisional Magistrate of Erode under R. 121, read with R. 38 (5) of the Defence of India Rules, and was sentenced to one year's rigorous imprisonment and a fine of Rs. 500. The matter was taken in appeal to the Sessions Judge of Coimbatore, who confirmed the conviction chiefly on the ground that the petitioner had pleaded guilty. He came to the conclusion that although the punishment was severe, the Sub-divisional Magistrate had given good reasons for the sentence and that under the circumstances he did not consider it to be excessive. The charge against the petitioner was that he organized meetings at which intending Satyagrahis made anti-war speeches, introduced them to the audiences, made appreciative references to their speeches at the close of the meetings, and thereby abetted the Satyagrahis in infringing the Defence of India Act.

It is argued by Mr. Bhashyam that as the principal offender had determined to commit an offence under the Defence of India Act, the petitioner committed no offence in merely announcing to the public that the principal offender intended to commit an offence. The offence of which the principal was convicted could not however be committed in the absence of the public; for the offence relates to an act calculated to cause a certain effect in the minds of the public. In order therefore that the accused should commit an offence, it was necessary that a section of the public should be gathered there. The principal offender at each meeting was a man of no importance and it is possible that had he been left to himself, he might not have gathered persons round him to listen to what he was about to say. The petitioner, an educated man of some influence in the locality, was however of sufficient influence to be able to hold a public meeting and to afford a platform for the principal offender to commit his offence. By bringing the principal, who intended to commit an offence punishable under the Defence of India Rules, into contact with the public, which was necessary for the commission of the offence,

the petitioner himself committed the offence of abetment within the meaning of R. 121.

A technical objection to the conviction has been taken by Mr. Bhashyam. He points out that the charge sheet filed by the police relates to an offence committed on 18th May 1941, whereas the charge itself relates primarily to an incident of 26th March 1941. Mr. Bhashyam argues that the accused must have been prejudiced by that charge; true that the petitioner was confronted, when the case was almost at an end, with a charge in an unexpected form; but the evidence of the Sub-Inspector the only witness in the case, mentions incidents other than that of 18th May 1941, and one of them was that of 26th March 1941. The Magistrate appears to have selected the incident which he thought had been most clearly proved and framed the charge primarily with regard to that particular offence. If the accused had himself said that he was prejudiced by this sudden and unexpected charge, I should have seriously considered whether a retrial should not be ordered; but the accused pleaded guilty and he was particularly questioned with regard to the speech of Arumugham, the principal in the case of 26th March 1941. Moreover, even in the lower appellate Court, this point was not taken and this difference between the charge sheet and the charge was discovered only during the researches of Mr. Bhashyam into the records in the case. Under the circumstances, I see no reason to think that the accused was prejudiced.

The charge mentions incidents on three dates in addition to the principal one of 26th March 1941. Strictly speaking, if the charge is read as being on four counts, then the charge would be illegal, because there would be a joinder of more than three offences. Rule 121 makes punishable the abetment of a particular offence and a person cannot be punished for abetting in general. He has to be charged with the abetment of a particular offence; so that the ordinary rules of joinder must apply to offences punishable under R. 121 read with the other provisions of the Defence of India Rules just as in an ordinary charge under the Penal Code. I do not however think this calls for any interference; because the attention of the accused was drawn primarily to the offence of 26th March 1941. Moreover, the accused pleaded guilty. It is difficult to see how a person who realises the nature of the charge and pleads guilty can be said to have been prejudiced by any misjoinder of charges. Finally, Mr. Bhashyam contends that the sentence is too severe. It is no doubt a heavy one; but the question of sentence has been carefully considered both by the Sub-Divisional Magistrate and by the Sessions Judge, and it is not heavier than those imposed for similar offences in other cases. It does not therefore call for any interference in revision. The petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

Cr. P. C. —
(b) ('41) Chitaley, S. 225, N. 1 Pt. 1 and N. 3 Pt. 2.
('41) Mitra, Page 792, N. 730.

A. I. R. (29) 1942 Madras 418

WADSWORTH AND PATANJALI SASTRI JJ.

Mantri Errama Reddi and another — *Petitioners*

v.

Karnam Soorappa — *Respondent.*

Civil Revn. Petn. No. 857 and Appeal No. 73 of 1940, Decided on 7th October 1941, to revise order of Dist. Court, Anantapur, D/- 12th January 1940.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 20—No appeal from dismissal.

From the dismissal of an application under S. 20, there is no right of appeal. [P 418 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), Ss. 19, 20 — Preliminary decree in mortgage suit before Act—Final decree after Act — Failure to take plea in final decree proceedings is no bar to such plea being taken subsequently.

Where the preliminary decree was passed before the Act and the final decree was passed after the Act failure of the judgment-debtor to take a plea under the Act in the final decree proceedings does not bar the use of the express procedure laid down in the Act subsequently. [P 419 C 1]

A. Bhujanga Rao, M. S. Ramachandra Rao and D. R. Krishna Rao—for Petitioners.

S. V. Venugopalachari — for Respondent.

WADSWORTH J. — This civil revision petition and the appeal filed in the alternative arise out of the dismissal of an application under S. 20 of Act 4 of 1938. There is no right of appeal and the question has to be decided with reference to the civil revision petition whether the dismissal of the application was without jurisdiction or involved any irregular refusal to exercise jurisdiction. The decree in question arose out of a mortgage suit. The preliminary decree was passed on 27th August 1937, that is to say, before Act 4 came into force. The final decree was passed on 25th June 1938, that is to say, after Act 4 came into force. The application for stay under S. 20 was not filed until 18th December 1939. The learned District Judge held that the petitioner had the opportunity to urge his defence under Act 4 at the time of the passing of the final decree, that it was a plea which he might have and ought to have raised at that stage and that he was barred from raising it after the final decree was passed. He therefore dismissed the application.

Now the question whether when the preliminary decree was passed before the Act and the final decree was passed after the Act, it is open to the judgment-debtor in the final decree proceedings to raise a defence under the Act which will have the effect of modifying the amount due under the preliminary decree, is not free from difficulty and it is one which we do not propose to decide in this case. It has been established, *vide* (1941) 2 M. L. J. 359,[1] that when the preliminary decree has been passed after the Act came into force, a defence under the Act cannot be be raised in the final decree proceedings. But it may well be argued that such a defence might be permitted in the final decree proceedings if it was not open to the judgment-debtor before the passing of the preliminary decree. It is however, one thing to say that such a plea may possibly be open to the judgment-debtor in the final decree proceedings and it is another thing to say that if he does not

1. ('41) 28 A.I.R. 1941 Mad. 891 : (1941) 2 M.L.J. 359, Varadaraja Pillai v. Rukmani Ammal.

take such a plea in the final decree proceedings, he automatically loses the statutory remedy which is given to him under S. 19 of the Act. It is well established that S. 19 applies to the scaling down of preliminary decrees in mortgage suits and there are many decisions in which this Court has approved of the scaling down of a mortgage decree after the final decree has been passed, when both the decrees were anterior to the commencement of the Act.

There is nothing in the passing of the final decree which should necessarily prevent the modification of the preliminary decree by the special procedure prescribed in the Act. A final decree is not, strictly speaking, a decree for the repayment of the debt and the modification of the preliminary decree does not prevent the final decree from operating on the modified preliminary decree, for the form of the final decree does not specify the amount for which the property is to be sold; it merely requires a sale to be held and the realisation to be paid into Court to be applied in reduction of the amount due under the preliminary decree and under any further orders that may have been passed. Seeing that this Act has given a special procedure whereby judgment-debtors against whom decrees for repayment of debts have been passed before the Act came into force can have the benefit of a defence under the Act which they had no opportunity to urge before the decree was passed, we do not consider that the mere existence of a parallel remedy in the case of final decree proceedings in a mortgage action can, if it does exist, bar judgment-debtors from taking advantage of a special remedy given under the statute. While therefore we express no opinion on the question whether such a plea is open in final decree proceedings, when the preliminary decree is before the Act we are definitely of opinion that the failure to utilise such a procedure would not bar the use of the express procedure laid down in the Act. It follows therefore that the learned District Judge took a wrong view of his powers and failed to exercise jurisdiction which he had to stay the execution of this decree pending the filing of an application under S. 19. We are informed that though there is no subsisting stay from this Court, the execution of the decree has been prevented by collateral proceedings. We therefore allow this civil revision petition set aside the lower Court's order and direct the execution of the decree to be stayed under S. 20 of the Act. The petitioner is entitled to the costs in the civil revision petition. The appeal is dismissed, but there will be no order as to costs therein.

C.R.K./K.S. *Order accordingly.*

A. I. R. (29) 1942 Madras 419 (1)

WADSWORTH J.

Sri Rajah Vyricherla Narayana Gajapati Raju Bahadur — Petitioner

v.

Malla Ramunaidu — Respondent.

Civil Revn. Petn. No. 776 of 1940, Decided on 30th January 1942, to revise order of Dist. Munsif, Vizagapatam, D/- 7th November 1939.

(a) Madras Estates Land Act (1 of 1908), S. 61—Scope—Kattubadi — Arrears of — Rules of Interest Act apply, not S. 61, Estates Land Act.

The Madras Estates Land Act, S. 61 imposes a statutory liability for interest on arrears, but there is no such statutory provision with reference to kattubadi and the ordinary rules of the Interest Act would apply. If the tenant wishes to non-suit the landlord on the ground of his failure to pay interest for the arrears of kattubadi, he must let in evidence that there was such demand as would have made interest payable. Where a receipt has been given for the amount paid as for the kattubadi with no indication that there was any deficiency, it has not been established that the deposit was deficient. [P 419 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938) — Rent.

When interest is due that interest must be included in the rent for the purpose of Act 4 of 1938. [P 419 C 2]

K. Umamaheswaran — for Petitioner.

B. V. Ramanarasu — for Respondent.

ORDER. — This revision petition arises out of an application to scale down a decree for rent under Madras Act 4 of 1938. The tenant paid the kattubadi for Faslis 1347 and 1346 within the time stipulated under S. 15. He did not pay anything by way of interest on kuttubadi. The landholder contended in the Court below that the deposit was bad because nothing was deposited by way of interest for these faslis. The lower Court held that this was immaterial, a decision which cannot be supported as a proposition of law. But I find in the record no materials upon which it could be held that interest was in fact due on the arrears of kattubadi for those faslis. No doubt, in respect of rent under the Estates Land Act, Sec. 61 of that Act imposes a statutory liability for interest on arrears, but there is no such statutory provision with reference to kattubadi and the ordinary rules of the Interest Act would apply. If the plaintiff wished to non-suit the applicant on the ground of his failure to pay interest for the arrears of those faslis, he should have let in evidence that there was such demand as would have made interest payable. In fact, a receipt was given for the amount paid as for the kattubadi of these two faslis with no indication that there was any deficiency. In such circumstances I am of opinion that it has not been established that the deposit for either of these two faslis was deficient, though I do not subscribe to the view of the learned District Munsif that when interest is due, that interest will not be included in the rent for the purpose of Act 4 of 1938. In the result therefore the civil revision petition is dismissed with costs.

C.R.K./R.K. *Revision dismissed.*

A. I. R. (29) 1942 Madras 419 (2)

VENKATARAMANA RAO J.

Muniappa Mudaliar alias Muniswami Mudaliar — Appellant

v.

Kuppuswami Mudaliar — Respondent.

Second Appeal No. 784 of 1940, Decided on 16th July 1941, against decree of Dist. Court, Chingleput, D/- 23rd March 1939.

(a) Hindu law — Maintenance — Illegitimate son — Father not possessing any joint family property.

A person, who is not possessed of any joint family property is not under any obligation under the Hindu law to maintain his adult illegitimate son : 11 Mad. 91, *Rel. on.* [P 420 C 1]

(b) Costs — Appellant though successful not given costs.

An appellant though he succeeded in the appeal need not be given costs if his conduct has been very reprehensible. [P 420 C 1]

M. Chelva Ayyangar — for Appellant.

M. Natesa Ayyar and V. Ramaswami Iyer — for Respondent.

JUDGMENT. — The only question for decision in this second appeal is whether a person, who is not possessed of any joint family property is under any obligation under the Hindu law to maintain his adult illegitimate son. Both the lower Courts seem to have assumed that the father is bound to maintain his illegitimate son during his own lifetime. It seems to me that this assumption is wrong. It is a well settled principle of Hindu law that where the father is not possessed of any joint family property, he is under no personal obligation to maintain his legitimate son and the latter has no claim over the separate property of his father : *vide* 11 Mad. 91.[1] An illegitimate son cannot claim higher rights than the legitimate son and the same principle ought to apply to him. Mr. M. Natesa Iyer who appears for Mr. V. Ramaswami Iyer has not been able to cite any authority in support of the view taken by the lower Court. It seems to me therefore that the decree of the lower Court awarding maintenance to the respondent must be set aside. There is no doubt that the respondent is the illegitimate son, and the conduct of the appellant is very reprehensible. After living for 30 years with the mother of the respondent and his sisters, he has turned them adrift. This is not a case in which though the appellant has succeeded, I should give him any costs; in fact in the lower Courts it does not appear to have been seriously contested that the respondent was not entitled to any maintenance. In these circumstances I direct each party to bear his own costs in this Court and in the lower appellate Court. The order as to costs made by the first Court will stand. Leave to appeal is refused.

C.R.K./K.S. *Appeal allowed.*

1. ('88) 11 Mad. 91, Ammakannu v. Appu.

Hindu law —
(a) ('40) Mulla, Page 583 Pt. (b).
('38) Gour, Page 320 Pt. (11).
C. P. C. —
(b) ('40) Chitaley, S. 35, Note 5 Pt. 7 ; Note 7 Pt. 18.
('41) Mulla, Page 149 Pts. (r) and (s).

A. I. R. (29) 1942 Madras 420

HORWILL J.

In re Muthusami Goundan and others

Appellants.

Criminal Appeal No. 443 of 1941, Decided on 7th November 1941, against order of Addl. Sess. Judge, Coimbatore Division, in C. C. No. 61 of 1941.

(a) Penal Code (1860), Ss. 149 and 326—Unlawful assembly — Common object to cause grievous hurt—Which accused caused specific injuries not known — All accused can be held guilty under S. 326 by virtue of S. 149.

Even though it is not known which of the accused constituting an unlawful assembly with the common object to cause grievous hurt caused the specific injuries, they can all be found guilty under S. 326 by virtue of the provisions of S. 149. [P 421 C 1,2]

(b) Penal Code (1860), Ss. 148 and 149—Person cannot be convicted under S. 148 unless he actually has dangerous weapon in his hands — He cannot be held constructively guilty under S. 148 by reason of S. 149 unless that condition is satisfied.

A person cannot be found guilty under S. 148 unless he actually has a dangerous weapon in his hands. Hence unless that condition is satisfied, he cannot be held constructively guilty under S. 148 by reason of S. 149. [P 421 C 2]

Nugent Grant and N. Somasundaram — for Appellants.

Public Prosecutor — for the Crown.

JUDGMENT.—The appellants and three others were charged by the Additional Sessions Judge of Coimbatore of the offences punishable under Ss. 148, 302, 302 read with S. 149, and S. 324, Penal Code. He found accused 1, 2 and 5 guilty under Sec. 148 and sentenced them to three years' rigorous imprisonment each. He found accused 6 and 8 guilty under S. 148, Penal Code, read with S. 149, Penal Code, and sentenced them to one year's rigorous imprisonment each. He found accused 1, 2 and 5 guilty under Sec. 326, Penal Code, and sentenced them to five years rigorous imprisonment each. He also found accused 6 and 8 guilty under Sec. 326, Penal Code, read with S. 149, Penal Code, and sentenced them to two years' rigorous imprisonment each. The prosecution story is that the deceased and P. W. 2 were returning to their village after they had been to Pollachi Shandy to buy a buffalo. They reached a certain rock at about 8-30 p. m., when the eight accused suddenly attacked them. The deceased received such serious injuries that he fell down and was never able to get up again. P. W. 2 ran home and returned in the morning and was sent with the deceased to hospital. He had six abrasions. The deceased gave three statements, one (Ex. G) to his brother-in-law, P. W. 7, who after attending on the deceased, went at 1-45 A. M. and gave a complaint to the Village Magistrate. The Village Magistrate thereupon framed a report and sent it to the police station at Kinathukadavu. The Head Constable came from the station to the scene of offence and found the deceased and P. W. 2 lying there. He recorded a dying declaration, Ex. H at 9 A. M. As the matter was urgent he did not examine P. W. 2, but sent him with the deceased to the hospital at the same time. There, at 1-55 P. M., a third dying declaration (Ex. B) was recorded by the Sub-Magistrate.

There are considerable differences between Ex. G on the one hand and Exs. H and B on the other, and Ex. B shows a development as compared with Ex. H. The learned Sessions Judge came to the conclusion that Exs. H and B were not trustworthy because the deceased was probably influenced by Marappa Goundan. The learned Sessions Judge also came to the conclusion that it was doubtful whether P. Ws. 2 and 3 were present. He, however, thought that as Ex. G was made by the deceased before he could be influenced by any person, it must be true; and he based his conviction of the appellants almost entirely on Ex. G. He thought that such elements of Exs. H and B as agreed with Ex. G could be said to corroborate the first statement. I find no reason for disagreeing with the learned Sessions Judge in his appreciation of the value of the evidence of P. W. 3. He might have been present ; but there are many reasons for suspecting that he was not. It was unsafe, as the learned Sessions Judge said, to place any reliance at all

on his evidence. I do not, however, find any reason for doubting that P. W. 2 was present. It is true that the earliest statement, Ex. G, makes no reference to his presence; but that is easily accounted for by the fact that Ex. G is a statement given by P. W. 7 in which he merely says that as his brother was returning from Pollachi Shandy he was attacked by certain accused, who inflicted certain injuries. He did not attempt to set out in any detail the circumstances under which the deceased was attacked, if indeed the deceased told him of them. P. W. 2, however, sustained six injuries which, although trifling, were approximately of the same age as the injuries to the deceased. There was therefore no reason at all to doubt his evidence that he was with the deceased when he was set upon by a number of persons and beaten. I cannot place quite the same reliance on Ex. G as the learned Sessions Judge did. The learned Public Prosecutor argues that the difference between Ex. G on the one hand and Exs. H and B on the other can be accounted for by the endeavour of Marrappa Goundan and those who were assisting the deceased to make a case against accused 1. I do not think, however, that this entirely accounts for the difference in the two stories. It would explain the prominent part given to accused 1 in Exs. H and B; because this attack arose out of ill-feeling between the accused and the deceased arising out of the intimacy that had sprung up between accused 1 and the wife of the deceased. It does not, however, account for the very important discrepancy with regards to the specific acts attributed to the various accused. There is a distinct variation between Ex. G on the one hand and Exs. H and B on the other with regard to the causing of almost all the principal injuries. It has also to be remembered that Ex. G was not a direct record of what the deceased said, but of what P. W. 7 said more than five hours after the offence was committed. It is therefore quite probable that P. W. 7 had forgotten a great deal of what the deceased had said and it is even possible that he somewhat embellished the story.

In view of the discrepancy as to the overt acts committed by the various accused, it would be unsafe to convict accused 1, 2 and 5 under S. 326 on the second charge. Their conviction on that charge has therefore to be set aside. The learned counsel for the appellants has laid emphasis on the opinion expressed by the learned Sessions Judge that Marappa Goundan played a big part in presenting the prosecution case. Moreover, accused 1 was the principal enemy of the deceased; and so it is possible that P. W. 2 and P. W. 7 might have said that he was present even though he was not. If we view the evidence of P. W. 2 and the dying declarations with the caution that seems necessary, the benefit of the doubt must be given to accused 1; for there was a very strong motive for introducing his name. If P. W. 2's evidence were in accord with Ex. G, I should consider the case against even this accused very strong; for Ex. G attributes a very minor part to him; but P. W. 2 supports the case given by the deceased in Exs. B and H. However, after making every allowance for embellishment, we can feel quite sure that at least five persons, including accused 2, 5, 6 and 8, attacked the deceased while he was returning home from the Pollachi Shandy with P. W. 2 and that some of them inflicted serious injuries in pursuance of the common object of the assembly, which must have been to cause grievous hurt, if nothing more serious. Nobody seems to have had any motive for falsely implicating these four accused. Even though we do not know which accused caused the specific injuries, they can all be found guilty under S. 326, Penal Code, by virtue of the provisions of S. 149, Penal Code.

Accused 6 and 8 have been convicted under S. 326 read with S. 149, Penal Code, and sentenced to two years' rigorous imprisonment. As I am finding accused 2 and 5 guilty under the same section, it seems proper to award to them the same sentence of two years rigorous imprisonment. The conviction of accused 6 and 8 under S. 148, Penal Code, read with S. 149, Penal Code, is probably improper. A plain reading of S. 148, Penal Code, seems to indicate that a person cannot be found guilty under S. 148, Penal Code, unless he actually has a dangerous weapon in his hands. I would, therefore, find them guilty under S. 147, Penal Code, instead of S. 148, Penal Code, and reduce the sentence to nine months rigorous imprisonment. As we cannot be certain that accused 1, 2 and 5 were guilty of the overt acts attributed to them in Ex. G, their conviction under S. 148 on the first charge will be set aside and accused 2 and 5 will be convicted under S. 147, Penal Code. They will be sentenced to nine months' rigorous imprisonment each. In the result, accused 1 is acquitted. The other appellants will have their conviction under S. 148, Penal Code, set aside and they will be convicted under S. 147, Penal Code, and sentenced to nine months' rigorous imprisonment each. The convictions and sentences of accused 6 and 8 on the third charge will be affirmed. Accused 1, 2 and 5 will be acquitted of the second charge and accused 2 and 5 found guilty of the same offence by virtue of S. 149, Penal Code, and sentenced to two years' rigorous imprisonment each. All the sentences will run concurrently.

C.R.K./G.N. *Order accordingly.*

Penal Code —

(a) ('36) Gour, Page 519, N. 1418.
('36) Ratanlal, Page 351, Note "In prosecution. . . 'that assembly'."

(b) ('36) Gour, Page 515 Pt. 1.
('36) Ratanlal, Page 348 Pt. 1.

A. I. R. (29) 1942 Madras 421

LEACH C. J. AND KUPPUSWAMI AYYAR J.

M. C. A. R. C. S. Chockalinga Thevar Firm represented by one of partners, M. C. Chockalinga Thevar—Appellant

v.

K. A. Sankarappa Naikar and another — Respondents.

Appeal No. 192 of 1939, Decided on 9th December 1941, against decree of Sub-Judge, Madura, in O. S. No. 75 of 1938.

Res judicata — Final judgment in another case on same point pronounced pending appeal operates as res judicata.

The rule of res judicata applies equally to appeals and miscellaneous proceedings as it does to original suits and therefore where during the pendency of an appeal a final judgment on the same issue is pronounced by a competent Court of jurisdiction in another case it operates as res judicata : 29 Mad. 333 (F.B.), *Expl.*; *Case law referred.* [P 422 C 1]

Advocate-General and T. S. Vaidhyanatha Iyer — for Appellant.

T. V. Ramiah, K. Rajah Ayyar and N. Sivaswami — for Respondents.

a LEACH C. J. — The appellants are a firm of merchants dealing in raw cotton at Tirumangalam and Virudhanagar. They filed the suit out of which this appeal arises in the Court of the Subordinate Judge of Madura to recover from the respondents the sum of Rs. 24,264-12-10, which they claimed to be the balance of the price of goods sold and delivered to the respondents. Their case was that the respondents had in partnership entered into the contracts with the appellants. The respondents denied that they were partners and averred that the appellants and their other creditors had agreed to a composition of twelve annas in the rupee, which precluded the appellants from recovering more. The Subordinate Judge held that the respondents had entered into the contract in partnership, but he found for them on the question relating to the composition. Consequently, he granted the b appellants a decree for Rs. 16,248-14-8, being three-fourths of Rs. 21,685-3-7 which he held to be the balance of the purchase consideration. The appellants have appealed against the finding that there was a completed agreement for a composition. The respondents have filed a memorandum of cross-objections with regard to the finding of the Subordinate Judge that they entered into the contracts in partnership.

When the appeal was called, learned counsel for the respondents reported that they were no longer instructed. The reason for the withdrawal of their instructions is not far to seek. The question whether there was a completed agreement for a composition was raised and decided in another suit in the same Court, (O. S. No 23 of 1929). That suit was filed by respondent 2 in the present appeal. It c was tried by a different Subordinate Judge, who held that the proposed agreement for a composition was not completed and this decision has not been challenged on appeal. The parties to the present appeal were all parties to O. S. No. 23 of 1929. In these circumstances the learned Advocate-General for the appellants contends that the decision in O. S. No. 23 of 1929 brings into operation in this appeal the doctrine of res judicata. We consider that the contention is well founded. In 11 All. 148,[1] a Full Bench of the Allahabad High Court held that the rule of res judicata applies equally to appeals and miscellaneous proceedings as it does to original suits and that where after the commencement of the trial of an issue a final judgment on the same issue is pronounced by a competent Court of jurisdiction in another case it operates as res d judicata. There are two single Judge decisions of this Court to the same effect, 59 Mad. 777[2] and 1937 M. W. N. 299.[3] In the former of these two cases, Varadachariar J. held that there was nothing in the observations of the Full Bench in 29 Mad. 333[4] to exclude from the operation of the rule of res judicata judgments coming into existence during the pendency of proceedings by way of appeal or revision if such judgments are allowed to become final. In the second of the two cases, Venkataramana Rao J. quoted with approval 11 All. 148[1] and 59 Mad. 777.[2]

We agree that there is nothing in the judgment e in 29 Mad. 333[4] which prevents the Court holding that the doctrine of res judicata does apply in such a case as is now before the Court. In 29 Mad. 333[4] there were cross suits between the same parties on the same facts. The suits were tried together and were dealt with in one judgment, although separate decrees were drawn up. An appeal was filed, but only against one of the decrees. The question was whether the fact that no appeal had been filed in the other suit brought into operation S. 13, Civil P. C. of 1882, which corresponds to S. 11 of the present Code. The Full Bench held that the doctrine of res judicata had no application when the object of the appeal, in substance if not in form, was to get rid of the decision which was pleaded in bar. In the present case the respondents have allowed the later decision to govern the position between themselves and the appellants and the later f decision being final it must be applied here. Explanation 1 to S. 11 of the Code states that the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto. The appellants are entitled to have the decree under appeal amended without any further investigation of the facts. They accept the finding that the balance outstanding is Rs. 21,685-3-7 and consequently there will be a decree for this amount with interest at six per cent. from 14th November 1938 to this date and thereafter interest on the decretal amount at the Court rate. The appellants' claim in the lower Court was valued at Rs. 24,264-12-10, but as they did not succeed to the full extent they will receive and pay proportionate costs there. In this Court they are entitled to costs on the difference g between Rs. 21,685-3-7, the amount now decreed and Rs. 16,248-14-8 the amount decreed in the trial Court. The memorandum of objections will be dismissed with costs.

C.R.K./K.S. *Order accordingly.*

C.P.C.—
('40) Chitaley, S. 11, N. 21 Pt. 1.
('41) Mulla, Page 38 Pt. (a).

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* A. I. R. (29) 1942 Madras 422

KING J.

Pasumarthi Venkateswara Rao, minor by next friend and grandfather, Venkataratnam — Appellant

v.

Pasumarthi Venkatanarayana — Respondent. h

Second Appeal No. 1223 and Civil Revn. Petn. No. 816 of 1938, Decided on 5th September 1941, against decree of District Court, West Godawari at Ellore, in Application No. 225 of 1937.

• **Hindu law — Partition — Suit for partition on behalf of two minors by their maternal grandfather for their share held did not constitute separation from each other.**

The joint filing of a plaint by two plaintiffs cannot automatically and invariably bring about their separation inter se. The question depends upon their wishes or intentions. When one coparcener separates from the others, there is no presumption that the latter remain united nor is there a presumption that they are separated: 30 Cal. 725 (P. C.) and ('25) 12 A. I. R. 1925 P. C. 49, *Rel. on.* [P 423 C 1]

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1. ('89) 11 All. 148: 1889 A. W. N. 42 (F. B.), Bal-Kishan v. Kishan Lal.
2. ('36) 23 A. I. R. 1936 Mad. 190: 161 I. C. 219: 59 Mad. 777: 70 M. L. J. 223, Rangachariar v. Rangaswami Iyengar.
3. ('37) 24 A. I. R. 1937 Mad. 544: 172 I. C. 268: 1937 M. W. N. 299, Krishnan Nair v. Kambi.
4. ('06) 29 Mad. 333: 16 M. L. J. 63 (F. B.), Panchananda Velan v. Vaithinatha Sastrial.

The decision whether the other members remain joint or become divided must therefore depend upon their own actions. [P 423 C 1]

Where a suit for partition on behalf of two minors was brought by their maternal grandfather for their share :

Held that the two plaintiffs speaking through their next friend did not intend to separate from each other : ('30) 17 A. I. R. 1930 Mad. 326, *Disting.* [P 423 C 2]

P. V. Vallabhacharyulu — for Appellant.

T. Satyanarayana — for Respondent.

JUDGMENT.—This appeal arises out of a suit for partition, O. S. No. 73 of 1934, filed on behalf of two minor plaintiffs who were brothers by their maternal grandfather. The father of the plaintiffs is defendant 4. When the suit was filed a step-brother of the plaintiffs was in the womb. After his birth he was impleaded as defendant 11 but died before the preliminary decree was passed. It is common ground that the share of defendant 4 and his sons in the family property is $\frac{1}{3}$. In its preliminary decree, the first Court declared that the plaintiffs were entitled to $\frac{1}{2}$ of this $\frac{1}{3}$, and that defendant 4 was entitled to the other half, $\frac{1}{4}$ in his own right, and $\frac{1}{4}$ by inheritance from his son defendant 11. Plaintiffs appealed. While the appeal was pending plaintiff 1 died. It was held by the appellate Court that his share fell to his father defendant 4, so that in the appellate decree plaintiff 2 is declared entitled to $\frac{1}{4}$ of $\frac{1}{3}$ and defendant 4 entitled to the remaining $\frac{3}{4}$ of that $\frac{1}{3}$. Against that decree, plaintiff 2 has preferred this second appeal. In the appeal memorandum he contends (i) that defendant 11 was never entitled to any share, and (ii) that plaintiff 1's share has passed not to defendant 4 but to himself. At the hearing of the appeal, the first of these contentions was not seriously pressed. I proceed accordingly to consider the second. The decision of this question depends upon whether the action of the two plaintiffs in filing the suit has brought about their separation from each other. If it has, defendant 4 certainly succeeds to plaintiff 1's share; if it has not, plaintiff 1's share falls to plaintiff 2 by survivorship. It is clear from the authorities that the joint filing of a plaint by two plaintiffs cannot automatically and invariably bring about their separation inter se. The question depends upon their wishes or intentions. When one coparcener separates from the others, there is no presumption that the latter remain united : *see* 30 Cal. 725.[1] On the other hand, there is equally no presumption that they are separated. As is laid down in 48 M. L. J. 83[2] (also a decision of the Privy Council): "A member of a joint family can separate himself from the other members ..... and the remaining coparceners without any special agreement amongst themselves may continue to be coparceners . . . ." The decision whether the other members remain joint or become divided must therefore depend upon their own actions.

What are the actions of the plaintiffs in the present case ? Of course, they do nothing of their own initiative. Their grandfather acts for them. Did he intend that his grandsons should divide from each other, or divide only from the other members of the family. The only evidence comes from the plaint itself. It is argued for defendant 4 that inasmuch as the plaint does not state specifically that the plaintiffs are to remain joint it must be presumed that they wished to be divided inter se. I do not see why I should presume so improbable an intention. What conceivable reason could there be in ordinary circumstances for two boys of 11 and 9 to divide from each other ? A reading of the plaint can leave no doubt in anyone's mind that the two brothers are, so to speak, treated as a unit, and what is asked for is their "share" in the singular. Nor does the original preliminary decree purport to give them any separate shares. It seems to me perfectly clear that the two plaintiffs, speaking through their next friend did not intend to separate from each other.

I need only refer briefly in conclusion to 52 Mad. 856,[3] upon which the lower appellate Court relies. That was a case in which two brothers, of whom one was a major, and the other a minor, represented by the first as his next friend, filed a suit for partition. It was held in that case that upon the death of plaintiff 2 his share did not devolve upon plaintiff 1. The reason for that decision, however, was that during the interval between the filing of the plaint and the decision of the Court to allow partition as desirable in the interests of the minor plaintiff, the major plaintiff was already divided, and the minor plaintiff was not. It was therefore impossible for the major plaintiff to contend during that interval that he and his brother were still undivided. Whatever may be said of that reasoning, and it seems to me, with the very greatest respect, open to some question, it cannot possibly in my opinion be applied to the facts of the present case where both plaintiffs were minors. In the result I must allow this appeal in part, by enlarging plaintiff 2's share to $\frac{1}{2}$ of $\frac{1}{3}$, and reducing the share of defendant 4 to the other half. Each party to bear his own costs. (Leave refused).

C.R.K./K.S. *Appeal partly allowed.*

1. ('03) 30 Cal. 725 : 30 I.A. 130 : 7 C.W. N. 642 : 8 Sar. 470 (P. C.), Balabux v. Rukmabai.
2. ('25) 12 A.I.R. 1925 P. C. 49 : 87 I. C. 333 : 52 I. A. 83 : 48 M. L. J. 83 : 48 Mad. 254 (P. C.), Palani Ammal v. Muthu Venkatachala Moniagar.
3. ('30) 17 A. I. R. 1930 Mad. 326 : 121 I. C. 837 : 52 Mad. 856 : 57 M.L.J. 720, Rama Rao v. Hanumantha Rao.

Hindu law —

('40) Mulla, Page 397 Pt. (o); Page 402 Pts. (l) & (m); Page 404 Pt. (r).

('38) Gour, Page 433 Pts. 5 & 6; Page 594 Pt. 6; Page 616 Pts. 2 & 3; Page 661, Pt. 1.

A. I. R. (29) 1942 Madras 423

KING AND HAPPELL JJ.

Batchu Mallikarjanarao — Appellant

v.

Official Receiver, Kistna at Masulipatam and another — Respondents.

Appeal No. 51 of 1940, Decided on 17th December 1941, against order of District Court, Kistna, D/- 8th August 1939.

(a) Provincial Insolvency Act (1920), S. 4 — Official Receiver cannot use S. 4 to re-agitate questions finally decided against him.

When an Official Receiver has allowed an order to be passed against him ex parte and has applied unsuccessfully to have that order set aside or reviewed, and fails to avail himself of his remedy by way of appeal or revision, he should not be permitted to make use of the provision of S. 4 to re-agitate a question which has been finally decided against him. Of course, the language of S. 4 is very wide

and comprehensive. But it is not comprehensive enough to cover the case of a dispute between the Official Receiver as representing the insolvent's estate and a person who has no real connexion whatever with the insolvency, when the subject-matter of that dispute is an order passed by an ordinary civil Court, where the jurisdiction of that Court cannot be questioned : ('40) 27 A. I. R. 1940 Mad. 733, *Rel. on*; ('39) 26 A. I. R. 1939 Mad. 896, *Disting*. [P 424 C 1, 2]

(b) Civil P. C. (1908), O. 21, R. 93 —Interest.

The wording of R. 93 is perfectly explicit. It gives the executing Court full discretion to order interest or refrain from doing so as it pleases. [P 424 C 1, 2]

P. Satyanarayana Rao — for Appellant.

V. Govindarajachari — for Respondents.

KING J. — The appellant was the purchaser in December 1935 of certain properties sold in execution of a decree in O. S. No. 79 of 1932. At that time, the judgment-debtor had been adjudicated an insolvent and the sale was held in spite of a protest by the Official Receiver against it. The purchase price and poundage were deposited in accordance with rules by the appellant at the conclusion of the sale. In 1936, upon an application by the Official Receiver, the sale was set aside, and this order was confirmed on appeal by the High Court. Accordingly in 1938 the appellant whose title to the property purchased had now gone, applied for the refund of the poundage and for the award of interest upon the purchase money for the period during which it was in deposit. Notice of this application was given to the Official Receiver in February 1938. But the Official Receiver, for reasons which it is not necessary now to investigate remained ex parte; and in July 1938 the executing Court passed an order in favour of the appellant that the poundage should be refunded and that interest on the purchase money deposited should be paid at the rate of six per cent. When this order was passed against him, the Official Receiver applied to the executing Court itself to have it reviewed or set aside. But the executing Court refused to accede to either of these requests. Thereupon the Official Receiver applied to the District Court under S. 4, Provincial Insolvency Act, for a declaration that the order of the executing Court was not binding upon him in respect of the question of interest. The District Judge passed an order upon this application in favour of the Official Receiver holding that the executing Court had no power to grant interest in the circumstances, and that even if it had the power, there were no circumstances which could justify imposing any liability to pay interest upon the Official Receiver or the insolvent's estate. Against this order of the learned District Judge, the purchaser has filed the present appeal.

Two points have been taken in the appeal. The first is that the District Judge had no jurisdiction to pass any order under S. 4, and the second is that the orders which he has passed are incorrect as he has overlooked the provisions of O. 21, R. 93, which gave the executing Court full discretion to order interest or refrain from doing so, as it pleases. We are inclined to agree with both these arguments. It seems to us, contrary to all judicial principle, that when an Official Receiver has allowed an order to be passed against him ex parte and has applied unsuccessfully to have that order set aside or reviewed, and fails to avail himself of his remedy by way of appeal or revision he should be permitted to make use of the provision of S. 4, Provincial Insolvency Act, to re-agitate a question which has been finally decided against him. Of course, the language of Section 4 is very wide and comprehensive. But we do not think that it is comprehensive enough to cover the case of a dispute between the Official Receiver as representing the insolvent's estate and a person who has no real connexion whatever with the insolvency, like the present appellant when the subject-matter of that dispute is an order passed by an ordinary civil Court under O. 21, R. 93, where the jurisdiction of that Court cannot be questioned. We have been referred to a judgment reported in A.I.R. 1940 Mad. 733,[1] by Somayya J., in which the identical question now before us has been considered. The learned Judge has pointed out that in a matter of this kind the Official Receiver is in precisely the same position as an ordinary suitor and that he would be prevented in those circumstances from filing a fresh suit to re-agitate the question which had been decided in execution. If he is prohibited from filing a suit, he is equally prohibited from making any application under S. 4, Provincial Insolvency Act. Learned counsel who has appeared for the Official Receiver, has not seriously attempted to challenge the reasoning of our learned brother in this case and with respect we adopt that reasoning. We have indeed been referred by learned counsel for the Official Receiver to another case reported in (1939) 1 M. L. J. 203,[2] in which an order in favour of certain appellants at a court auction has been set aside at the instance of the Official Receiver under S. 4, Provincial Insolvency Act. But to that order the Official Receiver was not himself a party, and therefore, that case can easily be distinguished from the case now before us. Following the decision to which we have referred, viz., A. I. R. 1940 Mad. 733,[1] we hold that in the circumstances of this case the learned Judge had no jurisdiction to interfere at the instance of the Official Receiver under S. 4 with the order passed by the executing Court.

On the question of the discretion of the executing Court to order payment of interest, no argument is possible in favour of the respondent, unless it be argued that the appellate Court can interfere with the exercise of that discretion. The wording of Rule 93 is perfectly explicit. The learned District Judge was wrong therefore in saying that the executing Court had no power to order payment of interest. On the question whether the executing Court made a wise use of its discretion or not, we of course, need now say nothing, because we have already held that the learned District Judge had no jurisdiction to entertain the application under S. 4 in the circumstances of the case. The result is that this appeal must be allowed and the order of the learned District Judge set aside and the application of the Official Receiver under S. 4 dismissed with costs of this appeal payable out of the insolvent's estate.

C.R.K/K.S. *Appeal allowed.*

1. ('40) 27 A. I. R. 1940 Mad. 733 : 193 I. C. 138, Arunachalam v. Official Receiver, Coimbatore.
2. ('39) 26 A.I.R, 1939 Mad. 896 : (1939) 1 M.L.J. 203, Seshayya v. Rangiah.

C. P. C. —
(b) ('40) Chitaley, O. 21, R. 93 N. 7 Pt. 1.
('41) Mulla, Page 905 Pt. (r).

a

* A. I. R. (29) 1942 Madras 425

KING AND HAPPELL JJ.

Firm of Bhimaji Motiji at Champagalli, Bombay — Appellant

v.

Official Receiver, Bellary—Respondent.

Appeal No. 219 of 1940, Decided on 18th December 1941, against order of Dist. Court, Bellary, D/- 10th October 1939..

(a) Provincial Insolvency Act (1920), S. 51 (3) — Construction — Expression "a person" in S. 51 (3) includes decree-holder purchaser.

The language of S. 51 (3) is very wide. "A person" in S. 51 (3) includes a decree-holder purchaser and b a stranger purchaser. [P 425 C 2]

(b) Provincial Insolvency Act (1920), S. 51 (3)—Execution proceedings — Intervention of judgment-debtor's insolvency cannot cancel proceedings.

In view of the provisions of S. 51 (3), the intervention of the judgment-debtor's insolvency in the course of the execution proceedings can never bring about a practical cancellation of the execution proceedings. [P 425 C 2]

*(c) Provincial Insolvency Act (1920), S. 51 —Benefit of execution refers to money—Decree-holder purchasing property in execution — Decree-holder must pay purchase money to Official Receiver and not property purchased : ('35) 22 A. I. R. 1935 Mad. 907=159 I. C. 244, c *OVERRULED.*

The only logical way of interpreting S. 51 is that the benefit of the execution represents the bids made at a sale or the assets realised otherwise in the course of execution. It refers in other words to money. There is no scope under S. 51 for the passing of an order directing a decree-holder to restore to an Official Receiver property which he has purchased at an execution sale. The decree-holder must pay the purchase money to the Official Receiver. In the practical working of a single section like S. 51 the decree-holder cannot be permitted to decide whether he should pay to the Official Receiver the money which he paid for the property or restore the property itself. The only disability under which the decree-holder purchaser lies is that he will not be entitled to the benefit of the execution, that is, he d cannot set off the amount of the decree debt against the purchase price but he is bound to pay the amount of the purchase money into Court just like any other stranger purchaser : ('38) 25 A.I.R. 1938 Mad. 906, *Rel. on*; ('35) 22 A.I.R. 1935 Mad. 907=159 I.C. 244, *OVERRULED.* [P 425 C 2; P 426 C 1]

V. S. Narasimhachar — for Appellant.

A. Bhujanga Rao and D. R. Krishna Rao — for Respondent.

KING J.—The subject-matter of this appeal is a claim by the Official Receiver under S. 51, Provincial Insolvency Act, for the payment to him of the amount of the bid of the decree-holder in execution of his decree against the judgment-debtor who was adjudicated insolvent. The learned District Judge of Bellary has passed an order calling upon the decree-holder to pay him the amount of his bid less the costs of the execution, and the decree-holder now appeals.

It is not seriously disputed at the hearing before us that S. 51, Provincial Insolvency Act, must govern the decision of this appeal. Nor does the appellant seriously dispute that on the question of the date of the insolvency of the judgment-debtor his rights must give way before those of the Official Receiver. What he does say, however, is that the benefit of the execution does not consist in the bid which he made but consists in his ownership of the property which he purchased, and therefore he is prepared not to pay to the Official Receiver the amount which he offered for the land but to restore the land itself to the Official Receiver. The learned District Judge holds that such a solution of the rights of the parties may be equitable but that there is no provision in the Act for carrying it into effect. We were at first much attracted by the argument in favour of the appellant that if the land, which he has purchased, and for which he did not need actually to pay any money into Court as he was f permitted to set off the purchase against his claim in execution, is restored to the Official Receiver, then the appellant derives no benefit from the execution and therefore the purpose of S. 51 has been fulfilled. On the other hand, it appears upon further reflection that such a procedure would in effect nullify S. 51. What is the practical result of permitting the appellant to convey the land which he purchased to the Official Receiver? It is this, that the whole execution proceedings are as if they were cancelled. The judgment creditor is in the same position as he was before the execution proceedings began with the same claim against the insolvent. The insolvent is in the same position with his debt still unsatisfied to the same extent. The Official Receiver is in the same position because if there had not been this execution, he would have g been entitled to take possession of the property which had vested in him, and that is what it is now proposed by appellant that he should be allowed to do. All the parties therefore occupy precisely the same position as if there had been no execution at all. That being so, it would appear that the "effect of the insolvency on antecedent transactions," to quote from the heading in the Act just before S. 51, would be that if the decree-holder purchases any property, the antecedent transaction is cancelled. That seems to us to be a matter which is simple enough to have been stated in simple language in the Act itself. There is, on the other hand, an indication in S. 51 that the intervention of insolvency in circumstances like these can never bring about a practical cancellation of the execution proceedings because sub-s. (3) says that a person who in good faith purchases the property of a debtor under a h sale in execution shall in all cases acquire a good title to it against the receiver. The language of this section is very wide. "A person" will include a decree-holder purchaser and a stranger purchaser and, there is the expression "in all cases." We think accordingly that the only logical way of interpreting S. 51 is in this way, that the benefit of the execution represents the bids made at a sale or the assets realised otherwise in the course of execution. It refers in other words to money and S. 51 decides that money which is so realised shall in certain circumstances be paid to the decree-holder, and in certain other circumstances be paid to the Official Receiver. There does not seem to us to be any scope under S. 51 for the passing of an order directing a decree-holder to restore to an Official Receiver property which he has purchased at an execution sale.

This matter has to be decided without very much assistance from the authorities. We have been re-

ferred only to two cases. In A.I.R. 1935 Mad. 907,[1] Pandrang Row J. had to deal with a case in which the point at issue was whether money should be paid by the decree-holder purchaser to the Official Receiver under S. 51. Pandrang Row J. decided that it should not be paid for two reasons, the first being that the execution sale itself was a nullity and therefore had to be set aside. The second reason, which we may say, with respect, was hardly necessary to be put forward in order to dispose of the case, was that when a Court has granted permission to a decree-holder to bid without actually depositing the money in Court, it is a breach of faith on the part of that Court to call upon the decree-holder later at the instance of the Official Receiver to pay money to the Official Receiver in cash. There is no attempt by Pandrang Row J. to analyse S. 51 and, with respect, although the situation may be an unfortunate one from the point of view of the decree-holder, we do not think that the good faith of the Court is at all involved in an interpretation of S. 51, which interpretation it is obligatory upon us to attempt. The other decision is one of Venkataramana Rao J. in 1938 M. W. N. 841.[2] There the learned Judge observes that having regard to the language of S. 51, sub-s. (3) no difference ought to be made between a decree-holder purchaser and a stranger purchaser. If the decree-holder has purchased property in good faith, the purchase by him should be upheld. The fact that he had notice of the insolvency would not indicate an absence of good faith on his part. In that case, Venkataramana Rao J. upheld the claim of the decree-holder purchaser under S. 51 (3) to retain the property which he had purchased. We do not think it possible that in the practical working of a single section like S. 51 the decree-holder should be permitted to decide whether he should pay to the Official Receiver the money which he paid for the property or restore the property itself. As Venkataramana Rao J. has said, the only disability under which the decree-holder purchaser lies is that he will not be entitled to the benefit of the execution, that is, he cannot set off the amount of the decree debt against the purchase price but he is bound to pay the amount of the purchase money into Court just like any other stranger purchaser. We with respect prefer to follow this second and later decision and in our opinion the learned District Judge's order is right. This appeal must fail and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

1. ('35) 22 A. I. R. 1935 Mad. 907 : 159 I. C. 244, Henry Merieu v. Official Receiver, Madura.
2. ('38) 25 A.I.R. 1938 Mad. 906 : 182 I. C. 888 : (1939) 1 M. L. J. 705 : 1938 M. W. N. 841, Venkatasivayya v. Suryanarayana.

A. I. R. (29) 1942 Madras 426

HORWILL J.

Sait Kasturi Chand and another — Petitioners

v.

Addagalla Vaikuntam — Respondent.

Criminal Revn. Case No. 1067 of 1941 (Criminal Revn. Petn. No. 1004 of 1941), Decided on 4th February 1942, to revise order of Sess. Judge, West Godavari Division at Ellore, D/- 14th November 1941.

Criminal P. C. (1898), Ss. 202, 200, 192—Case transferred under S. 192 — Stage of enquiry under S. 202 already passed by Magistrate transferring case—Transferee Magistrate cannot proceed under S. 202—Mere transfer is not sufficient to indicate whether stage has passed.

Section 202 makes express provision for action under that section in cases transferred to a Magistrate under S. 192 but if that stage has already been passed by the Magistrate who took cognizance of the case, then there cannot be any enquiry under S. 202. The question whether the transferee Magistrate has jurisdiction or not to order an investigation under S. 202 depends upon whether the transferor Magistrate had or had not passed beyond that stage when he transferred the case to the transferee Magistrate. The mere fact that the Magistrate transferred the case is itself no indication of the stage which the Magistrate taking cognizance had reached; because under Section 200 he can transfer the case even before the sworn statement is taken. [P 426 C 2; P 427 C 1]

K. S. Jayarama Iyer for V. Parthasarathy — for Petitioners.

C. V. Dikshitalu—for Respondent.

A. S. Sivakaminathan for Public Prosecutor— for the Crown.

ORDER.—The complainant in this case gave a complaint under Ss. 406 and 409, Penal Code, to the Joint Magistrate of Narasapur to the effect that he had pledged jewels with certain Marwari bankers (the petitioners in this Court) and that when he redeemed the jewels they were found to weigh 35 tolas as against 47 tolas entrusted. The Joint Magistrate, after recording the sworn statement of the complainant under S. 200, Criminal P. C., came to the conclusion that the present petitioners were not bankers and that the offence disclosed by the complaint was one under S. 406, Penal Code, which is triable by a Second Class Magistrate and not one punishable under S. 409, Penal Code, which is triable only by a First Class Magistrate. He therefore exercised his powers under S. 192, Criminal P. C., and transferred the case to the Stationary Sub-Magistrate of Narasapur for disposal. The Stationary Sub-Magistrate, instead of proceeding with the case under S. 204, Criminal P. C., referred the matter to the police for investigation under S. 202, Criminal P. C., and upon the police report the Stationary Sub-Magistrate dismissed the case under S. 203, Criminal P. C. The complainant was not satisfied with that order and took the matter in revision to the Sessions Judge of West Godavari, who set aside the order of dismissal on the ground that the Stationary Sub-Magistrate had no jurisdiction to take action under S. 202, Criminal P. C.

Section 202, Criminal P. C., makes express provision for action under that section in cases transferred to a Magistrate under S. 192, Criminal P. C., but if that stage had already been passed by the Magistrate who took cognizance of the case, then it appears clear to me that there cannot be any enquiry under S. 202, Criminal P. C. For example, if the Magistrate to whom the case is transferred always has the power under S. 202, Criminal P. C., to direct the police to make an investigation, it would mean that he has power under that section to revise or review the orders of the Magistrate who transferred the case to him if that Magistrate himself had already taken action under S. 202 and satisfied himself that there were sufficient grounds for proceeding with the case. The question whether the Stationary Sub-Magistrate had jurisdiction or not to order an investigation under S. 202, Criminal P. C., would therefore depend upon whether the Joint Magistrate had or had not passed beyond that stage

when he transferred the case to the Stationary Sub-Magistrate.

The mere fact that the Joint Magistrate transferred the case to the Stationary Sub-Magistrate is itself no indication of the stage which the Magistrate taking cognizance had reached; because under S. 200 he can transfer the case even before the sworn statement is taken. The wording of S. 200, Criminal P. C., is so wide as to make it permissible for a Magistrate taking cognizance of a case to transfer it at any stage. Only the Magistrate who took cognizance is in a position to say definitely whether he considered, in the words of S. 204, Criminal P. C., that there was sufficient ground for proceeding. In the absence of an opinion by that Magistrate (I do not think it will be fair to ask that Magistrate after such a lapse of time to try to recollect what his opinion was then), we have to judge of the Magistrate's intention—if that is possible — by the order which he passed. It is argued for the complainant that the mere fact that the Magistrate said that he took the case on file itself indicates that he did not think that it was a case which necessitated investigation or enquiry under S. 202, Criminal P. C. I am not however sure that that is so. "Taking on file" is not an expression found in the Code, and I do not think that it has any precise meaning even in Magisterial usage. The Joint Magistrate may have thought that he could not transfer the case to the file of the Stationary Sub-Magistrate unless he took the case on his own file; and so it may well be that he transferred the case even at the stage of taking of cognizance under S. 200, Criminal P. C. If so, it was open to the Stationary Sub-Magistrate to order an enquiry under S. 202, Criminal P. C. As one cannot be sure that the Sub-Magistrate had no jurisdiction, I do not think that the learned Sessions Judge was right in setting aside the order of the Stationary Sub-Magistrate on the ground of want of jurisdiction. We have to presume that he had jurisdiction unless we can be sure that he had not. This petition is therefore allowed and Cri. R. P. No. 17 of 1941 on the file of the Sessions Court, West Godavari, is restored and the Sessions Judge ordered to dispose of it according to law.

C.R.K./R.K. *Petition allowed.*

Cr. P. C.—

('41) Chitaley, S. 192, N. 3 Pt. 2 and S. 202, N. 8.

('41) Mitra, Page 614, N. 600 and Page 715, N. 664.

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* A. I. R. (29) 1942 Madras 427

HORWILL J.

In re G. Guruswami — Petitioner.

Criminal Revn. Case No. 909 and Crim. Revn. Petn. No. 856 of 1941, Decided on 27th October 1941, to revise judgment of Third Presidency Magistrate, Egmore, Madras, D/- 29th July 1941.

*** Defence of India Act (1939), S. 2—Applicability of Act — Speech in connexion with trade or industrial dispute—Speech not adversely affecting war effort or seriously embarrassing Government — Act should not be invoked — Sole object of speech to promote welfare of speaker and his fellow workers in a particular employment — Act does not apply.**

The preamble of the Act shows that it was not intended that the Act should be used where the public safety and the defence of British India is not imperilled. Where however a speaker is charged under the Act, the Magistrate is bound to convict if the provisions of the Act are infringed. He can however in determining the appropriate sentence, consider whether the speech causes any embarrassment to the Government in the prosecution of its war effort. [P 427 C 2]

Where a speech is made in connexion with a trade or industrial dispute which in normal times would not render the speaker liable to punishment, and the speech does not adversely affect the war effort or seriously embarrass the Government; it is ordinarily unfair to invoke the provisions of the Act. The Act cannot be applied to a speech the sole object of which was to promote the interests of the speaker and his fellow workers in a particular employment. [P 427 C 2]

N. D. Varadachari for R. Chakravarthi — for Petitioner.

Crown Prosecutor — for the Crown.

ORDER. — The petitioner has been convicted and sentenced in connexion with three speeches made by him, which have been marked as Exs. B, D and F; and he has been sentenced to six months rigorous imprisonment. From a perusal of the portions of the speeches marked, I have no doubt that the learned Magistrate was right in holding that they infringed the provisions of the Defence of India Act. They tend to bring the Government in some small measure into hatred or contempt. I do not think that there was any direct instigation to use criminal force against any public servant, but a great deal was said against the police which would have the effect of rousing hatred against them. There is, however, nothing in these comparatively mild speeches which could influence the conduct or attitude of any section of the public in a manner likely to be prejudicial to the effective prosecution of the war. I feel that where a speech is made in connexion with a trade or industrial dispute which in normal times would not render the speaker liable to punishment, and the speech does not adversely affect the war effort or seriously embarrass the Government, it is ordinarily unfair to invoke the provisions of this Act. It may be well in this connexion to refer to the Preamble of the Act, in which it is said :

"Whereas an emergency has arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences; and whereas the Governor-General in his discretion has declared by proclamation under sub-s. (1) of S. 102, Government of India Act, 1935, that a grave emergency exists whereby the security of India is threatened by war; It is hereby enacted as follows:". . . . . .

This Preamble shows that it was not intended that this Act should be used where the public safety and the defence of British India is not imperilled. Where, however, a speaker is charged under this Act, the Magistrate is bound to convict if the provisions of the Act are infringed. He can, however, in determining the appropriate sentence, consider whether the speech causes any embarrassment to the Government in the prosecution of its war effort. The speeches with which we are here concerned are non-political in nature and refer only once to the war and that indirectly. That one reference seems rather to approve of the war. I am satisfied, on a reading of the speech as a whole, that the sole object of the speaker was to promote the interests of himself and his fellow-workers in Municipal employment. The petitioner has already spent some months in jail; and I think that he has more than sufficiently suffered for any infringement of the

Defence of India Act. The sentence is reduced to that already undergone.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 428

WADSWORTH AND PATANJALI SASTRI JJ.

P. V. A. L. Ramaswami Naicker — *Appellant*

v.

Pudi N. Sokkayya Naicker — *Respondent.*

Appeal No. 308 of 1939, Decided on 2nd October 1941, against decree of Sub-Judge, Sivaganga, in O. S. No. 38 of 1938.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii), Proviso (A) — Firm or association of persons assessed to income-tax — Individual member comes within S. 3 (ii), Proviso (A).

In view of the provisions of Ss. 14 (2) and 48, Income-tax Act, when a firm or an association of persons is assessed to income-tax, what is really assessed is the income of the individual members and therefore the individual member comes within S. 3 (ii), Proviso (A). [P 429 C 1]

A brought a suit for partition against his father and other members of his family and during the pendency of the suit applied for appointment of a receiver. *A* himself was appointed as receiver, and while carrying on the family business, he was assessed as receiver in respect of the profits derived during the pendency of the suit. On the basis that *A* and the members of his family after the institution of the partition suit constituted an association of persons within the meaning of S. 3, Income-tax Act, it was argued for *A* that, inasmuch as he was assessed as representing an association of persons, the assessment could not be deemed to have been imposed upon him in his individual capacity and that, consequently he was not excluded from the benefits of the Act :

Held that *A* must be deemed to have been assessed to income-tax and was not entitled to claim the benefits of the Act : ('41) 28 A. I. R. 1941 Mad. 672, *Rel. on* ; ('39) 26 A. I. R. 1939 Mad. 942 and ('41) 28 A.I.R. 1941 Mad. 152, *Disting.* [P 429 C 1]

(b) Usurious Loans Act (1918, as amended by Madras Act, 8 of 1937), S. 3—Mortgage bond carrying 9 per cent. per annum compound interest with annual rests—Lower Court reducing rate to 7 per cent. compound interest with biennial rests — Reduced rate held not unduly high — Fact that reduced interest amounted to more than twice amount of principal originally advanced held no ground for further reduction.

The mortgage bond carried 9 per cent. per annum compound interest with annual rests. The lower Court applying the provisions of the Usurious Loans Act, reduced the rate of interest to 7 per cent. compound interest with biennial rests. It was argued that even that rate was unduly high and should be reduced still further on the ground that the interest alone as reduced amounted to more than twice the amount of the principal originally advanced :

Held that the mere fact that a debtor had failed to pay the interest due from time to time and had allowed it to accumulate for a long time was not a ground on which he could invite the Court to extend any indulgence to him. The rate of interest carried by the bond which had been reduced by the lower Court was not unduly high and in the circumstances no further reduction was called for in the interests of justice. [P 429 C 1]

R. Ramasubbu Ayyar — for Appellant.

K. Rajah Ayyar and P. P. Ramabhadra Iyer — for Respondent.

PATANJALI SASTRI J.—This appeal arises out of a suit brought by the respondent to enforce a mortgage dated 3rd September 1925. Only two questions have been argued before us. The first contention relates to the claim of the defendant-appellant to the benefits of the Madras Agriculturists Relief Act. In order to understand this contention it is necessary to state a few facts. The defendant brought a previous suit for partition against his father and other members of his family and during the pendency of the suit applied for appointment of a receiver. The defendant himself was appointed as receiver, and while carrying on the family business, he was assessed as receiver in respect of the profits derived during the pendency of the suit. The assessment was made during the years referred to in proviso (A) to S. 3 (ii), Agriculturists Relief Act. The assessment was made on the basis that the appellant and the members of his family after the institution of the partition suit constituted an association of persons within the meaning of S. 3, Income-tax Act. It is argued for the appellant that, inasmuch as he was assessed as representing an association of persons, the assessment could not be deemed to have been imposed upon him in his individual capacity and that, consequently, he is not excluded from the benefits of the Act. The decisions in (1939) 2 M. L. J. 495[1] and (1940) 2 M.L.J. 841[2] have been cited in support of this contention. We do not think that these decisions have much bearing on the point. The first of these cases lays down that, unless an assessment is made actually in the name of a person, he cannot be deemed to have been assessed for purposes of proviso (C) to S. 3 (ii) of the Act. It was a case where an assessment to property tax made in the name of a benamidar was relied upon in order to exclude the real owner of the property from the benefits of the Act, and it was held that the actual assessment was the test and not merely the ownership of the property which was the subject of assessment.

In the other case referred to the question was whether the annual rental value of property belonging to a person but assessed in the name of his wife could be added to the annual rental value of properties assessed in his own name so as to disqualify him under proviso (C) and it was held that in order to come within its scope the person should have been actually assessed. These cases have no application here, as the income of the association of persons assessed in the hands of the appellant cannot be said to belong to another "person", as that expression is defined in Act 4 of 1938. On the other hand, we are of opinion that the principle of the decision in (1941) 1 M. L. J. 782[3] governs this

1. ('39) 26 A. I. R. 1939 Mad. 942 : 186 I. C. 424 : (1939) 2 M. L. J. 495, Saminatha Odayar v. Srinivasa Iyer.
2. ('41) 28 A. I. R. 1941 Mad. 152 : 196 I. C. 288 : I. L. R. (1941) Mad. 383 : (1940) 2 M. L. J. 841, Sarveswara Rao v. Umamaheswara Rao.
3. ('41) 28 A. I. R. 1941 Mad. 672 : 199 I. C. 424 : (1941) 1 M. L. J. 782, Somappa v. Venkataswami Chetti.

case. There, it was held that an assessment to income-tax made on a firm must, having regard to the scheme of the Income-tax Act, be regarded as an assessment of the individual partners, although the assessment was made in the name of the firm. Just as in the case of the firm, when an association of persons is assessed to income-tax, an individual member's share of that income is not liable to tax under S. 14 (2) of the Act, and if an individual member's share of the income is not liable to assessment or is liable to be assessed at a lower rate than the income of the association the member is entitled, under the provisions of S. 48, to get a refund. Having regard to these provisions, it is clear that when an association of persons is assessed to income-tax, what is really assessed is the income of the individual members. Nor is the position different under the Agriculturists Relief Act. Both a firm and an association of persons are alike excluded from the definition of "person". The case is therefore governed by the decision in (1941) 1 M.L.J. 782[3] and the appellant must be deemed to have been assessed to income-tax within the relevant years. It follows that he is not entitled to claim the benefits of the Act.

The second point relates to the rate of interest to which the plaintiff is entitled. The bond carried 9 per cent. per annum compound interest with annual rests. The lower Court, applying the provisions of the Usurious Loans Act, reduced the rate of interest to 7 per cent. compound interest with biennial rests. It is argued that even this rate is unduly high and should be reduced still further. The fact that the interest alone now amounts to more than twice the amount of the principal originally advanced is put forward as a ground for such reduction. We do not think that the mere fact that a debtor has failed to pay the interest due from time to time and has allowed it to accumulate for a long time is a ground on which he can invite the Court to extend any indulgence to him. The rate of interest carried by the bond which has been reduced by the Court below is not unduly high and we do not consider that in the circumstances any further reduction is called for in the interests of justice. The appeal fails and it is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 429

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Ramineedi Rayalamma and others — Appellants

v.

Sree Muthangi Butchiramayya Garu and others — Respondents.

Appeal No. 174 of 1938, Decided on 29th October 1941, against decree of District Court, East Godawari at Rajahmundry, in O. S. No. 10 of 1936.

(a) Contract Act (1872), S. 73 — Interest.

Interest cannot be awarded under S. 73 to a party who is not entitled to it under any provision of law: ('38) 25 A.I.R. 1938 P.C. 67, *Foll.* [P 431 C 1]

(b) Interest — Prior to suit, when payable explained.

Interest could be awarded only if it is payable by custom or if there was an agreement either express or implied to pay interest or under the provision of any substantive law entitling the plaintiff to recover the same : ('38) 25 A. I. R. 1938 P. C. 67, *Foll.* [P 431 C 2]

(c) Interest Act (1839), S. 1—Date of payment — Court can find it out from construction of document.

Construction of a document is one of the well-recognised methods from which the intention of the parties is to be gathered. Where the Court is asked to find a date from a document, on which a certain act had to be done by one of the parties, it is not only permissible but incumbent upon the Court to ascertain it not only from what the parties have stated expressly but also from what they may be deemed to have said impliedly though unambiguously. It may be that a document may contain no indication express or implied, from which an inference as to the date on which the act had to be done or performed may be deducible. But that is a different matter. In ascertaining the intention of the parties as to the date of performance by an act of arithmetical calculation or by a reference to a calender is as much permissible for a Court as to discover it by the construction of a document or from what may be implied from the nature of the transaction from which it might be inferred that the contracting parties must have intended that date to be a part of the agreement between them. Hence it is open to a Court to find out the date of payment from the construction of a document : (1889) 14 P.D. 64, *Rel. on.* [P 432 C 1, 2]

(d) Interest Act (1839), S. 1 — Applicability of — Existence or non-existence of agreement to pay interest is irrelevant in applying provisions of Act.

In applying the provisions of the Interest Act, the facts that there was no agreement to pay interest or that the parties did not intend to pay interest as deducible by way of an inference from a mere omission of a promise to pay the same are entirely irrelevant. If there is an agreement to pay interest either express or implied it would have to be awarded independently of the provision of the Interest Act. The questions whether a creditor did or did not intend to take interest or a debtor did not intend to pay the same have no bearing when a Court is called upon to decide whether interest could be awarded under the provisions of the Interest Act. [P 433 C 1]

(e) Interest Act (1839), S. 1—"Certain time" — When it is payable at certain time — Test explained.

A sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for happening of those events, if they ever do happen, may be indefinitely postponed. [P 434 C 1]

Where a partition deed provided that a party taking certain property was to pay the other party a certain sum and accordingly a partition was effected and the parties had become complete owners of their definite shares :

Held that the payment of the money was not contingent upon events which might never happen. The time on which the payment was to be made must be held to be certain within the meaning of S. 1 : ('21) 8 A.I.R. 1921 Mad. 76; ('39) 26 A.I.R. 1939 Mad. 877 and ('27) 14 A. I. R. 1927 All. 444, *Disting.* [P 434 C 1]

a **(f) Interest Act (1839), S. 1 proviso — Equitable jurisdiction of Courts to grant interest — Partition — Party liable to pay certain sum to another party on taking particular share — Enjoyment of such property by such party but failure to pay amount — Other party held may be awarded interest.**

Under a partition, a party taking particular property was to pay the other party a certain sum. The party took the property and was enjoying the income thereof but he did not pay the money to the other party :

Held that though the jural relationship between the parties did not fall under one of the heads mentioned in Halsbury's law under which the equitable jurisdiction of the Court could be invoked for grant of interest, still having regard to the fact that the b defendants had been realising the income of the plaintiff's share in the joint property under the deed of partition without discharging the debt that they were liable to pay under the terms of the partition deed, it may not be incorrect to award interest under the proviso to S. 1, Interest Act. [P 435 C 1]

(g) Set off — Partition arrangement under which *S* to pay certain sum to some persons acting on behalf of whole joint family and to get certain sum on taking particular share from other party — Suit by *S* for such sum against such persons and their father who ratified partition—Latter held entitled to set off even though father was not party to partition arrangement.

Under a partition deed, *S* who took particular share was to get certain sum from the other parties to the partition. He was also to pay certain sum to c some of the other parties who proposed the partition. In a suit by *S* for the amount, the other parties claimed set off for the amount due by *S*. *S* contended that as the father of other parties was not a party to the partition arrangment but only to the suit, no set off could be claimed. The father had ratified the partition :

Held that the other parties were acting on behalf of the whole joint family including their father and that money being payable to all of them, set off could be allowed. [P 435 C 2]

Sir A. Krishnaswami Ayyar, Advocate-General, and Ch. Raghava Rao — for Appellants.

V. Govindarajachari and M. S. Ramachandra Rao — for Respondents.

ABDUR RAHMAN J.—The only two questions debated in this appeal relate to (a) interest claimed d by the plaintiff, and (b) set off claimed by defendants 2 to 5. They arise out of the following facts. Mutangi Butchiramiah defendant 1 and Mutangi Narasiah, were real brothers. Narasiah died leaving him surviving a son Sitharamiah, plaintiff 1 and four daughters. Sitharamiah died childless pendente lite and is now represented by his sisters plaintiffs 2 to 5. Sitharamiah was a minor at the time of his father's death and his uncle Butchiramiah acted as his guardian. Disputes seem to have arisen between them in regard to partition of property after Sitharamiah had come of age. Butchiramiah was, it appears adamant ; but his sons defendants 2 to 5 took a more reasonable attitude. They settled the matter amicably and entered into an agreement (Ex. A) on 11th March 1930 with Sitharamiah under which a partition of joint family properties, both moveable and immovable was agreed upon. A perusal of this document however shows that on account of difficulties in regard to partition of outstandings due to them by third persons, the parties to the agreement agreed to divide them along with other moveables separately and by a process different e from what was to be adopted in the partition of immovable properties. It also appears from this document that defendants 2 to 5 were to make a proposal for partition of immovable properties by dividing them into two lots and since the choice of selecting one of them for himself was given to Sitharamiah, he had agreed to pay a sum of Rs. 5500 to the persons making the proposal for partition. The properties were accordingly divided by defendants 2 to 5 into two lots "A" and "B" and in order to equalise the value of the two lots, the lot "A" was to carry with it a liability to pay a sum of Rs. 14,000 to the person who got the lot "B". Sitharamiah selected the lot "B" and thus became entitled to recover a sum of Rs. 14,000 from the defendants who had got immovable properties of that value in excess of their share. This settlef ment was recorded on 14th March 1930 in the deed of partition, Ex. B, under which the lot "B" was declared to have been allotted to Sitharamiah and the lot "A" along with its liability to pay the sum of Rs. 14,000 to all the defendants including Butchiramiah, his sons taking the responsibility on themselves to secure their father's consent to the partition thus effected and to indemnify the plaintiff if he suffered any loss in consequence of Butchiramiah's refusal to agree to the partition. Exhibit B provided that the "share marked B was allotted to Sitharamiah of us and he shall immediately" or (as translated by Mr. Govindarajachari as soon as possible) "take possession of the properties of that share and enjoy them." The same provision was made in regard to the other lot "A" allotted to the defendants. The deed of partition g also contained the following provision :

"The income derived from the properties in Schs. A and B shall be taken by the persons to whose respective share they had fallen. After 1st July 1929 each sharer shall take the income derived from his respective share of properties."

The schedule referring to the lot "A" appended to this deed of partition and described as Sch. A was followed by the following words : "Those who got this A schedule of properties should pay separately to those who got B schedule of properties a sum of Rs. 14,000." And a note was added to the effect that, "there is no connexion whatever between this amount and the sum of Rs. 5500 payable by Muthangi Sitharamiah to Muthangi Jaggarao and others." Butchiramiah ratified the agreement Ex. A and the deed of partition Ex. B. The defendants did not, in spite of taking possession of their share h of immovable properties in accordance with the deed of partition, pay the said sum of Rs. 14,000 to Sitharamiah. This led to the institution of the suit out of which the present appeal arises. The plaintiff claimed interest at 12 per cent. per annum with effect from either 1st July 1929 or from 14th March 1930 to 14th March 1936, i. e., the date when the suit was instituted. He also asked for subsequent interest from the date of the plaint up till the date of realisation of the amount sued for. Besides the objection as to limitation, non-maintainability of suit, etc., the defendants denied their liability to pay interest and claimed a set off of Rs. 5500 in accordance with the agreement contained in Ex. B. In regard to the partition of moveable properties and outstandings another suit was brought by the defendants in 1931 in the Subordinate Judge's Court of Rajahmundry. This is now numbered as O. S. No. 7 of 1935 and is in spite of a lapse of a decade still pending in that Court.

The learned District Judge of East Godawari overruled the other objections raised by the defendants ; but refused to allow the interest asked for by the plaintiff and allowed the set-off claimed by the defendants. In dealing with the question of interest he agreed with the contention raised by counsel for the plaintiffs that there was nothing in S. 73, Contract Act, or in S. 1, Interest Act, that would disentitle the plaintiff from recovering interest, thereby obviously meaning that it could be awarded under S. 73, Contract Act, a proposition which had already been negatived in 20 Mad. 481[1] and in 53 Mad. 549[2] and has now been set at rest by the decision of their Lordships of the Privy Council in I. L. R. (1938) 2 Cal. 72.[3] As regards S. 1, Interest Act, the point was not so easy as not to have merited any discussion at all. This was the main point that has engaged the attention of this Court and of learned counsel for the parties for more than a day and we will have to deal with it in due course in this judgment.

The facts which the learned Judge has mentioned for disallowing interest and the considerations by which he seems to have been guided in coming to that conclusion seem to be entirely irrelevant and would not bear examination. The learned Judge holds that he is quite satisfied "that the parties had no intention at all at the time of Ex. B of charging any interest or businessmen as they were, they would have made some provision for interest in Ex. B itself." The interest was not claimed under any agreement arrived at between the parties and in the absence of any such allegation a reflection like this was apt to lead him astray and succeeded in doing so. It has nothing to do with the application of the provisions of the Interest Act. Then the learned Judge states that the suit was filed on the last day of limitation without any registered notice (having regard in all probability to the provisions of the Interests Act but as to which there was no allegation) on rather legal advice that this claim for Rs. 14,000 would be time-barred. What again had the delay in instituting the suit to do with the award of interest, it is not easy to understand. No equitable relief was being asked for in regard to which delay could have been a deciding or even a material factor. Nonetheless, the learned Judge proceeds to say that he did not think it was a fit case in which interest should be awarded upto the date of decree—as if the grant of interest was a question of discretion and any reason would have been enough not to award it. Last of all he states, in his judgment that "the fact that interest has been disallowed in this suit can be brought to the notice of the Sub-Court, Rajahmundry when final decree is passed in the pending partition suit." We really fail to see what was at the back of the learned Judge's mind. He was not dealing with the other suit and the decision in this litigation could possibly have no bearing on the other one unless it be that he had the consent expressed by D. W. 1 in the witness-box to pay interest in this suit conditional on his getting the same in O. S. No. 7 of 1935, in mind, which he had rejected in an earlier portion of his judgment on the ground that it had probably emanated from the defendant with the object of prolonging this suit and deferring partition of moveable property. Nothing was said by the learned Judge in regard to the subsequent interest claimed by the plaintiff.

The learned Advocate-General who argued the case on behalf of the plaintiffs (appellants) contended in the first instance that according to the true construction of Ex. B, the date of payment of the sum of Rs. 14,000 should be held as specified and fixed and the money found to be payable at a "certain time" within the meaning of that expression as used in S. 1, Interest Act (Act 32 of 1839). If that be so, the provisions of the Interest Act would apply and the plaintiffs would be entitled to get interest at a rate not exceeding the current rate.

In view of the decision in I.L.R. (1938) 2 Cal. 72[3] it was admitted that interest could be awarded only if it was payable by custom or if there was an agreement either express or implied to pay interest or under the provisions of any substantive law entitling the plaintiff to recover the same. Since, there was no proof of custom or even of an express agreement (although at one time the learned Advocate-General wished to bring it within the meaning of the expression "income derived from the properties in Schs. A and B" used in Ex. B, a contention with which we were not impressed as, in our opinion, the word 'properties' used in that context refers to immovable properties alone), the second contention advanced by the learned Advocate-General was to the effect that inasmuch as possession of Sitharamiah's share had passed to the defendants from 1st July 1929 and they had been enjoying the rents and profits thereof from that date, the agreement to pay interest may be implied as from that date or in any case from 14th March 1930 when Ex. B was executed. The last position taken up on behalf of the appellant was that the defendants having got possession of the plaintiff's property on partition without paying its full price or equivalent in value, there was no reason why equitable jurisdiction should not be invoked and interest not awarded to the plaintiff within the meaning of the proviso to S. 1, Interest Act, which is to the effect that "interest shall be payable in all cases in which it is now payable by law".

Learned counsel for the respondents contended, on the other hand, that, (a) the provisions of the Interest Act could not be attracted in this case as the date on which the payment of Rs. 14,000 was to be made could not be regarded as "certain" within the meaning of that Act. He admitted that it was not necessary that a date to be "certain" should be specifically mentioned for payment but it was essential he contended, for the purpose of the Interest Act, that in the absence of a specific date on which a payment is to be made, a definite time for payment must have been explicitly and expressly mentioned in the document by virtue of which it is to be made and must not be left to be either merely inferable from its construction or held to have been impliedly fixed as contended for on behalf of the appellant in this case, (b) the date for payment, even if it could be inferable from the construction of the document or held to have been impliedly fixed, as urged by the learned Advocate-General, could not be regarded as "certain" as the payment of the sum of Rs. 14,000, was, according to the contents of Ex. B, contingent on the delivery of possession to the defendants, (c) there was no intention to pay any interest and the omission by businessmen like the parties to this document to

1. ('97) 20 Mad. 481 : 7 M. L. J. 263, Kamalammal v. Peeru Meera Levvai Rowthen.
2. ('30) 17 A. I. R. 1930 Mad. 727 : 127 I. C. 630 : 53 Mad. 549 : 59 M. L. J. 358, Nachappa Gounden v. Ittichathara Mannadiar.
3. ('38) 25 A. I. R. 1938 P. C. 67 : 173 I. C. 15 : I. L. R. (1938) 2 Cal. 72 : 32 S. L. R. 374 : 65 I. A. 66 (P. C.), Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji.

mention the same was extremely significant, (d) that partition of moveable and immovable property was the one object for which Ex. A came into being and the arrangement in Ex. B was merely a preliminary step towards a final partition of their entire properties between the parties. The item as to interest could therefore be at the outside an item in general accounting between them at the time of final partition in the suit O. S. No. 7 of 1935 which is still pending in the Court of the Subordinate Judge of Rajahmundry.

In order to ascertain whether the date of payment for the sum of Rs. 14,000 was fixed between the parties and "certain" or whether the payment of that sum was merely conditional or contingent on the happening of certain other events, we will have to bear the terms of the deed of partition in mind. It clearly states that the share marked "B" was allotted to Sitharamiah and not that it was to be allotted to him later on. This would mean that Sitharamiah had on or before the date on which this partition deed was executed, i. e., 14th March 1930 become, in accordance with the arrangement contained therein, the complete owner of the properties specified in the B schedule. Then follows the expression "and so he shall immediately take possession" and not that the other party, i. e., the defendants in the present suit will deliver possession. What I understand by that expression is that either party who was in joint possession of all the properties upto that date had agreed on partition that had been completed by then to surrender his respective rights and possession in the properties that had fallen to the other. In other words, the defendants to whom the properties specified in the "A" schedule had been allotted agreed to withdraw their rights and possession from the properties which had fallen to the plaintiff's share and the plaintiff agreed to withdraw his rights and possession from the share allotted to the defendants. Both the parties thus became free from that day to go and take possession of their respective shares irrespective of any act of the other. It could not therefore be said that the arrangement contained in the deed of partition or the payment of the sum of Rs. 14,000 was conditional or contingent on anything that had to happen or to be done subsequently.

It was vehemently argued by Mr. Govindarajachari, learned counsel for the respondents, that it is not open to a Court to find out the date of payment from the construction of a document and in order to fall within the provisions of the Interest Act, it should be either found to have been expressly stated therein or specified in it explicitly so as to be known by an arithmetical calculation or by a reference to a calender. But this is not correct in my opinion. Whether the time is found to have been specified expressly or by means of a necessary implication on a construction of a document, the result in both the cases is, in my judgment, the same. Construction of a document is one of the well-recognized methods from which the intention of the parties is to be gathered. Where the Court is asked to find a date from a document, on which a certain act had to be done by one of the parties, it is not only permissible but incumbent upon the Court to ascertain it not only from what the parties have stated expressly but also from what they may be deemed to have said impliedly though unambiguously. It may be that a document may contain no indication, express or implied, from which an inference as to the date on which the act had to be done or performed may be deducible. But that is a different matter. In that case the conclusion will be that the parties had omitted to specify the date of performance altogether. But this would be because by a reading of the document or by a construction of the same, the intention of the parties cannot be gathered. In ascertaining the intention of the parties as to the date of performance by an act of arithmetical calculation or by a reference to a calender is as much permissible for a Court as to discover it by the construction of a document or from what may be implied from the nature of the transaction from which it might be inferred that the contracting parties must have intended that date to be a part of the agreement between them.

No date was expressly specified in Ex. B for payment and unless it is contended that it was not to be paid at all, which would be obviously against the intention of the parties if the contract is to be effective, it must be held to be implied in that deed on the presumed intention of the parties. When a representation that it was safe for a ship to lie at a wharf was imported into a contract for the use of the wharf in (1889) 14 P. D. 64,[4] on the presumed intention of the parties and in order to give the transaction that efficacy that both parties must be intended to have given and to prevent such a failure of consideration as could have been within the contemplation of the parties, there is no reason why in construing the deed of partition, the date of payment should not for the same reasons be held to have been impliedly and unambiguously fixed between the parties in this case. Similarly, if A writes a slip to B to meet him in half an hour to receive payment of a debt due to the latter without specifying or mentioning the date on which he was to meet or on which the slip was written, the date on which the payment was to be made must be, in my opinion, held to be specified and certain although not expressly mentioned in the slip of paper if the date on which it was written could be established aliunde. Since the sum of Rs. 14,000 was to go to Sitharamiah in consideration of the larger share of the property which under the partition was allotted to the defendants, he must be, in my judgment, held entitled to recover that money, in the absence of anything else stated in the document, on that day in the same manner as he was entitled to recover or get possession on that day of the immovable properties allotted to him. According to the construction that I am placing on Ex. B, the contract to pay cannot be deemed to have been contingent, as urged by learned counsel for the respondents, and the date of payment must be held to be fixed. Whether it is possible to regard that date as falling within the expression of "at a certain time" under the provisions of the Interest Act is a different question and will be discussed later.

The contention of the learned Advocate-General that as in view of the provisions in Ex. B either party had to get the income of their respective shares from 1st July 1929, his clients should be entitled to recover interest from that date and that the sum of Rs. 14,000 had to become payable to them on that day is also, in my opinion, incorrect. I have already referred to the fact that the word "properties" used in Ex. B in the expression "income derived from the properties in Sch. A" does not refer to the sum of Rs. 14,000. It is clear from Ex. A which came into existence on 11th March 1930 that the proposal for partition, what to say of the actual allotment of properties in accordance with that proposal, was not made up to the time when that document was executed. How can then a

4. (1889) 14 P. D. 64, Moorcock's Case.

sum of Rs. 14,000 or for the matter of that any other sum be said to be payable to Sitharamiah before that date ? It was only after the execution of that document that the proposal to divide the immovable property must have been made by the defendants and as a part of that proposal, a sum of Rs. 14,000 had, in order to equalise the shares, to go to the person or persons who got the "B" lot. Had Sitharamiah selected the "A" schedule he would have been indebted in a sum of Rs. 14,000 instead of becoming entitled to recover the same sum from the defendants. In view of this, it is impossible to hold that the sum of Rs. 14,000 was payable on any date prior to the acceptance by Sitharamiah of the proposal for partition made by the defendants. Moreover, no income can be said to have been derived or in any case proved to have been so from this sum of Rs. 14,000 even if the expression "income derived from his respective share of properties" is interpreted so as to cover this amount. The date of payment cannot be, for the above reasons, held to be 1st July 1929 but 14th March 1930, the date on which the title to the entire property specified in Schedule B passed to Sitharamiah.

Having construed the deed of partition, Ex. B and found that the sum of Rs. 14,000 was payable by the defendants to Sitharamiah on the date on which the properties were allotted to him under Ex. B, the next question to decide is whether this is sufficient to attract the provisions contained in Part 1 of S. 1, Interest Act. Before proceeding to consider that section however, it must be stated that in applying the provisions of the Interest Act, the facts that there was no agreement to pay interest or that the parties did not intend to pay interest as deducible by way of an inference from a mere omission of a promise to pay the same are, in my opinion, entirely irrelevant. Had there been an agreement to pay interest either express or implied it would have had to be awarded independently of the provisions of the Interest Act. The questions whether a creditor did or did not intend to take interest or a debtor did not intend to pay the same have no bearing when a Court is called upon to decide whether interest could be awarded under the provisions of the Interest Act. Since the terms of the Interest Act (Act 32 of 1839) are identical with S. 28, Lord Tenterdon's Act, (3 and 4 William IV, Chap. 42) or even with S. 24 (1), New Brunswick Judicature Act of 1909, the parties freely referred to the English decisions on the point. The following English and Indian decisions were cited by learned counsel for the parties in the course of their arguments: (1810) 2 Camp 426 at p. 429=170 E. R. 1206 at p. 1207;[5] 7 M. I. A. 263;[6] (1874) 9 Q. B. 99;[7] (1875) 10 Q. B. 371;[8] (1892) 1 Ch. 120;[9] (1893) A. C. 429;[10] (1896) 2 Ch. 188;[11] (1929) A. C. 631=57 M. L. J. 662;[12] 40 M. L. J. 18;[13] I. L. R. (1940) Mad. 50;[14] A. I. R. 1927 All. 444.[15]

It is superarrogatory on my part to examine the English cases as most of them have been considered in (1896) 2 Ch. 188[11] and by their Lordships of the Privy Council in 1929 A. C. 631= 57 M. L. J. 662.[12] It may however be stated generally that every one of the English cases on which reliance was placed by learned counsel for the respondents are cases of contingent or conditional contracts in regard to which the dates of payment could not have been said to be certain until some other event had come into existence. A great deal of stress was laid by learned counsel for the respondents on Lord Blackburn's (then Blackburn J.) dissenting opinion in (1875) 10 Q. B. 371,[8] which was accepted later in (1892) 1 Ch. 120[9] and by the House of Lords in (1893) A. C. 429.[10] But even Blackburn J.'s dissenting opinion does not, in my judgment, help the respondents. Reliance was placed by Mr. Govindarajachari on the following words in his judgment:

"I think that the construction of the statute is that the written instrument should specify the time; and if that be so, the written instrument in this case does not do it."

In order to understand these words, one might remember that Lush J. was putting the case thus:

"In this case the contract is, one-third to be paid in cash, that is, in ready money, as soon as the goods are delivered, and the invoices are delivered, so that the amount can be ascertained. So that the time of payment is fixed by the contract of the parties, and it is to be determined by the time when the goods are delivered. That is, I think, in accordance with and in analogy to cases decided upon the well-known maxim '*Id certum est quod certum reddi potest*'."

Blackburn J.'s opinion to the contrary was that the section "does not mean by 'certain time,' a time which is to depend on a future named event, which will, when the event happens, become certain." This would show that the words on which reliance was placed by Mr. Govindarajachari only meant to convey that time should not have been conditional or contingent on things which were to happen subsequently but was certain on the date on which the document under which the payment was to be made came into being. He did not lay down that the written instrument should specify the time expressly. This was not the point which he was considering. That is how Lord Tomlin understood the effect of Blackburn J.'s decision as approved by the Court of Appeal and by the House of Lords in (1893) A.C. 429[10] and in (1929) A. C. 631.[12] The reply to the question "whether a sum certain is not payable by the written instrument at a time certain" under S. 1, Interest Act, was given by Lord Tomlin in delivering the judgment of the Board in (1929) A.C. 631,[12] in the following words:

5. (1810) 2 Camp 426 : 14 East 590*n* : 170 E. R. 1206 : 11 R. R. 755, De Barnales v. Fuller.
6. (1859) 7 M. I. A. 263 : 4 W. R. 8 (P. C.), Juggomohan Ghose v. Manickchand.
7. (1874) 9 Q. B. 99 : 43 L. J. Q. B. 24 : 29 L. T. 809 : 2 Asp. M. C. 185, Merchant Shipping Co. Ltd. v. Armitage.
8. (1875) 10 Q. B. 371 : 44 L.J.Q.B. 216 : 32 L. T. 863 : 23 W. R. 795, Duncombe v. Brighton Club and Narfolk Hotel Co.
9. (1892) 1 Ch. 120 : 61 L. J. Ch. 294 : 65 L. T. 722 : 40 W. R. 194, London Chatham and Dover Ry. Co. v. South Eastern Ry. Co.
10. (1893) 1893 A. C. 429 : 1 R. 275 : 63 L. J. Ch. 93 : 69 L. T. 637 : 58 J. P. 36, London Chatham and Dover Ry. Co. v. South Eastern Ry. Co.
11. (1896) 2 Ch. 188 : 65 L. J. Ch. 694 : 74 L. T. 686 : 44 W.R. 556, In re Horner; Fooks v. Horner.
12. ('29) 16 A. I. R. 1929 P.C. 185 : 119 I. C. 615 : 57 M. L. J. 662 : 1929 A. C. 631 : 98 L. J. P. C. 146 : 141 L. T. 370 (P. C.), Maine and New Brunswick Electric Power Co. v. Alice M. Hart.
13. ('21) 8 A. I. R. 1921 Mad 76 : 60 I. C. 353 : 40 M. L. J. 18, Rajah of Pithapur v. B. Pallamraju.
14. ('39) 26 A. I. R. 1939 Mad 877 : 188 I. C. 13 : I. L. R. (1940) Mad. 50 : (1939) 2 M. L. J. 579, Attakoya Thangal v. Kunhikoya Thangal.
15. ('27) 14 A. I. R. 1927 All. 444 : 101 I. C. 57, Gulab Shanker v. Moolchand Nimichand.

"That a sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for happening of those events, if they ever do happen, may be indefinitely postponed."

If that is the test which has to be applied to this case, there can be no doubt that the payment of Rs. 14,000 was not contingent upon events which might never happen, as partition had already been effected and Sitharamiah and the defendants had become complete owners of their definite shares which had fallen to them on partition. The last three Indian decisions to which reference was made have also no application as in 40 M. L. J. 18[13] the contract had provided that "all work done by the contractor shall be paid for by the Raja according to the rates herein specified within a reasonable time after it has been inspected and finally approved and passed." The money due under the contract could not be held to have been payable by the Raja unless it had been approved and passed and was for that reason held by Sir John Wallis C. J. (as he then was) not to "contain a provision for the payment of a sum certain or for the payment of such sum on a certain day."

As for the second Madras decision in I. L. R. (1940) Mad. 50,[14] the inam granted in that case did not fix the dates when the land revenue was to be paid to the inamdar ; and as within the provisions of the Interest Act, the debt or sums payable were to be so by virtue of a written instrument and the written instrument in that case was the inam grant only the provisions of the Interest Act could not be held to apply. In A. I. R. 1927 All. 444,[15] the rokka in question had simply stated that the defendants' father had borrowed Rs. 4000 in cash "which is to be debited to my account and I have, therefore, executed this rokka." Having regard to those words, it was held by the learned Judges of that Court that there was nothing in the form of a promise to pay, much less to pay on any certain day. I must, therefore, hold that the authorities cited by learned counsel for the respondents have no application to the facts of the present case and the time on which the payment was to be made must be held to be certain and the sum must be held to be payable on 14th March 1930 by virtue of the written partition deed, Ex. B, within the meaning of S. 1, Interest Act. This is quite enough to grant the plaintiff the relief as to interest which he claims although not at 12 per cent. as mentioned in the plaint but at a rate not exceeding the current rate of interest from the time when the sum of Rs. 14,000 was payable. But, in view of the other contentions raised by the parties, it is desirable that I might say a few words in regard to them as well.

The second contention advanced by the learned Advocate-General was that an agreement to pay interest may be implied from the fact that Sitharamiah's share had passed to the defendants who were to get the rents and profits of the same from 1st July 1929. It is not possible for me, however, to accept that contention. According to my construction of the partition deed, the sum of Rupees 14,000 had to be paid by the defendants on 14th March 1930. There was therefore no necessity for them to have agreed to pay any interest either expressly or even by implication. The money had to be paid on 14th March and if it was not paid on that day, it was open to Sitharamiah to bring an action against the defendants on the next day. In fact the cause of action for the recovery of that money must be deemed to have accrued on the date on which Ex. B was executed and had this money not been sued for for a period of six years, it would have been barred by time. That is why an attempt was made on behalf of the defendants to defeat this claim on the ground of limitation. But fortunately the document under which the payment was to be made was registered and the limitation for this payment was six years and not three. There was thus no question of credit granted to the defendants for the payment. I cannot, therefore, reasonably infer any implied agreement from the deed of partition, Ex. B.

The third contention advanced by the learned Advocate-General was that in so far as the defendants had taken the plaintiff's share of the property on partition and had begun to enjoy it not only from the date on which the partition took place but as from 1st July 1929, his client was entitled to recover interest under the proviso to S. 1, Interest Act, as interpreted by various Indian and Privy Council decisions where Courts of Equity could in the circumstances mentioned above and in the exercise of their equitable jurisdiction award interest. Had the jural relationship between the parties to this suit been of a vendor and purchaser, the jurisdiction of the Equity Courts to grant interest would have been undisputed. There is a specific provision now in regard to the payment of interest in cases where the vendor has parted with possession of the property sold by him without receiving the price either wholly or in part : *vide* S. 55 (4) (b), T. P. Act. This is not however a case of sale but that of partition. It was contended by the learned Advocate-General that even in this suit, Sitharamiah's share must be held to have passed to the defendants in consideration partly of the defendants' share in the joint property that was conveyed under this scheme of partition and partly of cash, i. e., of the sum of Rs. 14,000 and viewed thus, this sum would really be nothing else but the price payable to him (plaintiff 1) in cash by the defendants for the property that had passed to them.

Learned counsel for the respondents contended, on the other hand, that in order to attract the equitable jurisdiction of the Courts, the legal relationship between the parties must necessarily be such as mentioned in Halsbury's Laws of England, 1st Edn., Vol. XXI, para. 74 at pp. 40 and 41 and inasmuch as the jural relationship between the parties to the present suit did not fall under one of the heads mentioned therein, the equitable jurisdiction could not have been exercised by the Courts and interest could not be therefore said to be 'payable by law.' Learned counsel for the appellant relied on several decisions in support of his contention. The first one was in (1805) 12 Ves. 25=33 E. R. Reprint 10.[16] This was a case where a purchaser who had taken possession of a property without a conveyance was compelled to pay interest though the money was to be paid at a particular date on the execution of the conveyance. The Master of the Rolls in delivering the judgment for the plaintiff observed as follows :

"The purchaser might have said, he would not have anything to do with the estate, until he got a conveyance. But that is not the course he took. He enters into possession; an act, that generally amounts to a waiver even of objections to title. He proceeds upon the supposition, that the contract will be exe-

16. (1805) 12 Ves. 25: 33 E.R. Reprint 10: 8 R. R. 275, Fludyer v. Cooker.

cuted; and therefore agrees, that from that day, he will treat it, as if it was executed. The act of taking possession is an implied agreement to pay interest; for, so absurd an agreement, as that the purchaser is to receive the rents and profits, to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied."

Our attention was also drawn to the decision in 43 Bom. 181[17] where Lord Shaw in a case of compulsory acquisition awarded interest on equitable considerations. He observed as follows :

"The Board is of opinion that the right to interest depends upon the following broad and clear consideration. Unless there be something in the contract of parties which necessarily imports the opposite, the date when one party enters into possession of the property of another is the proper date from which interest on the unpaid price should run. On the one hand, the new owner has possession, use, and fruits; on the other the former owner, parting with these, has interest on the price. This is sound in principle and authority fully warrants it."

Following this decision, the Bombay High Court subsequently awarded interest in 46 Bom. 195[18] where in pursuance of a contract for sale of property a purchaser was let into possession and the vendor was in seeking to recover the balance of the purchase money held entitled, independently of the provisions of the Transfer of Property Act, to get interest on such unpaid balance from the date when possession was delivered by him. Mr. Govindarajachari relied, on the other hand, on a decision by a Division Bench of this Court in 53 Mad. 549[2] where it was held that a lessor was not entitled to recover interest on the arrears of rent under the provisions of the Interest Act on general equitable grounds as the proviso to S. 1, Interest Act, enabled the Court to award interest only in cases where it was payable in law before the Act was passed and the Courts in India following the practice of the English Courts did not prior to the Indian Act, award interest in the case of ordinary debts but did so only in certain special cases. Having regard to the various decisions to which reference has been made there cannot be much of a doubt that although the jural relationship of the parties to the present suit was not one of those stated in Halsbury Vol. 21, pp. 40 and 41, yet in view of what was stated by their Lordships of the Privy Council in 43 Bom. 181[17] and having regard to the fact that the defendants had been realising the income of the plaintiff's share in the joint property under the deed of partition even from 1st July 1929 without discharging the debt that they were liable to pay under the terms of the partition deed, it may not be incorrect to award interest under the proviso to S. 1, Interest Act, even if the analogy of a vendor and purchaser may not be strictly applicable to this case.

As for the question of set-off claimed by the defendants and allowed by the lower Court, I am of opinion that the decision of the learned District Judge was correct and cannot be interfered with. Having regard to certain English decisions, the learned Advocate-General did not advance the contention, and rightly so, that the defendants were not, in view of what was contained in the note to the partition deed, Ex. B and which has been reproduced in this judgment, entitled to claim a set-off; but he contended that in so far as defendant 1 was not a party to the partition and a promise by Sitharamiah to pay Rs. 5500 was made to defendants 2 to 5 only, it was not permissible to grant a set-off to them in an action to which defendant 1 was also a party. And, in support of this, reliance was placed on the statement made by defendant 2 as a witness in this case where he had expressed his inability to say if his father had anything to do with the sum of Rs. 5500. It is true that the agreement to pay Rs. 5500 was entered into between plaintiff 1 and defendants 2 to 5 only; but having regard to the fact that they were acting on behalf of the whole joint family including their father and the properties were being allotted on the assumption that defendant 1 (i. e., the father) was a party to the arrangement of partition, which he had eventually ratified, there can be no manner of doubt that this money was payable to all the defendants in spite of what defendant 2 had stated in his cross-examination and not only to defendants 2 to 5. It was therefore rightly allowed by way of set-off to the plaintiffs' claim. For the above reasons, the plaintiffs' appeal must be accepted to the extent that they will be entitled to recover interest at six per cent. from 14th March 1930 upto the date of realisation. The parties will be entitled to pay and receive proportionate costs, in accordance with the measure of their success and failure both in this and in the lower Court.

VENKATARAMANA RAO J. — The facts are so fully stated in the judgment of my learned brother that I consider it unnecessary to re-state them. He has also dealt with the question of set-off which arises in the case. I therefore do not propose to deal with it at length. The set-off must be clearly allowed in view of Ex. A, cl. 1, and the fact that the father ratified the partition. The main question in the case is whether the plaintiffs are entitled to claim interest on the sum of Rs. 14,000 payable under Ex. B. The claim to interest is rested by the learned Advocate-General who argued the appeal on the provisions of the Interest Act. Under that Act, the Court can award interest upon all debts or sums certain payable at a certain time or otherwise in the following cases : (i) the Court may allow interest to the plaintiff if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument; (ii) If payable otherwise, then from the time when the demand for payment shall have been made in writing; and (iii) Interest shall be payable in all cases in which it is payable by law.

The learned Advocate-General claimed interest both on the ground that there was a sum certain payable at a certain time by virtue of a written instrument, Ex. B, and also that it was payable by law. Taking the first ground, there is the written instrument and the sum certain. But the question is whether the said sum was payable at a certain time. The learned counsel on either side relied on a number of English cases in support of their respective contentions because the Interest Act is based on the English Act which is known as Lord Tenterdon's Act and the English cases have been relied on both by the Privy Council and the Courts in India in the interpretation of the Indian Act. There is a conflict of view in regard to the interpretation to be placed on the expression "certain time" in the English cases; but on a careful consideration of those cases it seems to me that with reference to the point in controversy in this case, that conflict is

17. ('18) 5 A.I.R. 1918 P.C. 129 : 48 I. C. 404 : 43 Bom. 181 : 45 I. A. 233 (P.C.), Ratanlal Chunilal Pannalal v. Municipal Commissioner, Bombay.
18. ('22) 9 A.I R. 1922 Bom. 186 : 64 I. C. 492 : 46 Bom. 195 : 23 Bom.L.R. 1000, Pandurang Balajee v. Mahadeo Gopal.

not material. In (1874) 9 Q.B. 99,[7] Coleridge C. J. who delivered the judgment of the Exchequer Chamber, held that where a sum of money was payable under a charter party after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the custom house although the time was ascertained and became settled by the event, the money was not payable at a time certain within the meaning of the statute. Lindley L. J. explained the scope of this decision in (1892) 1 Ch. 120[9] at p. 144 thus :

"The Act, as construed by the Exchequer Chamber, requires that the *contract shall ascertain the sum and the time; the certainty of both must appear from the contract.* But still if all the elements of certainty appear by the contract, and nothing more is required than an arithmetical computation to ascertain the exact sum or the exact time for payment, that will be sufficient." (The italics are mine.)

Lord Tomlin dealing with this case in 1929 A.C. 631[12] at p. 639 remarked thus :

"In their Lordships' judgment the decision of the Exchequer Chamber in (1874) 9 Q.B. 99[7] is an authority binding the English Courts upto and including the Court of Appeal to hold under Lord Tenterdon's Act that if the sum becomes payable *at a time fixed by reference to a contingent event* which may or may not happen, it is not payable by the written instrument at a time certain." (The italics are mine.)

In (1875) 10 Q.B. 371,[8] the Court had to consider this question and on the particular document before them there was a difference of view. In that case Blackburn J. took the view that the money was not payable at a certain time within the meaning of the Act. But both Mellor J. and Lush J. differed from him. In that case there was a contract for the supply of furniture. The terms of the contract were embodied in a letter which ran thus :

"I have thought over your application respecting the Norfolk Hotel; the best terms I could offer would be one-third in cash, and bills at six and twelve months for the balance."

Blackburn J. in construing this document remarked thus :

"I have not the slightest hesitation in saying that the written instrument, by virtue of which the debt became payable contemplated a particular day, which when the goods were delivered, would be ascertained, and then the money would be payable at a certain time. But did the debt become payable by the written instrument at a certain time ?"

He held not and gave the following reasons :

"The construction of the statute is that the written instrument would specify the time; and if that be so, the written instrument in this case does not do it. . . . ."

Mellor J. observed thus :

"The object of the section was, not that the actual day should be ascertained upon the face of the instrument, but that the basis of the calculation which was to make it certain should be found in the instrument in writing."

He therefore took the view that when the goods were sent in, the time for the payment of the one-third in cash had arrived and that would be enough. Lush J. observed thus :

"I agree with my brother, Blackburn, that the early part of the section which we are now discussing intends that the written document should specify the time of payment; but then it appears to me that the section does not require that it should so specify it by mentioning the day of payment . . . The section says, 'upon all debts or sums certain payable at a certain time, or otherwise'; that 'otherwise' is put into contrast with 'at a certain time.' It means, I think, payble originally by the contract of the parties at a time certain, or not at a time certain—where the time is fixed by the agreement of the parties, or not fixed by the agreement of the parties. But where it is fixed by the agreement of the parties it shall appear in writing . . . The other case 'or otherwise' is where no time is fixed for payment; then the creditor, the amount being due, may make interest to run from the time he chooses to demand it provided he makes the demand in writing. In this case the contract is one-third to be paid in cash, that is, in ready money, as soon as the goods are delivered and the invoices are delivered, so that the amount can be ascertained. So that the time of payment is fixed by the contract of the parties, and it is to be determined by the time when the goods are delivered."

It will be seen from this decision that all the Judges have concurred in one matter, namely, the written instrument should specify the time of payment; if not, the section would not apply. The conflict between the learned Judges was whether the day of payment could be rendered certain by reference to a future named event, i. e., as soon as the goods are delivered. The view of Blackburn J., was that when a time is made to depend upon a future named event, it cannot be called a certain time within the meaning of the section because it has to be rendered certain in future. But the other learned Judges were of the opinion that if the time of payment was specified, it would be enough. Mellor J. put it thus :

"It was quite sufficient if there was a time fixed which by extrensic facts, could be made to identify the date for the calculation, without its appearing in so many words upon the face of the instrument."

Even in (1874) 9 Q. B. 99[7] the time was specified in the contract but as Lord Tomlin points out, the precise time of payment can only be fixed by reference to a contingent event which may or may not happen. Sir John Coleridge, who delivered the judgment of the Privy Council in 7 M. I. A. 263[6] remarks that the statute requires that certainty of time and the amount should be created by the written instrument and should exist at the time when the promise is made and therefore it does not affect debts contingent in amount and time of becoming due so that the Act would not apply to cases where "there is no promise absolutely to pay any sum, certain or uncertain, nor any time limited for the payment but only a promise contingent on events which may never happen, to pay a sum capable of ascertainment only, and if when these shall happen, and the time for the happening of which, if they ever do happen, may be indefinitely postponed." No doubt in this case there is no question of contingency in regard to the payment of the amount. But the question is whether there is a time 'limited for the payment.' The written instrument need not name the precise day of payment but it should specify the time of payment. The exact day of payment can be ascertained with reference to the provision relating to the time specified. The question in this case is, does Ex. B specify the time of payment ? That which is relied on is the following passage in the document : "Those who got this A schedule share of properties should pay separately to those who get the B schedule share of properties a sum of Rs. 14,000." Prima facie this clause declares only the liability and does not specify when

the sum of Rs. 14,000 is payable. The learned Advocate-General has contended that the document specifies the time of payment and says that the time of payment is either 1st July 1929 or at any rate 14th March 1930, the date of the document. So far as the argument based on the former date is concerned, it is untenable because the liability to pay Rs. 14,000 is not fixed until 14th March 1930. The contention in regard to the date 14th March 1930 is put thus: that as from that date the parties became severally entitled in respect of properties which were allotted to them at the partition, the amount must be deemed to be payable from that date. The question is not whether the amount can be deemed to have become payable but did the document specify that from that date the amount was payable? I find it a little difficult to say that the document specifies the time from which it is payable. It is in such cases, I think, as Lush J. points out in (1875) 10 Q. B 371[8] the words "or otherwise" would become applicable (*vide* the observations already cited by me). I therefore prefer to rest my decision on the second ground advanced by the learned Advocate-General which seems to be well founded. The proviso to the section that interest should be allowed in all cases in which it is payable by law has been construed by the Privy Council both in 1929 A. C. 631[12] and I. L. R. (1938) 2 Cal. 72,[3] as applying to cases in which the Court of Equity exercises jurisdiction to allow interest. In case of sales and purchases of land, as pointed out by Viscount Cave in 1925 A. C. 520[19] at p. 532 "it is the practice of the Court of Chancery to require the purchaser to pay interest on his purchase money from the date when he took, or might safely have taken possession of the land; but this practice rests upon the view that the act of taking possession is an implied agreement to pay interest, and this rule has been extended to cases of compulsory purchase under the statutory enactments."

The principle of equity that is invoked is thus explained by Lord Shaw in 43 Bom. 181[17]: "On the one hand, the new owner has possession, use and fruits; on the other, the former owner, parting with these, has interest on the price. This is sound in principle, and authority fully warrants it." The question is whether this principle can be extended to the present case. The sum of Rs. 14,000 to be paid by the person who takes the Sch. A properties to the person who gets the Sch. B properties is by way of equality of partition or what is termed as "owelty" in a Court of Equity. When owelty has to be paid, the amount is always regarded as in the nature of a sum due to the vendor of land from his vendee. The reason is obvious. One co-sharer parts with a portion of the property as representing the share he is legitimately entitled to in consideration of a sum of money in respect whereof he must be regarded as the vendor and the person who takes the property must be regarded as the vendee. Mr. Govindarajachari relied upon a passage in Halsbury's Laws of England, 1st Edn., Vol. 21, p. 40, in support of his contention that the case of partition is not mentioned as one of the cases where a Court of Equity would grant interest. But the cases mentioned therein are only illustrative and not exhaustive. The passage clearly indicates that where the relationship of a vendor and purchaser exists between the parties, the Court of Equity would award interest. Therefore the passage relied on by Mr. Govindarajachari does not support him. I am therefore of the opinion that this is a case where the Court of Equity would certainly award interest. The plaintiffs would therefore be entitled to interest and I agree with my learned brother that the interest would be payable at 6 per cent. from 14th March 1930. The plaintiffs will be entitled to have a decree for the sum of Rs. 8500 after setting off the sum of Rs. 5500 with interest from 14th March 1930 upto the date of realisation. I also agree with the order as to costs proposed by my learned brother.

C.R.K./K.S. *Order accordingly.*

19. (1925) 1925 A.C. 520 : 94 L.J.K.B. 629 : 133 L.T. 49: 69 S.J. 443: 41 T.L.R. 411: 21 Ll.L.Rep. 270, Swift and Co. v. Board of Trade.

C. P. C. —
(b) ('40) Chitaley, S. 34, Note 6 Pt. 2.
('41) Mulla, Pages 143 and 144 Note "Interest prior to the date of suit."
(g) ('40) Chitaley, O. 8, R. 6 Note 9.
('41) Mulla, Page 626 Note "Same character."

A. I. R. (29) 1942 Madras 437

HORWILL J.

In re S. N. Vittal and others
Appellants.

Criminal Appeal No. 670 of 1941, Decided on 9th February 1942, against order of Chief Presidency Magistrate, Egmore, Madras, in C. C. No. 2000 of 1941.

Madras City Police Act (3 of 1888), S. 51— Fraud must be during betting or gaming and not prior or subsequent to it.

Under S. 51 the fraud must be during the betting or gaming and not prior to it or subsequent to it. Where therefore there is no reason to think that at the time the accused accepted the money from the complainant they had no intention of paying the winnings to him even though the horse that he had backed should win the race the accused cannot be guilty under S. 51. [P 437 C 2; P 438 C 1]

B. T. Sundara Rajan — for Accused.

C. D. Venkataraman for the Crown Prosecutor — for the Crown.

JUDGMENT.—The three appellants have been convicted and fined by the Chief Presidency Magistrate, Madras, under S. 51, Madras City Police Act, for winning from the complainant money by means of fraud or malpractice in betting. The case of the complainant is that he betted with the appellants, that the horse on which he had bet won, and that although he thereby became entitled to be paid the money promised by the appellant on the bet, they did not pay him. He complained to the police; and the present case was brought against the appellants under the City Police Act. Section 51 makes it clear that what is punishable under that section is fraud, unlawful device, or malpractice in betting or gaming, i. e., the fraud must be during the betting or gaming and not prior to it or subsequent to it. It seems to me that a breach of contract such as the appellants committed by not paying over money that was due to the complainant is not a malpractice or fraud at all—still less an unlawful device; but even if the failure to pay the money could be described by any of those expressions, the fraud or unlawful device or malpractice would be in the fulfilment of the contract and not in the actual betting itself. The betting had taken place before the race was won; and the paying over of the money was no part of the betting. Playing with a marked card or loaded dice would come under the section;

but not anything that occurred after the play or betting had ceased. If a man were induced to bet by one who had no intention of paying anything even if the horse backed should win, the man accepting the money would be guilty of cheating; but the appellants were not charged with that offence, and there is no reason to think that at the time they accepted the money from the complainant they had no intention of paying the winnings to him even though the horse that he had backed should win the race.

Two English cases have been referred to. They are both relevant to the question we are considering; because the betting law in England is very much the same as it is in the city of Madras. Section 17, Gaming Act, 1845 (8 and 9 Vict. c. 109) is very similarly worded to S. 51, Madras City Police Act. The question has been discussed in (1850) 4 Cox. C. C. 392[1] and (1912) 3 K. B. 568,[2] and it was emphasized there that the fraud or malpractice must be in the actual betting or gaming itself. The appellants did not therefore commit any act punishable under S. 51, City Police Act. The appeal is consequently allowed and the conviction and sentence set aside. The fines paid will be refunded.

C.R.K./R.K. *Appeal allowed.*

1. (1850) 4 Cox. C. C. 392, Reg. v. Bailey.
2. (1912) 3 K. B. 568, Rex. v. Governor of Brixton Prison; Ex parte Goland and Metzler.

A. I. R. (29) 1942 Madras 438

VENKATARAMANA RAO J.

Kanagavelu Nadar and others — *Appellants*

v.

Sooravali Subbier and others — *Respondents.*

Second Appeal No. 1082 of 1939, Decided on 19th December 1941, against decree of Sub-Judge, Madura, in A. S. No. 16 of 1939.

Trusts Act (1882), S. 62 — Principle in S. 62 is equitable one and applies to public or private trust—Public religious trust — Trustee selling trust property to third person and for purchase price conveying his own property to trust—Sale of trust property set aside — Trust is bound to refund benefit it had by virtue of sale — Sale in such case is not void but only voidable.

The principle in S. 62 is an equitable one which would apply to the case of a trust whether public or private. Consequently, where a trustee of a public religious trust sells trust property to a third person and for the purchase price conveys his own property to the trust, and the sale of the trust property is set aside on the ground that there was no valid necessity to sell that property, the trust is bound to refund the benefit it had by virtue of the sale. The sale in such a case is not void. It can only be held to be voidable on the ground that it was in excess of the powers of the trustee. [P 439 C 2]

B. Sitarama Rao and K. R. Rama Iyer — for Appellants.

T.M. Krishnaswami Ayyar for V. Meenakshi— for Respondents.

JUDGMENT.—This second appeal arises out of a suit for recovery of possession of the property comprised in Sch. A by the plaintiff who was a trustee of certain charities under a scheme decree in O. S. No. 13 of 1922 on the file of the Sub-Court, Madura. The said property admittedly belonged to the charity but it was sold on 7th December 1924 by defendant 1 who was then a trustee of the charity for Rs. 2212, to defendant 2. Defendant 2 firm was adjudicated insolvent and all its properties and effects including the said property vested in the Official Assignee of Madras, who by a conveyance dated 7th May 1929 sold this property among other properties to the firm of Maya Nadar Bros. and on the date of this suit the said property vested in defendants 4 to 6. Defendant 4 died during the pendency of the litigation, and defendants 8 to 10 who are the appellants herein are his legal representatives. Defendant 5 was adjudicated an insolvent and the Official Receiver, Madura, as representing his estate is defendant 7 in the suit. The sale in favour of defendant 2 was impeached by the plaintiff on the ground that it was in excess of the powers of the trustee and invalid. Both the Courts have answered that question in favour of the plaintiff and this finding is not challenged in second appeal by Mr. Sitarama Rao, learned counsel for the appellants. But the main contention urged by him is that his clients and defendants 6 and 7 are entitled to recover the properties comprised in the B schedule or the Rs. 2212 the purchase price paid for the sale of A schedule property before the plaintiff can recover possession of the said A schedule property. Both the Courts have negatived this contention and declined to give the relief asked for on behalf of defendants 4 to 7.

To appreciate the contention of Mr. Sitarama Rao a few facts are necessary. On 7th December 1924, two documents came into existence, viz., Exs. C and C-1. Exhibit C purports to be a declaration of trust executed by defendant 1. The recitals in the said deed are that as the A schedule property which was dedicated to charity was not yielding proper income, he for the benefit of the said charity settled the price of the said property at Rs. 2212 and completed the sale deed in favour of N. K. K. Venkatarama Iyer, defendant 2 herein, that in substitution of A schedule property, through the said document Ex. C, he was setting apart of his free will the property comprised in B schedule which is also worth Rs. 2212 and which belonged to him so that the income of the said property may be utilized for the said charity. Exhibit C-1 is a deed of absolute sale in favour of defendant 2 by defendant 1 for Rupees 2212. He recites almost the same facts as in Ex. C. In the said document also occurs the recital that A schedule property which was being sold was not yielding any income and therefore he had to sell this property to defendant 2 and that in substitution thereof he was giving his own property. To provide against any loss that defendant 2 may sustain by reason of the conveyance he provided the following security, viz., the B schedule property. The clause relating thereto runs thus :

"If any incumbrances or litigations should arise and you should incur a loss, you shall get the undermentioned item 2 of property shown as security for the same; to this effect is the deed of absolute sale of punja land executed by me out of my free will."

The contention of Mr. Sitarama Rao is that for the price of Rs. 2212, B schedule property must be deemed to have been conveyed by defendant 1 to the trust and therefore it had the benefit of that property and the trust must reconvey the property under Sch. B or pay the price thereof because while getting A schedule property, it cannot be allowed to retain the benefit it had from the money received from defendant 2. The contention of Mr. T. M. Krishnaswamy Iyer is that this plea for the recovery

of B schedule property or its price was not specifically raised in the pleadings though no doubt there was a plea in the written statement of defendants 4 to 6 that the plaintiff should have no right to get the cancellation of the sale without repaying the defendants the purchase price and the amount spent by them. Again, there was no assignment of the covenant relating to the security in Ex. C-1 in favour of defendant 2 or his assignors by the Official Assignee. Mr. T. M. Krishnaswami Iyer also stated that the plaintiff's case is that the B schedule property is also charity property and is not property belonging to defendant 1. In fact an issue (issue 2) was raised in the case but that was not gone into by both the Courts.

The learned District Munsif observed that he considered it unnecessary to decide the said issue. The learned Subordinate Judge dealt with the case on the assumption that the property belonged to defendant 1. The view he took was that the transaction represented by Exs. C and C-1 in effect amounted to an exchange between defendant 1 in his personal capacity and defendant 1 in his capacity as trustee, that he took the trust property in exchange for his own and sold the trust property and appropriated the sale proceeds himself. Taking this view he held that defendants 5, 6 and 8 to 10 cannot claim possession of the property described in Sch. B or any charge on the property on the ground that their predecessor in interest did not purchase the B schedule property from the Official Assignee and further that there was no warranty of title given by the Official Assignee in favour of their predecessor-in-title and there was no assignment by the Official Assignee of the covenant relating to security in Ex. C-1 in favour of the predecessor-in-title. The question is whether the view taken by the learned Subordinate Judge is sound and whether any relief can be given to defendants 5, 6 and 8 to 10 in this suit.

After listening to the arguments of learned counsel on both sides, it seems to me that the view taken by the learned Subordinate Judge that the transactions represented by Exs. C and C-1 amount in law to an exchange is not correct. The substance of the transaction is that defendant 1 as trustee sold the A schedule property to defendant 2 and for the purchase price he conveyed his own property to the trust. If the matter is viewed thus, the question is when the sale of A schedule property is set aside on the ground that there was no valid necessity to sell that property, whether the trust is not bound to refund the benefit it had by virtue of the sale. If the question related to a private trust and even if it is assumed that the purchase was by the trustee himself, there can be no doubt that the trustee or his alience will be entitled to call upon the trust to surrender the benefit the trust had by virtue of the sale in his favour. This principle is recognized by Legislature in S. 62, Trusts Act, which so far as is material for the present discussion runs thus:

"Where a trustee has wrongfully bought trust property, the beneficiary has a right to have the property declared subject to the trust or re-transferred by the trustee, if it remains in his hands unsold, or, if it has been bought from him by any person with notice of the trust, by such person. But in such case the beneficiary must repay the purchase money paid by the trustee, with interest, and such other expenses, (if any) as he has properly incurred in the preservation of the property."

The contention of Mr. Krishnaswami Iyer is that that provision will not apply to a case of public religious trust and that the conveyance of A schedule property must be deemed to be void and the trust is not bound to refund any benefit which it had received and in fact no benefit was received because defendant 1 appropriated the purchase price for himself. I am not inclined to agree with the contention of Mr. Krishnaswami Iyer that the transaction is void. The sale can only be held to be voidable on the ground that it was in excess of the powers of the trustee. His contention that the transaction is void is based on the ground that the transaction must in law amount to an exchange and the trustee must be deemed to have conveyed the A schedule property to himself and then sold it under Ex. C-1. As I have already stated I am not inclined to take this view of the transaction.

Again the question is not whether the transaction is void or voidable but whether a trust is entitled not only to recover the trust property which has been wrongfully conveyed but also retain any benefit it had from the transaction. I do not see why the principle in S. 62 should not be held applicable to the case of public religious trusts. I am inclined to hold that the principle is an equitable one which would apply to the case of a trust whether public or private. But the question is whether the appellants are entitled to get any relief in this suit. In the written statement no relief was asked for the reconveyance of the B schedule property or the sum of Rs. 2212 though no doubt they asked for a refund of the purchase price. Further the title to B schedule property was not gone into. Instead of remanding the suit for trial on issue 2, I think it is more desirable that the question of title to B schedule property, i. e., whether it is charity property or property belonging to defendant 1 and if so whether defendant 4 should not be given the relief which he is entitled to if it is found to be property belonging to defendant 1 may be left for investigation in a separate suit. Learned counsel for the appellant has also no objection to this course being adopted. In the result the second appeal is dismissed. But as I am deciding the case on a view quite different from that taken by the learned Subordinate Judge I direct each party to bear their own costs in the second appeal. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 439

HORWILL J.

In re G. S. Paramarth and another Petitioners.

Criminal Revn. Case No. 924 of 1941 and (Cri. Revn. Petn. No. 870 of 1941), Decided on 19th January 1942, to revise judgment of third Presidency Magistrate, Egmore, Madras, D/- 1st September 1941.

Defence of India Act (1939), S. 2 — Rules under, R. 58 (1) — Accused held guilty under R. 58 (1).

A thing is said to be of a military nature when it resembles something done by or appertaining to or belonging to soldiers, so that if any exercise, movement, evolution, or drill is of the same kind as is done by soldiers under training, or during the course of their ordinary drill, then that exercise, movement, evolution, or drill could be said to be of a military nature. Where the object of the evolutions performed by the accused and their men is clearly to enable a large body of men to respond immediately to a word of command so that it would be possible for one man in charge of a large body of

persons to make them execute his will without the need of any elaborate explanations or directions the accused do infringe R. 58 (1). [P 440 C 1]

V. Rajagopalachari and K. Sanjiva Kamath— for Petitioners.

Crown Prosecutor — for the Crown.

ORDER.—The two petitioners were convicted by the third Presidency Magistrate, Egmore, Madras, for an offence punishable under Rule 58 (2), Defence of India Rules, by engaging in exercises, movements, and drill of a military nature. Petitioner 1 is the organiser of the Rashtriya Swayam Sevak Sangh and petitioner 2 is an instructor. This organisation has a membership of about 200 and they drill every Sunday morning on the grounds in front of the Royal Theatre. On 17th August 1941 the Police found about 150 members gathered there; and P. W. 1 and other Police Officers watched their evolutions for sometime. They lined up in formations, saluted an orange flag, which is said to represent Hinduism, and in saluting it they performed certain evolutions with the lathis which they were holding in their hands. Some drill then took place, they divided into squads, and then two squads of four each began to exercise with lathis. There were sixty seven other persons armed with lathis; but they laid them on the ground while the police were watching and performed certain movements with their body and arms to try to satisfy the Police that what they were doing was, as the petitioners say, with the object of exercising their bodies in the interests of their health rather than to perform exercises which might afford training for action by force against other communities and persons.

It is difficult to say what "exercise, movement, evolution or drill" is not of a military nature. A thing is said to be of a military nature when it resembles something done by or appertaining to or belonging to soldiers, so that if any exercise, movement, evolution, or drill is of the same kind as is done by soldiers under training, or during the course of their ordinary drill, then that exercise, movement, evolution, or drill could be said to be of a military nature. The object of the evolutions performed by the accused and their men was clearly to enable a large body of men to respond immediately to a word of command so that it would be possible for one man in charge of a large body of persons to make them execute his will without the need of any elaborate explanations or directions. The exercises further made them alert and readily responsive to orders. The fact that 75 persons were armed with lathis cannot be ignored. It is true that even in ordinary physical exercises sticks are sometimes used; but the lathis held by the petitioners and their men were about 4 to 6 feet long and were formidable weapons if used by trained men. I therefore have no doubt that the appellants did infringe R. 58 (1), Defence of India Rules.

The Police officers, P. Ws. 1 and 2, say that the petitioners were warned on more than one occasion that they were doing something which was illegal; but I do not think that the fact that the petitioners disregarded those warnings necessarily means that they intended to deliberately flout the law. It is not easy to say what may be done and what may not be done under the Defence of India Rules; and any intelligent person is as much entitled to his opinion in regard to what is and what is not military drill as the Sub-Inspector. It seems desirable that the Madras Government should follow the example of the Bombay Government in stating more explicitly what they will permit to be done and what they will not. The expression "exercise, movement, evolution, or drill of a military nature" is so wide in its scope that a person clicking his heels and making a smart salute might well be guilty of an infringement of the Defence of India Rules and make himself liable to a punishment upto five years rigorous imprisonment. The petitioners have told the police—and they seem to have told the Magistrate also—that they had no desire of infringing the law and that if it were found that they had infringed the law, they were prepared to give up their physical exercises and to abstain from them in future. Under these circumstances, it will be sufficient in the interests of justice if the petitioners are called upon to pay a small fine of Rs. 20 each. The balance of the fines paid should be refunded.

C.R.K./R.K. *Fines reduced.*

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* A. I. R. (29) 1942 Madras 440

HORWILL J.

In re Tamalampudi Veeranna

Accused.

Criminal Revn. Case No. 1024 of 1941 (Case Referred No. 56 of 1941), Decided on 30th January 1942, referred by Sess. Judge, East Godawari at Rajahmundry, D/- 20th November 1941.

*** (a) Penal Code (1860), Ss. 75 and 511— S. 75 does not apply to offence under S. 511.**

Section 511 not being in Chap. 12 or Chap. 17, Penal Code, S. 75 does not apply to offences under Section 511. [P 441 C 1]

(b) Criminal P. C. (1898), Ss. 209, 28 and 438 — Joint Magistrate before whom accused was charged under S. 511 and S. 379, Penal Code, erroneously thinking S. 75, Penal Code, to be applicable and transferring case to Sub-Magistrate—Sub-Magistrate holding that prima facie case was made out and committing accused to Sessions—Committal held not illegal — Reference by Sessions Judge to High Court to have committal quashed held unnecessary — Proper procedure stated.

The accused was charged before the joint Magistrate under S. 511 read with S. 379, Penal Code. The joint Magistrate thought that as S. 75, Penal Code, would have to be applied, the accused ought to be punished with a larger sentence than he himself could impose; and so he transferred the case to the file of the Sub-Magistrate to be tried as a P. R. case and the accused committed to Sessions if the Sub-Magistrate thought that a prima facie case had been made out against him. The Sub-Magistrate after enquiry thought that a prima facie case had been made out and committed the accused to Sessions. The Sessions Judge thinking the committal to be illegal referred the case to the High Court to have the committal quashed:

Held that the committal was not illegal on the ground that the joint Magistrate was wrong in his view that S. 75, Penal Code, applied to the offence under S. 511, Penal Code, and so he could not impose a sufficient sentence. Since the Sub-Magistrate did not think that some other Magistrate should try the case, his order committing the accused to Sessions was a legal order. The fact that the joint Magistrate had no power to order the Sub-Magistrate to try the case did not make the committal illegal. [P 441 C 1]

Held further that there was no need at all for the Sessions Judge to refer the case to the High

Court to have the committal quashed. He could have drawn the attention of the Magistrate through the District Magistrate to the fact that it was unnecessary to have committed the accused to Sessions. [P 441 C 1]

Public Prosecutor — for the Crown.

ORDER.—The accused was an old offender. He was charged by the police before the joint Magistrate of Rajahmundry with attempting to steal a purse from a person's pocket. The joint Magistrate thought that as S. 75, Penal Code, would have to be applied, the accused ought to be punished with a larger sentence than he himself could impose; and so he transferred the case to the file of the stationary Sub-Magistrate of Rajahmundry to be tried as a P. R. case and the accused committed to Sessions if the stationary Sub-Magistrate thought that a prima facie case had been made out against him. The stationary Sub-Magistrate after enquiry thought that a prima facie case had been made out and committed the accused to Sessions. The Sessions Judge, on reading the committal order was of the opinion that the committal was illegal, in that S. 75, Penal Code, does not apply to an offence punishable under S. 511, Penal Code, read with S. 379, Penal Code. He therefore referred the case to this Court to have the committal quashed. Section 75, Penal Code, can be applied to offences punishable under Chaps. 12 and 17, Penal Code, but the joint Magistrate overlooked the fact that S. 511, Penal Code, is neither in Chap. 12 nor in Chap. 17, but in Chap. 23. The learned Sessions Judge was therefore quite right in thinking that the joint Magistrate had formed a wrong conclusion that S. 75, Penal Code, could be applied and that he himself could not impose a sufficient sentence. Under S. 511, Penal Code, the maximum sentence is one half of the maximum sentence for the offence which the accused attempts to commit. The maximum sentence for theft is three years rigorous imprisonment; so the maximum sentence for an attempt to commit theft is 18 months rigorous imprisonment, which was within the powers of the joint Magistrate.

The learned Sessions Judge was however wrong in thinking that on that account the committal was illegal. Under S. 28, Criminal P. C., a Sessions Court can try any case. Chap. 18, Criminal P. C., lays down the procedure to be adopted in preliminary enquiry cases; and under S. 209, the Magistrate, if he finds that the prosecution has made out its case, should commit the accused to sessions unless it appears to him that "such person should be tried before himself or some other Magistrate." Clearly, the stationary Sub-Magistrate did not think that some other Magistrate should try it, and so his order committing the accused to sessions was a legal order. Even when a warrant procedure is adopted, the Magistrate may under S. 347 commit the accused to sessions if he thinks that it is a case which ought to be tried by the Court of Session. It may be true that the joint Magistrate had no power to order the Sub-Magistrate to try the case; but that does not make the committal illegal. There was therefore no need at all for the Sessions Judge to refer this case to the High Court. In order that such mistakes might be avoided in future, he could have drawn the attention of the Magistrate through the District Magistrate to the fact that it was unnecessary to have committed the accused to Sessions. However, as the matter is now before this Court and the trial has not begun, and as it seems desirable that the time of a higher tribunal should not be taken when a lower tribunal can try the case, the committal is quashed and the joint Magistrate of Rajahmundry is ordered to take this case on his file and dispose of it according to law.

C.R.K./G.N. *Order accordingly.*

Penal Code—
(a) ('36) Gour, Page 260 Pt. 7 and Page 1784 Pt. 4.
('36) Ratanlal, Page 136 Pt. 1 and Page 1292 Pt. 1.
Cr. P. C.—
(b) ('41) Chitaley, S. 209, Notes 5 and 11 and S. 438 N. 3 Point 6.
('41) Mitra, Pages 750-751, N. 701 and Page 1414 N. 1197.

A. I. R. (29) 1942 Madras 441

WADSWORTH AND PATANJALI SASTRI JJ.

Pariyanampatta Devaswom Uralan Kannanoorpata Moopil Nair and others — *Petitioners*

v.

K. K. Gopalan Nair — *Receiver* — *Respondent.*

Civil Revn. Petns. Nos. 149, 1292, 230, 231, 366 and 369 of 1940, Decided on 14th October 1941, to revise orders of District Munsif, Ottapalam, D/- 8th September 1939.

Madras Agriculturists Relief Act (4 of 1938), Ss. 15 and 3 (ii) proviso (D) — Malabar tarwad paying sufficient land revenue to disqualify it under S. 3 (ii) proviso (D) — Partition suit — Receiver appointed — Properties not divided by metes and bounds — Application by receiver under orders of Court on behalf of all tenants-in-common for relief under S. 15 held competent.

A suit for partition of a Malabar tarwad filed in 1934 resulted in a preliminary decree dated 30th March 1935. The Court appointed a receiver to hold the properties during the process of partition and when the Act came into force the properties had not yet been divided by metes and bounds and the 84 sharers were tenants-in-common together liable to pay rent to the landholder. The receiver under orders of the Court put in appplications under S. 15 on behalf of the tenants-in-common with reference to different jenmis to whom rent was payable :

Held that by the preliminary decree in the partition suit the tarwad had ceased to exist and the leasehold interest was vested in individual sharers none of whom was liable to pay land revenue sufficient to disqualify him under S. 3 (ii) proviso (D) and hence the application by the receiver was not disqualified on ground that original tarwad was disqualified under S. 3 (ii) Proviso (D). [P 442 C 1]

Held further that there was no basis for refusing to agriculturists the benefit to which they were entitled under S. 15 merely because by the process of devolution the tenancy was held by more than one individual. The application by the receiver on behalf of a group of individuals, that is, all the tenants-in-common whom he represented was competent provided at any rate that he was duly authorised by the Court to do so. [P 442 C 2]

P. Govinda Menon — for Petitioners.

K. P. Raman Menon and K. Krishna Menon — for Respondent.

WADSWORTH J. — These civil revision petitions all arise out of applications under S. 15 (4), Madras Act 4 of 1938, made by the receiver appointed in a suit for the partition of a Malabar tarwad. The partition suit was filed in 1934 and it resulted in a preliminary decree dated 30th March 1935. The Court appointed a receiver to hold the properties during the process of partition and when the Act came into force the position was that the properties had not yet been divided by metes and bounds and that the 84 sharers were, with reference to the leasehold interest with which we are concerned, tenants-in-common together liable to pay rent to the landholder. The receiver's petition asserts that all the sharers are agriculturists and there is no denial of this assertion in the counter affidavit, nor is there any plea that any one of the sharers is disqualified under one or other of the provisos to S. 3 of the Act. We may take it that the receiver was in charge of the leasehold interests held on behalf of 84 sharers some of whom were grouped in tavazhies comprising not more than nine sharers, that all the sharers had a saleable interest in agricultural land and that no individual sharer or group of sharers has been shown to be disqualified under any of the provisos. The receiver was directed by the Court under the orders of which he worked to raise funds and make a deposit of the rent due for the Malabar year corresponding to Fasli 1347, in order to claim relief from arrears under S. 15. The present revision petitions relate to different applications presented by the receiver with reference to different jenmis to whom rent was payable.

It is contended in revision that these applications should have been dismissed. The contention appears to be that the original tenant being a tarwad paying sufficient land revenue to disqualify it from having an agriculturist status with reference to proviso D to S. 3, the receiver, representing the leasehold interest formerly held by the tarwad, is similarly disqualified. This contention will not bear examination, for by the preliminary decree in the partition suit the tarwad has ceased to exist and the leasehold interest is vested in individual sharers none of whom appears to pay land revenue sufficient to disqualify him under proviso D, so far as our information goes.

It is next contended that an application under S. 15 (4) of the Act can only be preferred by an individual and that this application made on behalf of a group of individuals is therefore incompetent. Here again, it seems to us that the argument will not bear examination. The position, when the tarwad is disrupted and the leasehold interest becomes vested in individual sharers, is surely very similar to the position when a tenant dies and his heirs become liable as tenants-in-common to pay the rent. Unless and until the individual heir has attorned to the landlord and a new tenancy has been created for a portion of the rent, surely the heirs would be collectively liable to pay a single rent under a single tenancy which has devolved upon them by the death of the original tenant and in such a case it would seem that the only way in which the relief under S. 15 of the Act could ordinarily be obtained would be by the submission of a joint application. The position seems to be that when a tarwad has been disrupted and before the partition has been completed and fresh individual tenancies have been created, the old tenancy continues though the liability for rent is a liability incidental to the tenancy in common which results from the disruption of the tarwad. Surely the result is that all the tenants-in-common are collectively liable to pay rent and should proceed collectively to get any relief to which they may be entitled; at any rate though it would not be necessary for them all to join if any individual applies separately for relief in respect of the rent due, from them all; he would only be able to get that relief on a deposit of the whole of the rent due for Fasli 1347 in respect of the tenancy. It seems to us that there is no basis for refusing to agriculturists the benefit to which they are entitled under S. 15 merely because by the process of devolution the tenancy is held by more than one individual. If so much is conceded, there seems to be no reason why the receiver should not make the application on behalf of all the tenants-in-common whom he represents provided at any rate that he is duly authorised by the Court to do so. It is the receiver who would have to pay the rent so long as he holds the property and it is fitting that the deposit to be made on behalf of the tenants-in-common should be made by him. No doubt the question whether the application should succeed or not will depend on the individual qualification of the various sharers when it is made on their behalf by the receiver. But we cannot see why the application should be rejected merely because it is presented under the orders of Court by the receiver on behalf of all the sharers. In the result therefore these petitions are dismissed with costs in C. R. Ps. 149, 230 and 231 one set in each petition.

C.R.K./G.N. *Petitions dismissed.*

A. I. R. (29) 1942 Madras 442

KING AND BYERS JJ.

Palamalai Chettiar and others — *Appellants*

v.

P. A. L. V. V. R. Ramanathan Chettiar and others — *Respondents.*

Appeal No. 446 of 1940, Decided on 29th January 1942, against order of Sub-Judge, Devakottai, D/- 7th September 1940.

(a) Civil P. C. (1908), S. 47—Execution sale —Application by judgment-debtor for payment of surplus proceeds lying in Court—Decree-holder claiming surplus in lieu of interest—Application falls under S. 47—Appeal lies from its dismissal.

After the sale of his property in execution of a decree the judgment-debtor applied to the Court for payment to him of the surplus proceeds lying in Court. The decree-holder claimed the surplus in lieu of interest. The judgment-debtor's application was dismissed. In the appeal by the judgment-debtor against the dismissal it was argued that the order was merely one dealing with the payment out of some money and was one passed on an application filed specifically under S. 151, Civil P. C., and that no appeal lay against an order passed under that section by a Court in the exercise of its inherent powers :

Held that although the contention raised was correct the application by judgment-debtor was equally one under S. 47. The main subject-matter of the application was a question regarding the right of the decree-holder to obtain further sums by way of interest upon the decree amount and clearly fell within S. 47 as relating to the discharge or satisfaction of the decree. Hence the appeal by judgment-debtor was competent. [P 443 C 2]

(b) Civil P. C. (1908), Ss. 34 and 47 — Sale confirmed — Decree-holder claiming interest during period between date of receipt of money into Court and actual payment of same to him— Aforesaid interest can be claimed only if action on judgment-debtor's part prevents or postpones payment—Decree-holder held not entitled to interest as claimed as no blame could be attached to judgment-debtor.

The date upon which the sale is confirmed is the date upon which the money due by the judgment-debtors under the decree is paid by them and realised by the judgment-creditors through the Court which has been acting for them upon their application. It is only if there is some subsequent action on the part of the judgment-debtors during the period between the receipt of the money into Court and the actual payment by the Court of the money to the judgment-creditors which prevents or postpones that payment, that any question can arise of any further liability resting upon the judgment-debtor under the decree. So long as no blame can attach to the judgment-debtors they cannot be compelled to pay interest for any further period beyond the date when payment was made into Court in satisfaction of the decree. [P 443 C 2; P 444 C 1]

After the sale had been confirmed and a statement as to the amount due to him had been received from the decree-holder on the date of confirmation of sale, a suit was filed by the judgment-debtor for partition and there was an application by the auction purchaser of the property at the sale in question for an injunction against the distribution of the sale proceeds. An injunction was issued and was not finally dissolved until two or three years had elapsed. The application by the judgment-debtor for the repayment to him of the surplus money lying in Court was opposed by the judgment-creditor who contended that as he had not been able to draw out the money until the dissolution of the injunction passed in connexion with the auction-purchaser's application, interest on his decree amount as it stood on the date of the confirmation of sale should be allowed and therefore the money still lying in deposit should be paid out not to the judgment-debtor but to himself:

Held that there was nothing to show that the judgment-debtor by filing the partition suit in any way attempted to impugn the decree obtained by the judgment creditor or the sale held in execution of the decree. Since no blame could be attached to the judgment-debtor for the grant of injunction by the Court for insufficient reason, the decree-holder was not entitled to the interest claimed.

[P 443 C 2; P 444 C 1]

C. Padmanabha Iyengar—for Appellants.

K. S. Champagesa Iyengar and K. C. Srinivasan—for Respondents.

KING J.—The subject-matter of this appeal is a sum of Rs. 1584-7-1 lying in the Court of the Subordinate Judge, Devakottai, to the credit of O. S. No. 108 of 1933. The facts are that certain properties were sold in execution of the decree in that suit and the sum of approximately Rs. 37,000, realised. The judgment-creditor and two other creditors of the judgment-debtors filed a joint statement in which the amount due to them in satisfaction of their respective decrees on the date of the confirmation of sale is entered. The total of these three amounts comes to Rs. 35,000 odd, and the balance remaining in Court is the subject-matter of this appeal. It appears that after the sale had been confirmed and this statement had been received from the three decree-holders a suit was filed by the judgment-debtors in 1936 for partition and there was an application by the auction-purchaser of the property at the sale in question for an injunction against the distribution of the sale proceeds. An injunction was issued and was not finally dissolved until two or three years had elapsed. This application by the judgment-debtors for the repayment to them of the surplus money lying in Court was opposed by the judgment creditors who contended that as they had not been able to draw out the money until the dissolution of the injunction passed in connexion with the auction purchaser's application, interest on their decree amount as it stood on the date of the confirmation of sale should be allowed and therefore that the money still lying in deposit should be paid out not to the judgment-debtors but to themselves. Upon this opposition the learned Subordinate Judge of Devakottai dismissed the application of the judgment-debtors for repayment of the money. It was contended in the first instance as a preliminary objection that no appeal lies against this order. It was argued that the order was merely one dealing with the payment out of some money and was one passed on an application filed specifically under S. 151, Civil P. C., and that no appeal lies against an order passed under that section by a Court in the exercise of its inherent powers. No doubt that is so, but this application is equally one under S. 47, Civil P. C. It is clear that the main subject-matter of the application was a question regarding the right of the decree-holders to obtain further sums by way of interest upon the decree amount. That clearly falls within S. 47 as relating to the discharge or satisfaction of the decree. We therefore overrule the preliminary objection.

Upon the merits of the appeal we think that the order of the lower Court is wrong. The lower Court has based its order awarding interest to the judgment creditors almost solely upon the fact that they were not to blame for the long delay in the final realisation of the money. There is, however, no discussion in the order of the learned Subordinate Judge of the position of the judgment-debtors. We are of opinion that if no further facts emerge, the date upon which the sale is confirmed is the date upon which the money due by the judgment-debtors under the decree is paid by them and realised by the judgment creditors through the Court which has been acting for them upon their application. It is only if there is some subsequent action on the part of the judgment-debtors during the period between the receipt of the money into Court and the actual payment by the Court of the money to the judgment creditors which prevents or postpones that payment, that any question can arise of any further liability resting upon the judgment-debtors under the decree. It has not been shown in this case that when they filed their suit in 1936, the judgment-debtors in any way attempted to impugn the decree obtained by the judgment creditors in this suit or the sale held in execution of the decree. It is indeed extremely difficult to believe that any such attempt could possibly have been made because the facts show that the judgment-debtors did not avail themselves of the opportunity to apply to set aside the sale under O. 21, Civil P. C., and must have realised the impossibility of attempting to do so by any partition suit. It is unfortunate no doubt for the judgment creditors that the auction purchaser applied for an injunction regarding the payment of this money, and unfortunate that the Court to which the application was made granted

such an injunction for what appear to us insufficient reasons. But so long as no blame can attach to the judgment-debtors, we cannot see under what principle they can be compelled to pay interest for any further period beyond the date when payment was made into Court in satisfaction of the decree. We accordingly set aside the order of the learned Subordinate Judge and direct that execution application No. 360 of 1940 be allowed with costs throughout and a cheque issued to the appellants for the sum claimed by them, subject to the furnishing of the security undertaken by themselves in their own application, or if the money is no longer available in Court it is hereby declared that the appellants are entitled to recover it from the respondents.

C.R.K./G.N. *Appeal allowed.*

C. P. C.—

(a) ('40) Chitaley, S. 47, N. 71a, Pts. 12 and 13.
('41) Mulla, Pages 179 to 181, N. "Questions relating to execution, discharge or satisfaction."

(b) ('40) Chitaley, S. 34, N. 12 and O. 24, R. 3, N. 3.
('41) Mulla, Page 978, N. "Execution proceedings."

A. I. R. (29) 1942 Madras 444

HORWILL J.

In re Muthandi alias Periakaruppan Ambalam and others — Appellants.

Criminal Appeal No. 689 of 1941, Decided on 2nd March 1942, against order of Assist. Sessions Judge, Madura Division at Dindigul, in C. C. No. 104 of 1941.

(a) Evidence Act (1872), S. 27 — Portion admissible.

Only such portions of a confession as lead to the discovery of some fact material to the case can be admitted. [P 444 C 1]

(b) Evidence Act (1872), S. 30 — Confession of co-accused how far to be used, explained.

If there is substantial evidence against the non-confessing accused and there remains some lingering doubt, the confession of the co-accused may be taken into account to set that little doubt at rest. [P 444 C 2]

J. S. Vedamanikkam — for Appellants.

Public Prosecutor — for the Crown.

JUDGMENT. — The five appellants were convicted by the Assistant Sessions Judge of Madura of an offence punishable under Ss. 457 and 395, Penal Code, and sentenced to five years' rigorous imprisonment and ordered to report all changes of residence to the police for two years after release. The accused were tried by Jury and the verdict was unanimous. There are however one or two directions in the charge which are open to criticism. The most important defect in the charge is that the learned Assistant Sessions Judge has admitted the whole of the confessional statement of accused 1 without criticism or question. Only such portions of a confession as lead to the discovery of some fact material to the case can be admitted. What was discovered as a result of the confession of accused 1 was a thali kodi wrapped up with a piece of charcoal in a piece of rag. The confession need not however be confined merely to that part of it which deals with the "thali kodi." We have to know from the portions admitted that the "thali kodi" which accused 1 disposed of and which was found as a result of his confession was the thali kodi of the complainant. The only way in which the thali kodi recovered by the accused as a result of his confession can be identified with the thali kodi of the complainant is by admitting that portion of the confession which says that the accused entered the house of the complainant and took a thali kodi from somewhere. Excluding all that is not absolutely necessary for the purpose of identification of the thali kodi or which relates to the disposal of the thali kodi, we arrive at the following as the admissible portion of accused 1's confession :

"I and Guruswami (accused 2) . . . . came to the roof of the Ayyangar's house along the upstairs and I and Guruswami got down . . . . . Four women were lying in that nadai. The woman who was lying to the west among them, was wearing plenty of jewels. I removed the thali kodi by unscrewing the screw . . . , . . Perumal (accused 5) gave a torn piece of female cloth which he had tied in his waist. I tied the pieces of charcoal in it as also the jewel, placed in a small broken chunam pot of the house of Oomayan, and I buried it underneath a cattle trough of the house of Oomayan."

Two other parts of the charge which can be criticised—but not very seriously—are those found in paras. 17 and 22. The learned Assistant Sessions Judge says "the confessional statement of accused 1 (Ex. H) may be taken into consideration not only against himself but also against accused 2 to 5. But so far as they are concerned, its evidentiary value is very poor; for the statement is not one made on oath, and the author has not been subjected to cross-examination. Such a statement cannot be acted upon as against the others unless corroborated in material particulars so far as it concerns them. This means that even if you accept accused 1's confessional statement at its face value as against him, you cannot act on it as against accused 2 to 5 unless you are satisfied that it receives corroboration from material facts proved against them." This way of putting the case is perhaps not very inaccurate; but it rather puts the cart before the horse. It is not that the confession of one accused must be corroborated by other evidence before it can be accepted against a co-accused; but rather there must be a basis of substantial evidence to which the confessional statement may be added. If there is substantial evidence against the accused and there remains some lingering doubt, the confession of the accused may be taken into account to set that little doubt at rest. Much the same criticism may be made of para. 22 of the charge where the learned Assistant Sessions Judge says: "These recoveries of rags from the houses of accused 4 and 5 are the only evidence by which the prosecution seeks to corroborate Ex. H in so far as those accused are concerned. Whether they would amount to material corroboration and whether you would therefore act on Ex. H as against them, it is for you to decide."

If we accept only that portion of the charge which I have indicated above, the only evidence against accused 4 is that some pieces of rags were found in his house; and there is no part of the confessional statement that can be taken into account against him. There is the same evidence against accused 5. In the portion that I have considered admissible from accused 1's statement there is a mention of accused 5; for he gave a piece of sari to accused 1 in which were tied pieces of charcoal and the jewel; but there is nothing in that part of the statement which connects accused 5 with the crime, or even suggests that he knew that the jewel belonged to the complainant or was in any way connected with

any offence. The mere discovery of bits of cloth in the houses of accused 4 and 5 is not sufficient to warrant their conviction. The appeal has therefore to be allowed as far as they are concerned and their convictions set aside entirely.

Accused 2 and 3 made statements that their share of the spoil was to be found at such and such places; and upon going to the places indicated, articles were found which had been taken from the house of the complainant at the time of the house breaking. That is sufficient to bring home to them the charge of house breaking. But if we limit the confession to the portion I have indicated, there is no reason to think that the offence of dacoity was committed; for no witness saw five persons. The case of dacoity rests entirely on the confession of accused 1. Accused 1 to 3 did however commit the offences of house breaking by night and robbery. Although the sentences are not excessive even for offences of house breaking and robbery, I think the sentences should be reduced, inasmuch as the learned Assistant Sessions Judge would not presumably have given the appellants quite such heavy sentences had he found them guilty under Ss. 457 and 392, Penal Code. The convictions of appellants 1 to 3 will therefore be modified as indicated above and their sentences reduced from five years' rigorous imprisonment to four years' rigorous imprisonment. The order under S. 565, Criminal P. C., will stand as against the three accused.

C.R.K./R.K. *Order accordingly.*

Cr. P. C. —
(b) ('41) Chitaley, S. 164 N. 19.

A. I. R. (29) 1942 Madras 445 (1)

KING AND BYERS JJ.

Minor Chockalingam Chettiar alias Thiagarajan Chettiar, through mother and next friend Karuppayi Achi alias Paripoornam Achi — Appellant

v.

S. T. Chocklingam Chettiar alias Nagappa Chettiar — Respondent.

Appeal No. 479 of 1940, Decided on 29th January 1942, against order of Sub-Judge, Devakottai, D/- 9th November 1939.

(a) Hindu law — Succession — Father dying before uncle who died without widow or other heirs — Nephew held entitled to apply as heir of uncle.

A person established the fact that his father died before his uncle and that his uncle had already lost his wife and had left no other heirs. No possible alternative heir to the uncle was suggested by the other side :

Held that that there was sufficient evidence proving the title of the person to apply as heir of the uncle. [P 445 C 2]

(b) Civil P. C. (1908), S. 144—Application for restitution is for debt within Succession Act.

An application on the part of the successful party in the appellate Court for restitution from the unsuccessful party if that is expressed in terms of rupees is for a debt and a succession certificate is required for such an application under S. 144 by the heir of the successful party. [P 445 C 2]

A. C. Sampath Ayyangar — for Appellant.

KING J.—This is an appeal against an order of the learned Subordinate Judge of Devakottai dismissing an application filed under S. 144, Civil P. C. The petition was filed by a minor for whom his next friend asserted that he was the heir of the original party to the litigation who had an undoubted right to restitution under S. 144, Civil P. C. His relationship to that original party was questioned by the respondent who put him to strict proof of his title. The learned Subordinate Judge has held that he has not sufficiently proved that he is the heir of the original party. It is difficult to understand how the learned Judge came to this conclusion. There is the definite evidence given on behalf of the petitioner establishing the fact that his father died before his uncle who was the party concerned and that his uncle had already lost his wife and had left no other heirs. No possible alternative heir to the uncle was suggested by the respondent. In these circumstances we are satisfied that there is sufficient evidence proving the title of the petitioner to apply as heir of the original party.

The more important question however then arises as to whether this application will lie without a succession certificate. It is argued on behalf of the appellant that no such succession certificate is required for an application under S. 144, Civil P. C., because the claim which is made under that section cannot be considered a claim for a debt. We are unable to appreciate this argument and no authority has been cited in its support. It seems to us clear that an application on the part of the successful party in the appellate Court for restitution from the unsuccessful party if that is expressed in terms of rupees is for a debt. It was pointed out that a debt must be for a liquidated sum of money. But it is quite clear from a perusal of the contents of the application in this case that it was for a liquidated sum of money in every sense of that word that the appellant was applying. In view however of our decision with regard to the relationship of the appellant as the heir to the original party we do not consider that the order of the learned Subordinate Judge dismissing his application can be supported. We set aside that order and direct that the learned Subordinate Judge do take the application again on file and continue to keep it on file for a period of three months or such time as may appear reasonable to the learned Subordinate Judge, in order to enable the appellant to provide himself with necessary succession certificate. The learned Subordinate Judge will then dispose of the application according to law. The costs will abide the event.

C.R.K./R.K. *Order set aside.*

C. P. C. —
(b) ('40) Chitaley, S. 144, N. 8.

A. I. R. (29) 1942 Madras 445 (2)

BURN J.

In re M. Kuttia Pillai — Petitioner.

Civil Revn. Petn. No. 921 of 1941, Decided on 20th February 1942, to revise orders of Dist. Munsif, Namakkal, D/- 6th March 1941.

(a) Court-fee —Fixation of — Duty is of trial Court.

The duty of fixing the court-fee is cast by law on the trial Court, and the trial Court's decision is ordinarily final. [P 446 C 1]

(b) Pleadings—Court cannot compel party to seek particular relief.

a The Court has no power to compel any party to pray for any particular relief. [P 446 C 1]

K. V. Ramachandra Iyer — for Petitioner.

Government Pleader on behalf of Government.

ORDER.—The learned District Munsif has not called upon the petitioner to pay any particular court-fee, and the question of what is the proper court-fee is not in my opinion before me. If it were, I should be obliged to decline it, because the duty of fixing the court-fee is cast by law on the trial Court, and the trial Court's decision is ordinarily final. The learned District Munsif has however exceeded his jurisdiction in directing the plaintiff to add to his plaint certain prayers which the plaintiff does not want to add. The Court has no power, so far as I am aware, to compel any party to pray for any particular relief. In this case the b petitioner alleges that the decree and subsequent proceedings in execution of the decree in O. S. No. 23 of 1932 are null and void, and not binding on him. But he does not ask the Court to make any declaration to that effect, or to set them aside as void against him. The learned District Munsif has ordered him to add a prayer for the cancellation of the decree. He does not wish to do so, and I am not aware of any power in the Court to compel him. The order of the lower Court directing amendment of the prayer is accordingly cancelled. It remains for the lower Court to determine, on the plaint as it is, what is the proper court-fee, and to dispose of the plaint according to law. I make no order as to costs of this petition.

C.R.K./R.K. *Order accordingly.*

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c C. P. C. —
(b) ('40) Chitaley, O. 7 R. 7, N. 1.
('41) Mulla, Page 606, Note "Relief."

A. I. R. (29) 1942 Madras 446

KING AND BYERS JJ.

In re Manakkal Kumaran and others Appellants.

Criminal Appeal No. 617 of 1941, Decided on 30th January 1942, against order of Court of Session, South Malabar Division in C. C. No. 39 of 1941.

(a) Criminal trial — Evidence — Prosecution witnesses taking part in defending deceased— Their unwillingness to accept responsibility for long wound on back of accused is not sufficient d **for doubting prosecution story.**

The fact that none of the prosecution witnesses who took part in defending the deceased are willing to accept responsibility for a long wound on the back of the accused is not a sufficient reason for doubting the prosecution story. [P 447 C 2; P 448 C 1]

(b) Criminal trial — Evidence — Witnesses using defensive measures against rowdies and giving evidence freely regarding death of their companion—Witnesses cannot be described as interested.

Witnesses cannot be described as interested merely because they were prepared to use defensive measures against rowdies and freely give evidence regarding the death of some of their companions. If this constitutes interest, then every witness who gives evidence against accused persons who commit crimes of violence either against him or in his presence must be described as an interested witness.

[P 448 C 1]

(c) Criminal trial — Evidence — Number of e **persons attacking without warning in crowded place—Number of minor discrepancies and inconsistencies in evidence given by prosecution witnesses — That is insufficient to throw real doubt on prosecution story.**

In an occurrence where an attack is made by a number of persons without warning in a crowded place, the accounts given by the prosecution witnesses must necessarily vary in details and what may have been noticed by one may not have been seen by another, and therefore the fact that there are a number of minor discrepancies and inconsistencies in the evidence of the witnesses is insufficient to throw any real doubt on the prosecution story. [P 448 C 1]

(d) Penal Code (1860), Ss. 149, 302 and 324 — — Construction of S. 149—Words "in prosecution of" in S. 149 mean "in order to attain" — f **Accused *A* armed with dagger and *B* with knife — *A* and *B* along with their companions to avenge rough treatment meted out to them by trustees of temple, going to temple and killing two trustees—Accused other than *A* and *B* using hands in beating off men of party of trustees — Common object of unlawful assembly held to cause hurt—Use of threatening words by *A* and *B* that none of trustees should be left alive held did not show that rest of accused shared homicidal intention with them—*A* and *B* held guilty of murder and rest of hurt.**

If the word "or" in S. 149 is given its literal meaning, and if the expression "in prosecution of" in both clauses is given exactly the same interpretation the section becomes unintelligible : 20 W.R.Cr. 5 (F.B.), *Approved.* [P 449 C 1] g

But a consideration of the section as a whole is no impediment to strictly construing the words "in prosecution of the common object" in cl. (1) of S. 149 as equivalent to "in order to attain the common object" : C. A. Nos. 283 and 376 of 1941, *Disting.* [P 448 C 2]

The accused insulted and annoyed the womenfolk who had come to attend a festival which was being celebrated in a temple. The trustees of the temple and their men intervened; a scuffle ensued in which blows were exchanged and the accused were driven out. About an hour later the accused returned in order to have their revenge on the trustees for the rough treatment they had received. Accused 1 and 2 who were armed with a pen-knife and a dagger respectively came running along with their companions towards the trustees shouting h out that none of the trustees were to be left alive. All the accused went directly to the place where the trustees were conducting the proceedings and accused 2 immediately stabbed one of the trustees in the abdomen and accused 1 stabbed another trustee also in the abdomen as a result of which the trustees died. The rest of the accused used their hands in beating off the men of the party of the trustees and all then bolted.

Held that boastful and threatening expressions were frequently used by villagers and the use of the threatening words that none of the trustees should be left alive by accused 1 and 2 was not sufficient evidence to show that the rest of the accused shared a homicidal intention with them. In all the circumstances of the case and the nature of the weapons used, the evidence was insufficient to show that the common object of the accused was murder. Their common object was only to cause hurt.

[P 448 C 2]

Held further that the actions of accused 1 and 2 could not be considered as indivisible but must be analysed into two parts. In so far as they were prosecuting the common object of the assembly accused 1 and 2 intended to cause hurt and did cause hurt to the deceased. But they also intended to kill the deceased or cause them such bodily injuries as would be sufficient to cause their deaths. In conceiving and carrying out that intention they were not acting in prosecution of the common object, but in prosecution of private objects of their own. Accused 1 and 2 were therefore guilty of murder and the rest of causing hurt under S. 324, Penal Code. [P 449 C 1]

V. T. Rangaswami Ayyangar and M. Chinnappan Nair — for Appellants.

Public Prosecutor — for the Crown.

KING J.—The five appellants were involved in a case of rioting and murder at a village in the Calicut Taluk on the night of 31st March last. All of them were convicted of rioting, two of them being convicted under S. 148, Penal Code, because of their possession of lethal weapons, and appellants 1 and 2 were convicted of two murders committed by them in the course of the occurrence. The remaining appellants were also convicted on two counts of constructive liability for these murders. The story of the occurrence is comparatively simple. A festival extending over several days was being celebrated at the temple where the occurrence took place and, on 30th March, these appellants created a disturbance by going to that part of the pandal reserved for the womenfolk. They insulted them and began to annoy them by throwing discarded beedi ends at them. Several of the uralars or temple managers including the two murdered men, went and ejected them. There was no further trouble that night but the following night about 10 o'clock the appellants arrived at the temple and began to repeat their performance of the night before. On that occasion the prosecution witnesses who were ordered to eject them did not find the task so easy and there was a scuffle and blows were exchanged on both sides before they could be driven out. Several injuries were inflicted on the appellants and one of them received an incised wound twelve inches long across the back. About an hour later, the appellants returned in order to have their revenge on the uralars for the rough treatment they had received. Appellants 1 and 2 were armed with a pen-knife and a dagger respectively and it was the prosecution case that the common object of the unlawful assembly thus formed was to kill the uralars, members of their families and their supporters. As they arrived at the scene they were heard shouting out that none of the uralars were to be left alive. All the appellants went directly to the place where the uralars were conducting the proceedings and accused 2 immediately stabbed one Raman in the abdomen and accused 1 stabbed Narayanan also in the abdomen, followed by another blow as soon as he sat down. The rest of the appellants used their hands in beating off the prosecution witnesses and all then bolted. Raman died almost immediately but Narayanan survived until 6th April. Early information was given at the police station half a mile away and before the Sessions Judge there was ample evidence identifying appellants 1 and 2 as the authors of the fatal injuries on Narayanan and Raman respectively. The rest of the appellants were also well identified and in the result the first two appellants were convicted under S. 148, Penal Code, while the remainder were convicted under S. 147, Penal Code. Appellant 1 was convicted of the murder of Narayanan and the remainder of the accused were convicted of this murder by operation of S. 149, Penal Code. Appellant 2 was convicted of the murder of Raman while his companions were convicted under S. 149, Penal Code. All the appellants were sentenced to transportation for life for the offences of murder while the convictions under Ss. 147 and 148, Penal Code, were followed by sentences of rigorous imprisonment for six months and one year respectively.

Mr. Rangaswami Ayyangar has strenuously argued that the evidence in the case is not reliable and that on account of several discrepancies in the stories told, the witnesses cannot be believed regarding what took place. According to the case set out by the appellants before the Committing Magistrate and the learned Sessions Judge, appellants 1 and 2 went to the temple about 11 o'clock that night and shortly after getting there, the deceased Narayanan came and told them they were wanted by the uralars. The two of them went to see what was the matter and as soon as the uralars saw them, they attacked and beat them. Appellant 1 saw appellant 2 being stabbed by the two deceased and he then took out a small pen knife and began to brandish it in order to keep off his assailants. As is usually the case in pleas of this kind, appellant 1 is unable to say whom he struck when he was waving his knife about in this way. The two of them then managed to escape. Appellant 2 supported his brother in this story while appellants 3 and 4 claimed to have gone to the spot on seeing appellant 2 being stabbed and to have received injuries in the ensuing fight. Appellant 5 denied all knowledge of the occurrence and claimed that he had been falsely implicated in the case because he refused to give evidence in support of the uralars. If the prosecution witnesses are prepared deliberately to swear away the lives of the five appellants it necessarily follows that there must be some deep rooted enmity to account for this but on turning to the statement of appellant 1 before the committing Magistrate, there is an adminission which effectively disposes of this theory of enmity and ill feeling on the part of the uralars. In answer to a specific question, appellant 1 denied that there was any ill feeling between him and the prosecution witnesses. He went on to refer to some slight trouble between Narayanan (P. W. 5) and appellant 3 but this was so slight that it is no adequate explanation for giving evidence of this kind against the appellants.

In support of the argument, that the prosecution witnesses were aggressors, considerable reliance has been placed on the injuries suffered by the appellants. Appellant 2 had an incised wound two inches long on the left arm and a much smaller one on the back of the right arm, but the injury which the prosecution witnesses have not satisfactorily explained was an incised wound twelve inches long and three quarters of an inch broad muscle deep across the back. None of the witnesses admit having caused this although there is no attempt to hide the fact that when the appellants had to be forcibly removed, the prosecution witnesses pulled out of the ground some of the bamboos forming part of the pandal and used them somewhat freely in driving out the appellants. These bamboos were split and having been driven into the ground their ends must have been sharpened. The medical witness, P. W. 3, admitted that all the injuries on appellants 2, 3 and 4 could have been caused with split bamboos. Although none of the prosecution witnesses is willing to accept responsibility for this long wound

on the back of appellant 2, we do not consider this is a sufficient reason for doubting the prosecution story. There is ample evidence of the appellants' visit the night before and their attempt to interfere with the womenfolk, and this renders probable the prosecution story that they became aggressive again the following night about the same time and began to interrupt the proceedings.

The prosecution story was supported by P. Ws. 10 to 18. Information was first given to the police by P. W. 10 shortly after midnight. The occurrence took place according to this report at 10.30 p.m. and having regard to the time probably occupied in giving first aid to the victims and recovering from the shock of the attack, there was no delay to be accounted for. The five appellants were clearly mentioned by name in this report, Ex. N and in referring to the incident the previous night, there was no attempt to conceal the fact that when the appellants made their second visit the next night, the prosecution witnesses came to blows with them. Within a few hours of the occurrence a dying declaration, Ex. B, was taken by the local Magistrate from the deceased Narayanan and because of his weak state, the Sub-Inspector of police did not attempt to examine him himself. In this statement Narayanan made a brief accusation that the first two appellants and three companions not mentioned by name had attacked him and that appellant 1 stabbed him with a dagger. He also referred to the attack on his brothers and others and briefly mentioned his attempt to dissuade the appellants from interfering with the womenfolk as the cause of this attack. He made no attempt to separate the interference with the womenfolk from the attack an hour or so later and this has been relied upon by Mr. Rangaswami Ayyangar as an important discrepancy in the evidence. We are unable to accept this as an adequate reason for rejecting the whole of this dying declaration. Although the deceased did not die for several days, he was then suffering from severe injuries and must have been in considerable bodily pain, which probably explains why he confined himself to his own injuries without attempting to mention what happened to Raman or to describe in clear detail the chronological sequence of events. Admittedly, several of the prosecution witnesses are temple uralars but we are unable to see how they can be described as interested witnesses merely because they were prepared to use defensive measures against rowdies and freely give evidence regarding the death of two of their companions. If this constitutes interest, then every witness who gives evidence against accused persons who commit crimes of violence either against him or in his presence must be described as an interested witness. The learned advocate for the appellants has drawn our attention to a number of minor discrepancies and inconsistencies in the evidence but they are insufficient to throw any real doubt on the prosecution story. In an occurrence of this kind where an attack is made by a number of persons without warning in a crowded place, the accounts given by the witnesses must necessarily vary in details and what may have been noticed by one may not have been seen by another. We can see no sufficient reason for disagreeing with the learned Sessions Judge in his acceptance of the prosecution evidence identifying the five appellants as having taken part in the attack and the first two appellants as the authors of the fatal injuries on the two victims. So far as the convictions of the latter for the two murders are concerned there is no difficulty. Their convictions are confirmed and their sentences, which are the minimum prescribed by law, are upheld. The convictions of all the appellants under Ss. 147 and 148, Penal Code, are also upheld and their sentences maintained.

It is regarding the application of S. 149, Penal Code, that we find ourselves unable to agree with the learned Judge. The prosecution evidence was that the five appellants came running towards their victims shouting out that none of the uralars were to be left alive and it was largely on the use of these words and the lethal weapons with the first two appellants that the common object of the unlawful assembly was held to be the murder of the uralars and their families. On examining the evidence of the prosecution witnesses who speak to the use of these threatening words we find there is considerable ambiguity. P. Ws. 11 and 16 say that the threats were uttered by all the appellants but the rest of the eye witnesses implicate only the first two appellants as having shouted out these ominous words. If the personal pronouns occurring in the relevant sentences have been correctly used, they can refer, according to the context, only to the first two appellants and not to the rest of the assailants. Boastful and threatening expressions of this kind are frequently used by villagers and we consider it doubtful whether the use of these threatening words by the first two appellants is sufficient evidence to show that the rest of the appellants shared a homicidal intention with them. There is no doubt the possession of the two weapons by the first two appellants has to be considered. One of them is a dagger about the lethal nature of which there can be no doubt but the other is only a small penknife and we consider that in all the circumstances of the case, the evidence is insufficient to show that the common object of the appellants was murder. We consider their common object was only to cause hurt.

It is, however, argued by the learned Public Prosecutor that even though the common object of the unlawful assembly may not have been to commit murder as asserted in the charges but only to cause hurt, two persons were in fact murdered by two of the appellants in prosecution of that common object and therefore under cl. 1 of S. 149, Penal Code, the remaining three appellants must also be found guilty of those murders. The crucial question which we have now to decide is whether the murders of Raman and Narayanan were committed "in prosecution of the common object" of the unlawful assembly. The learned Public Prosecutor argues, very plausibly, that the injuries which caused the deaths of Raman and Narayanan were inflicted by the two appellants in prosecution of the common object and therefore that the murders were committed in such prosecution. We feel, on general grounds, the greatest reluctance to accept any such interpretation, which involves the conviction of an offender for an offence which he neither committed himself nor intended should be committed, nor even contemplated as likely to be committed by his associates. This, we feel, is contrary to all principles of criminal responsibility, and cannot have been the intention of the Legislature.

Nor do we think, if we confine ourselves to cl. 1 of S. 149, that the language used presents any difficulty. The plain literal meaning of "in prosecution of" would seem to be "in order to achieve or attain". "Prosecution" is derived from latin, and the root meaning of the word is "to follow". When a person has already attained or caught up with his object and passes beyond it he can no longer be said to be pursuing or prosecuting it. We think that the actions of the two appellants cannot

be considered as indivisible, but must be analysed into two parts. In so far as they were prosecuting the common object of the assembly, these appellants intended to cause hurt and did cause hurt to Raman and Narayanan. But they also intended to kill Raman and Narayanan or cause them such bodily injuries as would be sufficient to cause their deaths. In conceiving and carrying out that intention they were not acting in prosecution of the common object, but in prosecution of private objects of their own. Difficulties, however, undoubtedly arise from the fact that the phrase "in prosecution of that object" occurs in cl. 2 of the section. It is not necessary for us in disposing of this appeal to find specifically whether appellants 3, 4 and 5 had or had not the knowledge required by that clause because, as the learned Public Prosecutor himself pointed out, they were not charged with having that knowledge, and had no direct opportunity therefore of establishing their want of it. All we need say now on this point is this—that if the word 'or' in S. 149 is given its literal meaning, and if the expression "in prosecution of" in both clauses is given exactly the same interpretation, then it seems to us that the section is unintelligible. This was recognised nearly 70 years ago in 20 W. R. Cr. 5.[1] We do not find therefore that a consideration of the section as a whole presents any impediment to our holding that "in prosecution of the common object" in cl. 1 must be strictly construed as equivalent to "in order to attain the common object".

There appear to be no reported authorities in favour of the proposition of the learned Public Prosecutor. He has however referred us to a recent decision of a Bench of this Court (in Cr. A. Nos. 283 and 376 of 1941) of which one of us was a member. It may perhaps be possible to read portions of that judgment as impliedly accepting the view which the learned Public Prosecutor is now pressing upon us, but there is also the most definite finding in that judgment that the members of the unlawful assembly must have known that murder was likely. The accused in that case were convicted therefore by the application of cl. 2 of S. 149. The question of any antithesis between the two clauses was not raised, nor were the learned Judges considering facts in which knowledge of the likelihood of murder was absent. We do not consider therefore that the decision in Cr. A. Nos. 283 and 376 of 1941 is binding upon us when considering the particular facts and circumstances of the present case. There is, of course, no doubt that cl. 1 of S. 149 must be resorted to in this case to convict appellants 3, 4 and 5 of some offences. We hold, however, for the reasons which we have given that the offences which appellants 1 and 2 committed in prosecution of the common object were not murder but hurt under S. 324. We find appellants 3, 4 and 5 guilty on both charges of offences under S. 324 read with S. 149 and sentence them each to rigorous imprisonment for 18 months on each of the charges, these sentences to run concurrently with each other and concurrently with those imposed under S. 147.

C.R.K./G.N. *Order accordingly.*

1. ('73) 20 W. R. Cr. 5 : 11 Beng. L. R. 347 (F.B.), The Queen v. Sabid Ali.

Cr. P. C. —

(c) ('41) Chitaley, S. 367, N. 6 Pt. 32.

Penal Code —

(d) ('36) Ratanlal, Page 351 Note: "In prosecution of . . . . that assembly." Page 352 Note: "Or such as the . . . . . to be committed." Page 353 Note: "Act done in . . . . . common object." Page 354 Note: "Persons having no . . . . of it by others."

('36) Gour, Page 517, N. 1412; Page 518, Notes 1415 and 1416 and Page 520, N. 1422.

A. I. R. (29) 1942 Madras 449

WADSWORTH AND PATANJALI SASTRI JJ.

Variath Krishna Warriar — *Petitioner*

v.

Malayalee Bank Ltd., Managing Director, T. Kadungi Nedungadi and another — *Respondents.*

Civil Revn. Petn. No. 448 of 1940, Decided on 16th February 1942, to revise decree of Sub-Judge, Palghat, D/- 2nd October 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (2) Proviso B — Police pensioner paying profession tax does so on income from profession other than agriculture.

A person who pays profession tax on his pension as a retired police officer does in fact pay profession tax other than agriculture within proviso B to S. 3 (2) on an income derived from a profession.

[P 449 C 2; P 450 C 1]

(b) Practice — New plea — Revision.

Where there are no materials in the record to support an argument it is not proper to allow such a contention to be raised for the first time in revision.

[P 450 C 1]

C. Unikanda Menon — for Petitioner.

M. Chinappan Nair — for Respondents.

WADSWORTH J.—The petitioner was defendant 1 in a suit on a promissory note and he claimed relief under Madras Act 4 of 1938. He admitted however in the lower Court that he had been paying profession tax to the District Board for the last seven or eight years and on this admission the suit was decreed in full against him. It is contended in revision that the petitioner is not disqualified under proviso B to S. 3 (2) of Act 4 of 1938 because he has been paying profession tax not on the income derived from the actual exercise of a profession other than agriculture, but on his pension as a retired police officer.

The words of the proviso are—"has within two years immediately preceding the 1st October 1937 been assessed to profession tax on a half yearly income of more than three hundred rupees derived from a profession other than agriculture"—etc. If the words 'derived from a profession other than agriculture' are read in their strictest sense, the effect would be to confine the disqualification under this proviso to persons paying profession tax on income derived from what are usually called the learned professions and it would not exclude persons paying profession tax in respect of income derived from business. But having regard to the very wide use of the word profession in the term "profession tax" it seems doubtful whether the Legislature intended to use the word in its most restricted sense in this phrase "derived from a profession other than agriculture" more especially as agriculture itself would not ordinarily be treated as a profession in the strictest sense of the word. The argument that "income derived from a profession" must be confined to income derived from the present exercise of a profession seems however to find no justification in the words of the proviso. We have no difficulty in holding that the present petitioner when he pays profes-

sion tax on his pension as a retired police officer does in fact pay profession tax on an income derived from a profession. We do not wish to say anything which can be interpreted as an expression of opinion to the effect that income derived from a source not falling within the strictest definition of a profession would fall outside the scope of this proviso. On the facts of the present case, we are clear that, even giving the word "profession" its strictest interpretation, the pension in question must be deemed to be income derived from a profession.

An attempt has been made to argue that the profession tax in question was not levied by a panchayat which was a union before 26th August 1930. There are no materials in the record to support this argument and we do not think it proper to allow such a contention to be raised for the first time in revision. It has no basis in the facts put into evidence. The result therefore is the revision petition is dismissed with costs.

C.R.K./R.K. *Revision dismissed.*

C. P. C. —
(b) ('40) Chitaley, S. 115 N. 2 Pt. 7.
('41) Mulla, Page 408 Note "Limits of revisional jurisdiction."

A. I. R. (29) 1942 Madras 450

KING AND HAPPELL JJ.

In re Peria Chelliah Nadar—Accused.

Referred Trial No. 166 of 1941 and Criminal Appeal No. 626 of 1941, Decided on 17th November 1941, referred by Addl. Sess. Judge, Tinnevelly Division, D/- 10th September 1941.

(a) Evidence Act (1872), Ss. 32 and 35—Statement of *C* to village Munsif recorded by him that *P* killed *C's* husband while she was with *P* —*C* committed suicide same evening — In trial of *P* for murder of *C's* husband, statement of *C* held not admissible under S. 32 nor under S. 35.

A woman *C* made a statement to the village Munsif which he recorded in writing. In it *C* stated that her husband on the evening of the 13th had found her on the other side of the river with the accused *P* that a quarrel had ensued between the accused and her husband, and that the accused had cut her husband in the abdomen with an aruval. *C* the same evening committed suicide. In the trial of *P* for the murder of *C's* husband :

Held that the statement was not admissible under S. 32 because the death of *C* did not come into question in the sessions case. It was also not admissible under S. 35 because this statement recorded by the village Munsif and attested by two witnesses was clearly not an entry in a public or official register or record within the meaning of S. 35. [P 451 C 1]

(b) Criminal trial — Evidence — Record of accused's statement attested by witnesses not filed — Witnesses stating what accused said — There is no check on accuracy.

Where there is no record of the statement by the accused taken at the time and attested by the witnesses but the witnesses merely give evidence, each of them, of what the accused had said, although there are no serious discrepancies in their evidence still there is no check on its exact accuracy. [P 451 C 1]

(c) Evidence Act (1872), S. 27 — Principle of S. 27 is guarantee of truth of information.

The ground on which the information received from an accused person is admissible under S. 27 is that the fact discovered thereby is to some degree, which will vary with the circumstances of each case and the nature of the fact discovered, a guarantee of the truth of the information. [P 451 C 1]

The discovery of an aruval which was not blood stained, and a cloth, blood stained indeed but to what extent not known, from the accused's own home does very little to guarantee either that the accused did make the statement alleged or that, if he did make it, it is true. [P 451 C 1, 2]

(d) Criminal trial — Retracted confession — Conviction is not safe if confession is uncorroborated.

Where the case against the accused rests on a retracted confession which is not materially corroborated, it is not safe to convict the accused on his statement alone. [P 451 C 2]

C. K. Venkatanarasimham—for Accused.

Public Prosecutor—for the Crown.

HAPPELL J. — The appellant has been convicted by the learned Additional Sessions Judge of Tinnevelly of the murder of one Baliah Nadar on 13th March last at the village of Attankarai and has been sentenced to death. The deceased Baliah Nadar was married to a woman named Chellammal. The evidence is that this woman was not faithful to him, and that she was on terms of intimacy with a certain Chinna Chelliah Nadar. The accused was this man's elder brother. On 13th March Chellammal and P. W. 6 went in the evening to the river in the neighbourhood of the village for water. Chellammal put her pot down, crossed the river and did not return. P. W. 6 on going back to the village informed Baliah Nadar's father (P. W. 5) of this and P. W. 5 sent Baliah Nadar to search for her. Neither Baliah Nadar nor Chellammal returned and inquiries made by P. W. 5 that night had no result. The next morning he went and made a search in the neighbourhood of the river and found marks of blood near a pit by the side of a brick kiln. He reported this to the Village Munsif and the Village Munsif sent a report to the police. Investigation of the case was started on the 15th and that afternoon the accused was arrested. According to the evidence of the Sub-Inspector of Police who arrested him and of the Village Munsif (P. W. 7) and two other witnesses (P. Ws. 11 and 12), the accused after his arrest said that he would show them where he had buried the body of Baliah Nadar, where he had hidden some pambadams (ear-rings) given to him by Chellammal and where he had hidden the aruval with which he had killed Baliah Nadar and the cloth which he was wearing when he killed him. On that, according to the evidence of these witnesses, he did show them the place where the body was hidden. He gave them the ear-rings and he showed them where the aruval was hidden in his sister's garden and handed him the cloth which was hanging on a clothes' line in his own house.

The learned Sessions Judge did not believe that the body had in fact been discovered as a result of the information given by the accused and we have no doubt that in this opinion he was correct. The Sub-Inspector himself admitted in so many words that, owing to the smell, he was really aware where the body was as early as 12 o'clock that day although the accused was not arrested at the earliest until 3 o'clock in the afternoon. The evidence against the accused therefore, as far as his alleged

statement was concerned, rested on the information which led to the recovery of the pampadams, the cloth and the aruval. This, however, was not the whole of the evidence which was accepted by the learned Sessions Judge as admissible against the accused. At about midday on the 14th, Chellammal appeared at her uncle's house at the village of Mettupatti and told him what had happened. Her uncle P. W. 10 then took her to Attankarai where she had lived with the deceased and she then made the same statement to her father-in-law (P. W. 5). The Village Munsif was sent for, and she made a statement to him which he recorded in writing. This statement was admitted as Ex. H and in it Chellammal stated that her husband on the evening of the 13th had found her on the other side of the river with the accused Peria Chelliah Nadar, that a quarrel had ensued between the accused and her husband, and that the accused had cut her husband in the abdomen with an aruval. Chellammal the same evening committed suicide. The learned Sessions Judge was of opinion that her statement was admissible under Ss. 32 and 35, Evidence Act. There can be no question that the statement was not admissible and the learned Public Prosecutor has not supported the view of the Sessions Judge. It is not admissible under S. 32 because the death of Chellammal did not come into question in the Sessions case, and it is not admissible under S. 35 because this statement recorded by the Village Munsif and attested by two witnesses is clearly not an entry in a public or official register or record within the meaning of S. 35, Evidence Act.

The learned Sessions Judge founded his conviction of the accused largely on the statement made by Chellammal which he admitted, and he has used the statement of the accused to the police rather to corroborate the statement of Chellammal than the statement of Chellammal to corroborate the statement made to the police. It is clear that, if the learned Additional Sessions Judge had not admitted the statement made by Chellammal, he would not have convicted the accused. In our opinion, as the statement of Chellammal is not admissible, the conviction of the accused cannot safely be founded on the statements alleged to have been made by him to the Sub-Inspector of Police and the other witnesses which is the only evidence that connects him in any way with the death of Baliah Nadar. The evidence relating to the recovery of the pampadams is not relevant once the statement of Chellammal goes, since it is on her statement that the connexion of the pampadams with the deceased rests. There remains the evidence that the cloth and the aruval were recovered on information given by the accused to the police and the other witnesses. It has to be noted that no record of the statement by the accused taken at the time and attested by the witnesses was filed in the Sessions Court. The witnesses merely gave evidence, each of them, of what the accused had said. It is true that there are no serious discrepancies in their evidence, but at the same time there is no check on its exact accuracy. Moreover, the ground on which the information received from an accused person is admissible under S. 27, Evidence Act, is that the fact discovered thereby is to some degree, which will vary with the circumstances of each case and the nature of the fact discovered, a guarantee of the truth of the information. In the present case, the discovery of an aruval which was not blood stained, and a cloth, blood stained indeed but to what extent we do not know, from the accused's own home does very little to guarantee either that the accused did make the statement alleged or that, if he did make it, it is true. The accused in his statement at the trial denied that the aruval or the cloth were his and stated that he knew nothing about the offence. The position, therefore, is in effect that the case against the accused rests on a retracted confession which is not materially corroborated. We do not think consequently that it is safe to convict the accused on his statement alone and the learned Public Prosecutor, agreeing that Chellammal's statement, is not admissible has not seriously maintained that the conviction can be upheld. We therefore allow the appeal and set aside the conviction of the accused and direct that he be set at liberty.

C.R.K./R.K. *Conviction set aside.*

Cr. P. C. —
(d) ('41) Chitaley, S. 164, N. 18 Pt. 1.
('41) Mitra, Pages 521-522, N. 515.

A. I. R. (29) 1942 Madras 451

HORWILL J.

In re Penubolu Subbaramiah and others Petitioners.

Criminal Revn. No. 55 of of 1942 (Criminal Revn. Petn. No. 51 of 1942), Decided on 27th January 1942, to revise order of Special Second Class (sub) Magistrate, Nellore, D/- 3rd January 1942.

Criminal P. C. (1898), S. 162—Copies of witness's statement when granted, stated.

No doubt the proper stage at which to apply for a copy of a witness's statement is at the beginning of the cross-examination. In practice, however, copies are either granted in advance or the Court reads out the relevant part of the accused's statement or the vakil is allowed to look into the diary. In the last two cases, copies must still be furnished if required; but the examination of witnesses need not be held up while this is being done. [P 451 C 2]

A. S. Sivakaminathan — for Petitioners.

Public Prosecutor — for the Crown.

ORDER.—It has been repeatedly laid down that the proper stage at which to apply for a copy of a witness's statement is at the beginning of the cross-examination. This was apparently done by the counsel for the accused; and so the Magistrate was bound to grant the application. This method however, if strictly followed, would lead to interminable delays. In practice, copies are either granted in advance or the Court reads out the relevant part of the accused's statement or the vakil is allowed to look into the diary. In the last two cases, copies must still be furnished if required ; but the examination of witnesses need not be held up while this is being done. Some co-operation between the counsel and the Court is necessary to make S. 162, Criminal P. C., work smoothly. The petition is allowed and the Magistrate ordered to furnish the copies prayed for.

C.R.K./R.K. *Petition allowed.*

Cr. P. C.—
('41) Chitaley, S. 162 N. 13.
('41) Mitra, Pages 498-499 N. 503 (a).

A. I. R. (29) 1942 Madras 452 (1)

HORWILL J.

K. K. Subbier — Petitioner

v.

K. M. S. Lakshmana Iyer and others— Respondents.

Criminal Revn. No. 831 of 1941 (Criminal Revn. Petn. No. 781 of 1941), Decided on 19th November 1941, to revise order of Court of Session, Madura, D/- 7th July 1941.

(a) Companies Act (1913), S. 86 (d) — Loan sanctioned to one of directors — Directors held guilty under S. 86 (d) — Registrar's duty explained — High Court refused to interfere at instance of private person.

In contravention of the provisions of S. 86 (d) the directors sanctioned a loan to accused 2, who was a director, for a period of one year. Before that year had terminated, the complainant, who is one of the directors moved his fellow directors to cancel the earlier resolution. They refused to do this and resolved that as the year for which the loan was made had not then elapsed, they would not interfere. The complainant thereupon filed a complaint under S. 86 (d). The Registrar of Joint Stock Companies was approached in this matter, but he refused to intervene :

Held that the parties to both the resolutions acted wrongly. There was undoubtedly a contravention of the provisions of S. 86 (d) in sanctioning a loan to a director and when the attention of the directors on the second occasion was drawn to this, they should have taken steps at once to see that the illegal loan was terminated. Even if the complainant was prompted by personal motives, he was justified in his conduct. The Registrar of Joint Stock Companies should also have taken action in the matter and at least have told the directors that they should see that such an illegality was not committed again. [P 452 C 2]

Held further that it was not necessary to intervene in this matter at the instance of a private party and to punish various accused for something that was done in 1939, especially as the loan has been repaid and no fresh breach under S. 86 (d) had been committed. [P 452 C 2]

(b) Criminal trial — Witnesses not examined —Accused cannot be acquitted.

The Criminal Procedure Code makes no provision for the acquittal of accused persons without examining witnesses: ('32) 19 A.I.R. 1932 Mad. 25, *Rel. on.* [P 452 C 2]

P. S. Sarangapani — for Petitioner.

V.T. Rangaswami Iyengar, K.S. Sankara Iyer, O. V. Baluswami and V. Sundaresan — for Respondents.

Public Prosecutor — for the Crown.

ORDER.—A sabha of the Sourashtra community was registered as a society. In contravention of the provisions of S. 86 (d), Companies Act, the directors sanctioned a loan to accused 2—who was a director — for a period of one year. Before that year had terminated, the present complainant, who is one of the directors, moved his fellow directors to cancel the earlier resolution. They refused to do this and resolved that as the year for which the loan was made had not then elapsed, they would not interfere. The complainant thereupon filed a complaint in the Court of the City First Class Magistrate of Madura under S. 86 (d), Companies Act, against the present directors, who were parties to the second resolution. The Magistrate summoned witnesses, but before he had taken their evidence he acquitted all the accused on a reading of the complaint; for he was of opinion that no offence had been committed by the present directors in passing the second resolution. The offence was committed when the loan was made as a result of the resolution passed in 1939 and the persons who were guilty of the offence were those who were parties to the first resolution. The complainant approached the Sessions Judge, who has referred the matter to this Court, expressing the opinion that accused 2 was guilty of abetting the offence by receiving the loan himself. The complainant has also filed a revision petition in this Court against the acquittal of accused 1, who is said to have been a party to the first resolution.

It appears that the Registrar of Joint Stock Companies was approached in this matter; but he refused to intervene and referred the complainant to a criminal Court. There can be no doubt that the parties to both the resolutions acted wrongly. There was undoubtedly a contravention of the provisions of S. 86 (d), Companies Act, in sanctioning a loan to a director and when the attention of the directors on the second occasion was drawn to this, they should have taken steps at once to see that the illegal loan was terminated. Even if the complainant was prompted by personal motives, he was justified in his conduct. I also think that the Registrar of Joint Stock Companies should have taken action in the matter and at least have told the directors that they should see that such an illegality was not committed again and that they should take steps to end it. However, I do not think that it is necessary to intervene in this matter at the instance of a private party and to punish various accused for something that was done in 1939, especially as the loan has been repaid and no fresh breach under this section seems to have been committed. It is contended that the City Magistrate acted illegally in acquitting the accused without hearing the complainant's evidence. I have not thought it necessary to examine the authorities bearing on that point; but it may be pointed out that the Criminal Procedure Code makes no provision for the acquittal of accused persons without examining witnesses. Lakshmana Rao J. condemned the practice in 35 M. L. W. 140.[1] The petitions are dismissed.

C.R.K./R.K. *Petitions dismissed.*

1. ('32) 19 A.I.R. 1932 Mad. 25 : 136 I. C. 314: 33 Cr. L. J. 274: 35 M.L.W. 140, In re Varadarajulu Naidu.

Cr. P. C. —
(b) ('41) Chitaley, S. 245, N. 2 Pt. 1.
('41) Mitra, Page 874, N. 794.

A. I. R. (29) 1942 Madras 452 (2)

HORWILL J.

In re Oomayan — Petitioner.

Criminal Revn. No. 994 of 1941 (Criminal Revn. Petn. No. 937 of 1941), Decided on 21st November 1941, to revise judgment of Court of Sub-Divisional Magistrate, Trichinopoly, in C. A. No. 107 of 1941.

Criminal trial — Experts—Footprint experts —Evidence of, how far relevant explained.

Experts in footprints are not recognized by the Evidence Act but a Magistrate is entitled to take

into consideration the evidence of a person, who has seen a footprint and taken the footprints of the accused and found that they are very similar. That evidence is not, however, sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another. [P 453 C 1]

A. S. Sivakaminathan for A. V. Narayanaswami Iyer — for Petitioner.

Public Prosecutor — for the Crown.

ORDER. — The Stationary Sub-Magistrate of Trichinopoly convicted the appellant under Ss. 342 and 451, Penal Code, and sentenced him to two months' rigorous imprisonment and to pay a fine of Rs. 25 on each count. There is some evidence that the accused was on bad terms with the butler of the complainant's house. The only other evidence against the accused is that of a head constable, who has made a special study of footprints. He came to the conclusion that a footprint found in the compound of the complainant's house was that of the accused. Experts in footprints are not recognised by the Evidence Act; but there can be no doubt that a Magistrate is entitled to take into consideration the evidence of a person who has seen a footprint and taken the footprints of the accused and found that they are very similar. That evidence is not however sufficient to bring home the offence to the accused in the absence of further knowledge regarding the differences between one foot and another. After admitting this petition my attention was drawn to a reference by the District Magistrate under S. 438, Criminal P. C., in which he made very similar observations to that in the previous paragraph. I agree with the District Magistrate that the evidence against the accused was not sufficient to support a conviction. The convictions and sentences are therefore set aside and the appellant acquitted.

C.R.K./R.K. *Accused acquitted.*

A. I. R. (29) 1942 Madras 453

PATANJALI SASTRI J.

V. E. R. M. K. Krishnan Chettiar by Agent Rama Ayyangar — Petitioner

v.

Nachimuthu Goundar — Respondent.

Civil Revn. Petns. Nos. 2480 of 1939 and 2184 of 1941 (C. M. A. No. 385 of 1939 converted into C. R. P. No. 2184 of 1941), Decided on 6th February 1942, to revise orders of Sub-Judge, Coimbatore, D/- 27th July 1939.

Civil P. C. (1908), O. 21, R. 89 — Property sold — Judgment-debtor applying under S. 19, Agriculturist Relief Act, and depositing amount under O. 21, R. 89—Sale set aside—On accounts being taken decree found satisfied — Decree-holder held not entitled to claim amount deposited as deposit by judgment-debtor held not voluntary.

After the property was brought to sale in execution of a decree, the judgment-debtor applied under S. 19, Agriculturist Relief Act, for scaling down and entering satisfaction of the decree. The judgment-debtor also deposited the necessary amount under O. 21, R. 89 and the sale was set aside. On application by the decree-holder for the withdrawal of the amount deposited :

Held that the decree became liable to be scaled down and having regard to previous payments must be held completely satisfied and discharged. The decree in pursuance of which the property was sold was gone just as if it was reversed on appeal or set aside in a suit brought for the purpose and the decree-holder could have no more right to claim the money deposited in Court under O. 21, R. 89 than a decree-holder whose decree was reversed on appeal or set aside in a suit. The deposit made by the judgment-debtor to avert the sale of his property could not be considered to be voluntary : ('40) 27 A. I. R. 1940 Mad. 725 and ('41) 28 A. I. R. 1941 Mad. 635, *Rel. on* ; ('30) 17 A.I.R. 1930 Mad. 921, *Expl. and Disting.* [P 454 C 2]

T. V. Ramiah — for Petitioner.

A. C. Sampath Ayyangar — for Respondent.

JUDGMENT. — The petitioner in these connected civil revision petitions obtained a decree for Rs. 4678 against the respondent on 23rd October 1930 and, after recovering various amounts from time to time, applied on 7th January 1938 for execution of the decree in E. P. No. 18 of 1938 for realising the balance of Rs. 627. The respondent's property was in due course brought to sale on 8th February 1939 and was purchased by a third party. The respondent then applied on 3rd March 1939 under S. 19, Madras Agriculturists Relief Act, to enter satisfaction of the decree as no amount would, according to him, be payable to the petitioner if the provisions of the Act were applied to the decree. When this application was pending, he also applied under O. 21, R. 89, Civil P. C., to set aside the sale of his property making the necessary deposit on 8th March 1939, the last day of the period limited for making such application. The petitioner as well as the auction purchaser appear to have consented to have the sale set aside and an order setting aside the sale was accordingly passed on 17th March 1939. Nothing however turns on such consent, as the Court was bound in any case to set aside the sale as the conditions of O. 21, R. 89 were complied with. The petitioner thereupon applied by E. A. No. 341 of 1939 on 17th March 1939 for the payment out to him of the amount due under the decree out of the sum deposited in Court by the respondent. This application and the respondent's application to scale down the decree were heard together on 27th July 1939 and the Court below has dismissed the petitioner's application for payment and allowed the respondent's application to enter satisfaction of the decree. Against these orders these civil revision petitions have been brought by the petitioner decree-holder. It was contended for the petitioner that a deposit under O. 21, R. 89 must be unconditional, that when the respondent made such deposit and got the sale set aside on 17th March 1939 the decree was satisfied and discharged automatically on that date and that although the respondent had already applied to have the decree scaled down under the Agriculturists Relief Act, no relief under the Act could be awarded to him as there was no decree in existence to be scaled down after 17th March 1939. Reliance was placed in support of this contention upon the decision of Venkatasubba Rao J. in 53 Mad. 943[1] and particularly on the observation at p. 947 that,

"If the debtor wants to keep a dispute open, he cannot claim the benefit of this section." (i. e., O. 21, R. 89). "In fact, this accords to him a special indulgence. While he is thus favoured, care

1. ('30) 17 A. I. R. 1930 Mad. 921 : 128 I.C. 509 : 53 Mad. 943 : 59 M. L. J. 893, Kummakutty v. Neelakandan Nambudiri.

is taken to provide that the interest neither of the decree-holder nor of the purchaser are sacrificed. It follows from this that, when the judgment-debtor pays the amount specified, he pays it unconditionally. The payment followed by the order setting aside the sale has the effect of automatically extinguishing the decree debt. If an application is made under R. 89 and the deposit required by that rule is made within thirty days from the date of the sale, the Court has no option but to make an order setting it aside. (see R. 92). This assumes that the decree-debt is discharged and the decree-holder's remedy is gone."

That was a case where a person having filed a suit for a declaration of his title to certain property attached as belonging to another applied under O. 21, R. 89 to set aside the sale held in pursuance of the attachment but required that security should be taken from the decree-holder before the amount due to the decree-holder was paid out to him out of the deposit. There was no dispute that the debt due to the decree-holder under the decree was really due. All that the applicant claimed was that the property in his possession was not liable to attachment in execution of the decree. In those circumstances it was held that a deposit made for purposes of an application under O. 21, R. 89 must be an unconditional deposit and that the Court had no power to call upon the decree-holder to execute a security bond for repayment of the amount to the applicant in the event of the latter succeeding in establishing his title to the property sold. This is far from saying that when the decree itself is gone, the decree-holder can claim payment out of the money deposited into Court.

I had occasion to consider the nature and effect of a deposit made under O. 21, R. 89 in 52 M.L.W. 226[2] where pending a suit to declare that a decree obtained against the karnavan of a tarwad was not binding on the junior members, the property of the family was brought to sale and the junior members had the sale set aside making the deposit required under O. 21, R. 89 and sued the decree-holder for refund of the amount paid to him after obtaining a declaration that the decree was not binding upon them. It was held that the payment into Court by the junior members must be deemed to have been made under coercion and was liable to be refunded to them. That was a case where the decree was got rid of by a suit brought for the purpose by the persons affected. In the course of my judgment I also expressed the view that the result must be the same where the decree in execution of which the property has been sold is reversed in appeal. Referring to the observations of Venkatasubba Rao J. cited above I observed:

"These observations are rather widely expressed and if they were intended to convey the meaning that once a judgment-debtor pays the amount to set aside the sale under O. 21, R. 89, he must be deemed to have made the payment voluntarily even though he has preferred an appeal from the decree in question and will be disentitled to a restitution of the amount if the decree is set aside on appeal, I must respectfully dissent from them."

And I proceeded to point out that the learned Judge could not be taken to have intended to lay down as a general proposition that in all cases a deposit made under O. 21, R. 89 should be paid out to the decree-holder irrespective of the subsistence of the decree debt; for in a later case (1938) 1 M.L.J. 829[3] that learned Judge sitting with Abdur Rahman J. thus explained and distinguished his own previous decision in 53 Mad. 943.[1]

"In the former case, it has been held that O. 21, R. 89 is inconsistent with the notion that payment can be made either under protest or coupled with conditions. True, but the whole judgment proceeds upon the footing, first that there was a subsisting decree, that is, subsisting in fact and secondly, there was a decree-holder, one who really answered that description. . . . . Order 21, R. 89 assumes the existence of a "decree" and of a "decree-holder," and where the very foundation is gone, namely, a subsisting decree, it would be futile to contend that the decisions which refer to unconditional payment can apply."

In the present case the position is not essentially different. By virtue of the provisions of the Madras Agriculturists Relief Ac,t the decree in question became liable to be scaled down and having regard to previous payments must be held completely satisfied and discharged. In other words the decree in pursuance of which the property was sold is gone just as if it was reversed on appeal or set aside in a suit brought for the purpose, and the petitioner can have no more right to claim the money deposited in Court under O. 21, R. 89 than a decree-holder whose decree is reversed on appeal or set aside in a suit. The deposit made by the respondent to avert the sale of his property can be considered to be no more voluntary than that made in 52 M.L.W. 226[2] already referred to or in (1941) 1 M. L. J. 793[4] and cannot have the effect of rendering the application already filed by him for relief under the Agriculturists Relief Act infructuous.

It was said that the respondent could well have applied for the scaling down of the decree before the property was brought to sale and having allowed the sale to take place after the Act came into force on the footing of a subsisting decree, he should be held to have waived his right to relief under the Act. I fail to appreciate this argument. The respondent was entitled to apply for relief so long as the decree continued to subsist except in the circumstances contemplated in S. 20 of the Act, *see* (1939) 2 M.L.J. 308[5] and he was equally entitled to avert the sale of his property by making the deposit under O. 21, R. 89 before such sale was confirmed. It was of course open to the respondent to have applied earlier for scaling down the decree and if he had done so the question would not have arisen, but this can hardly have any bearing on the question which now arises for determination; and I can see no ground for inferring waiver in the circumstances of the case. In the result the civil revision petitions are dismissed with costs. One advocate's fee.

C.R.K./R.K. *Petitions dismissed.*

2. ('40) 27 A.I.R. 1940 Mad. 725 : (1940) 1 M.L.J. 340 : 52 M.L.W. 226, Raman Adiyoti v. Kannan Nambiar.

3. ('38) 25 A.I.R. 1938 Mad. 493 : (1938) 1 M.L.J. 829, Pappu Reddiar v. Pichu Ayyar.

4. ('41) 28 A. I. R. 1941 Mad. 635 : 198 I.C. 552 : (1941) 1 M. L. J. 793, Venkatadri Apparao v. Venkatakudumbarao.

5. ('39) 26 A. I. R. 1939 Mad. 613 : 186 I. C. 379 : I. L. R. (1939) Mad 886 : (1939) 2 M. L. J. 308, Kumaraswami Pillai v. Thiruvengadatha Ayyangar.

C. P. C. —

('40) Chitaley, O. 21, R. 89, N. 31.

('41) Mulla, Pages 880-881 Note "Deposit under this rule, a voluntary payment."

* A. I. R. (29) 1942 Madras 455

SPECIAL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND SOMAYYA JJ.

In re Chittoor Krishnaswami
Petitioner.

Civil Misc. Petn. No. 1156 of 1942, Decided on 4th March 1942.

*** (a) Bar Councils Act (1926) — Madras High Court Rules, Rr. 1 (i) and (ii) and 16 Proviso — Advocate holding law degree of Rangoon University enrolled as advocate of Rangoon High Court before separation of Burma and practising there for 17 years — On invasion of Burma by Japanese advocate coming to Madras and applying for enrolment as advocate of Madras High Court—Bar Council recommending advocate for exemption under R. 16 Proviso—Advocate held should be enrolled — Case held fit for granting exemption under R. 16, Proviso — Payment of further fee held not necessary as advocate came within exemption under Art. 30, Stamp Act.**

An advocate who held the degree of Bachelor of Arts and the degree of Bachelor of Laws of the University of Rangoon was enrolled as an advocate of the Rangoon High Court before the separation of Burma in 1937 and practised there for some seventeen years. As the result of the invasion of Burma by the Japanese he returned to Madras the land of his birth and applied to be enrolled as an advocate of Madras High Court. The Madras Bar Council considered the advocate's case and recommended to the Madras High Court that he be enrolled without the necessity of complying with the requirements of its rules :

Held that (1) the advocate could not claim admission under R. 1 (ii) because the Rangoon High Court had never reciprocated with the Madras High Court or in fact with any other Court in British India. But having obtained the law degree of the Rangoon University at a time when that University was a University established by law in British India the advocate could claim admission under R. 1 (i);

(2) the case was a fit one for granting exemption under R. 16 Proviso and that the advocate should be enrolled as an advocate of the Madras High Court;

(3) the term "High Court" in Art. 30, Stamp Act, must be deemed to be a High Court established in British India. The Rangoon High Court could no longer be regarded as an Indian High Court but since it had that status when the advocate was enrolled, and as he paid the fee required by the Stamp Act on that occasion he came within the exemption contained in Art. 30, Stamp Act, and consequently could be enrolled without the payment of any further fee. [P 456 C 1]

(b) Bar Councils Act (1926), S. 8 (1) — Since separation of Burma, Act no longer applies to Rangoon High Court.

Until the separation of Burma in 1937 the Rangoon High Court was a High Court within the meaning of the Bar Councils Act but as the result of the separation the Act no longer applies to it. [P 455 C 2]

T. R. Vankatrama Sastri — for Petitioner.

Advocate-General — for the Government.

LEACH C. J.—The petitioner who is an advocate of the Rangoon High Court applies for enrolment as an advocate of this Court. He is an Indian and was born in Madras, but hitherto he has only practised in Burma. As the result of the invasion of Burma by the Japanese he has returned to the land of his birth and wishes to practise his profession here. The petitioner holds the degree of Bachelor of Arts and the degree of Bachelor of Laws of the University of Rangoon and it was on these qualifications that he was enrolled as an advocate of the Rangoon High Court some 17 years ago. When the Indian Bar Councils Act, 1926, came into force Burma was a Province of British India and remained part of British India until the Government of India Act, 1935, came into operation on 1st April 1937. Until the separation took place, the Rangoon High Court was a High Court within the meaning of the Bar Councils Act, but as the result of the separation the Act no longer applies to it. Section 8 (1) states that no person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under the Act. Sub-section (2) says that the High Court shall prepare and maintain a roll of advocates in which shall be entered the names of (a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which the section came into force; and (b) all other persons who have been admitted to be advocates of the High Court under the Act. There is a proviso to this section to the effect that such persons shall have paid in respect of enrolment the stamp fee chargeable under the Stamp Act, 1899, and a fee payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in cl. (a) and in other cases such amount as may be prescribed. The rules of the Bar Council of Madras prescribe a fee of Rs. 50 "in other cases." Article 30, Stamp Act, requires a person on enrolment as an advocate of an Indian High Court to pay a stamp fee of Rs. 500. On enrolment in the Rangoon High Court the petitioner paid the Rs. 500 and he has now paid the Rs. 50 required by the rules of the Madras Bar Council. He asks to be enrolled as an advocate of this Court as the result of a resolution of the Madras Bar Council passed under the proviso to R. 16 recommending exemption from strict compliance with its rules. He maintains that if he is enrolled no further stamp fee is necessary.

Rule 1 (i) of the Madras Bar Council Rules provides that a person who has taken the degree of Bachelor of Laws of any of the Universities established by law in British India or taken a degree in law of any other University which the Bar Council may by general or special order accept as equivalent to that degree, be admitted as an advocate of this Court. Rule 3 requires a person applying for admission under R. 1 (i) to have studied as a pupil in the chambers of an advocate practising in the Madras High Court or in one of the district centres specified and requires him also to have passed the examination prescribed by R. 22, or to have practised as a pleader in the Court of a District or a Subordinate Judge in the Presidency or in one of certain specified Courts outside the Presidency for a period of not less than five years immediately preceding the date of his application; or to have practised as a pleader for not less than ten years in any other Court; or to have presided as a Judge of a civil Court in the Presidency for a period of not less than five years immediately preceding the date of his application. Rule 1 (ii) states that an advocate

entered on the roll of advocates of a High Court established by Letters Patent other than the High Court of Madras may be enrolled as an advocate provided that there is reciprocity in this respect between the High Court in which the applicant has been enrolled and this Court. The petitioner cannot claim admission under R. 1 (ii) because the Rangoon High Court has never reciprocated with this Court or in fact with any other Court in British India.

Having obtained the law degree of the Rangoon University at a time when that University was a University established by law in British India the petitioner can claim admission under R. 1 (i), but in that case R. 3 comes into operation and naturally having practised as an advocate in the Rangoon High Court for seventeen years he does not wish to study as a pupil in the chambers of an advocate of this Court for a period of 12 months. Consequently, the petitioner has to rely on the proviso to R. 16. That proviso is to the effect that the Bar Council may in special cases, for reasons to be recorded by it recommend to the High Court for exemption a candidate not complying with all or any of the requirements of the rules and that on such exemption being granted, he shall be deemed to have complied with the rules. The Madras Bar Council has considered the petitioner's case and has recommended to this Court that he be enrolled without the necessity of complying with the requirements of its rules. We agree with the Bar Council that this is a fit case for granting an exemption and we direct that the petitioner be enrolled as an advocate of this Court. There remains to be considered the question whether the petitioner is required to pay the stamp fee referred to in Art. 30, Stamp Act. That article exempts an advocate who has already paid the required fee on enrolment in a High Court from payment of it when he is enrolled in another High Court. The term "High Court" of course must be deemed to be a High Court established in British India. The Rangoon High Court can no longer be regarded as an Indian High Court, but it had that status when the petitioner was enrolled, and as he paid the fee required by the Stamp Act on that occasion we consider that he comes within the exemption contained in the article. Consequently, the petitioner will be enrolled without the payment of any further fee.

C.R.K./G.N. *Petitioner enrolled.*

A. I. R. (29) 1942 Madras 456

WADSWORTH AND PATANJALI SASTRI JJ.

Ekkanathtavazhi Karnavan and Manager Dakshayani Kunchi Amma's Children Nalamunni alias Ponnunni and others — Appellants

v.

Manikkath Kanchi Ammu Amma's Children, Dakshayani Amma and another — Respondents.

Appeal No. 266 of 1939, Decided on 30th October 1941, against decree of Sub-Judge, South Malabar at Palghat, D/- 16th August 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), Ss. 8 and 9—Suit note renewal of earlier note of 1927 for Rs. 2100—Note of 1927 renewal of other four notes one of them being of 1917 for Rs. 700 which itself was renewal of note of 1906 for Rs. 250 — Mode of scaling down suit note stated.

The suit note could be traced back to an earlier note dated 2nd January 1927 for a sum of Rs. 2100 executed by a representative of the defendant to the plaintiffs' assignor. The note of 1927 was made up of four other notes regarding which the materials were not very complete. But one of those notes was for Rs. 700 dated 1st February 1917 which itself could be traced back to a still earlier note of 6th August 1906 for Rs. 250 between the same parties so that Rs. 450 out of Rs. 700 represented interest :

Held that except for the amount of Rs. 450 representing the interest included in the principal of the note of 1917, the balance of the consideration for Rs. 2100 for the note of 1927 must be deemed to be the original principal of the suit transaction. Therefore the proper way of scaling down the amount of the suit note was to treat as the original principal the amount of Rs. 2100 less Rs. 450 that is Rs. 1650 and award interest at 6¼ per cent. from 1st October 1937 on that sum. [P 457 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 3 (1) — Marumakathayam family — Individual member himself constituting tavazhi has saleable interest in family property—Family property agricultural land — Member if not otherwise disqualified can claim benefits of Act —Groups of individual members each constituting sub-tavazhi female ancestor of which living — They have as individuals no saleable interest in family property.

When an individual member of a Marumakathayam family himself constitutes a tavazhi entitled to claim partition, his share is attachable. Such a person has a saleable interest in the family property. If that family property is agricultural land and he is not otherwise disqualified, he would be entitled to claim to be an agriculturist for the purposes of the Act. With reference to those groups of individuals each constituting a sub-tavazhi the female ancestor of which is still living, they have no right to claim partition without the consent of that female ancestor and therefore they have as individuals no saleable interest in the family properties, though for calculating the shares into which the tarwad properties have to be divided, the number of individuals comprised in such groups is taken into consideration and the allotment of shares is per capita : ('38) 25 A.I.R. 1938 Mad. 553, *Approved.* [P 458 C 1]

(c) Madras Agriculturists Relief Act (4 of 1938), Ss. 14 and 3 (1) — Section 14 applies to Marumakathayam Hindu family.

The phrase "Hindu family" in S. 3 (1) would ordinarily include a Marumakathayam family which is Hindu by religion and hence S. 14 applies to a Hindu Marumakathayam tarwad or tavazhi. [P 458 C 2]

(d) Madras Agriculturists Relief Act (4 of 1938), Ss. 14 and 3 (1) — Word "member" in S. 14 means individual or group of individuals entitled to share at partition — Group of individuals is person within S. 3 (1)—Hindu Marumakathayam family — Sub-tavazhi consisting of group of individuals is person within S. 3 (1) and when entitled to share in family property is "member" within S. 14.

The word "member" in S. 14 must be interpreted as individual or group of individuals entitled to a share at partition in the family property. There is

nothing foreign to the tenor of the Act in regarding a group of individuals as a person for the definition in S. 3 (1) expressly provides that a person means an individual and includes an undivided Hindu family or Marumakathayam tarwad or tavazhi. A sub-tavazhi consisting of a group of individuals in a Marumakathayam family is a person within the meaning of the Act and must be regarded as the "member" for the purpose of S. 14 if it can claim a share at partition. [P 458 C 2 ; P 459 C 1]

(e) Madras Agriculturists Relief Act (4 of 1938), S. 14 — Mode of application of S. 14 indicated—Procedure in applying S. 14 to Hindu Marumakathayam family stated.

When there are in one family agriculturist members and non-agriculturist members, the proper procedure having regard to S. 14 is not to sell each member's share separately for his individual proportionate liability of the debt, but to take together the agriculturist members and sell their collective share of the family property for their proportionate liability as scaled down and to take together the non-agriculturist members of the family and sell together their collective share of the family property for the proportionate share of the family debt as not scaled down. There is no equity in restricting the liability of each individual member to his individual proportionate share of the debt; while the use of the singular word "share" instead of the plural "shares" in cls. (a) and (b) of the section sufficiently indicates an intention that the collective share of each category of members should be jointly liable for what is after all a joint family debt. The procedure in applying S. 14 to a Hindu Marumakathayam family therefore would be to find out first which members (including in this term any sub-tavazhi entitled to claim partition) are agriculturists and which are non-agriculturists; ascertain how many shares belong to the agriculturist members and how many to the non-agriculturist members and after scaling down the debt hold the agriculturist section of members collectively liable for the proportionate share of the debt as scaled down and the non-agriculturist section of members collectively liable for the proportionate share of the debt as not scaled down. The creditor would thus be required to divide his execution proceedings into two parts, one relating to the scaled down decree and the other relating to the unscaled down decree and so far as family properties are concerned, each of these parts of the decree would be executable against a composite fraction of the family property. [P 459 C 1, 2]

(f) Madras Agriculturists Relief Act (4 of 1938), S. 14—Object — S. 14 is concerned only with liability of family property—It has nothing to do with personal liability or separate property of member of family.

Section 14 is intended to deal with the difficulty of apportioning a liability which was partly scaled down and partly intact to the properties of the family whether undivided or divided. There is no reason why any special process should be applied so far as the separate properties of members are concerned. The natural process is that in respect of his separate properties, the individual member should claim relief according to his status and without reference to the extent of his share in the family properties. The apportionment of joint liability between agriculturists and non-agriculturists is really not a matter arising with reference to the personal liability of actual executants.

[P 459 C 2 ; P 460 C 1]

Section 14 is concerned only with the liability of family property, and the phrase "member or members and his or their share" in that section must be interpreted as "member or members in respect of his or their share." Such interpretation involves the least deviation from the language and the apparent scope of the section. Section 14 therefore has nothing to do with the personal liability of separate property of the members of an agricultural family and therefore its operation will not affect the personal liability of the members who have actually executed the promissory note sought to be scaled down. [P 460 C 1]

(g) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) Proviso (D) — Partition suit — Payment of land revenue by receiver is payment by persons entitled to properties in respect of which it is paid.

The payment of land revenue by the receiver in a partition suit is a payment by the persons entitled to the properties in respect of which the land revenue is paid. [P 460 C 1]

B. Sitarama Rao and D. A. Krishna Variar — for Appellants.

P. Govinda Menon and P. Chandrasekhara Menon — for Respondents.

WADSWORTH J.— This appeal raises questions of some difficulty with reference to the interpretation of S. 14 of Act 4 of 1938 and its application to families governed by Marumakathayam law. The appellants were the defendants in a suit brought on a promissory note for a sum of Rupees 5664-10-0 executed by them and by two other members of their family who have since died, on 1st December 1935. The debt is admittedly a family debt binding the tavazhi of which the defendants are members. There is no particular difficulty about the way in which the debt is to be scaled down if it is to be scaled down. The suit note can be traced back to an earlier note dated 2nd January 1927 for a sum of Rs. 2100 executed by a representative of the defendants' tavazhi to the plaintiffs' assignor. This note of 1927 is made up of four other notes regarding which the materials are not very complete. But one of those notes is a note for Rs. 700 dated 1st February 1917 which itself can be traced back to a still earlier note of 6th August 1906 for Rs. 250 between the same parties so that Rs. 450 out of this Rs. 700 must represent interest. Then there is a note of 1919 for Rs. 195 which is in the name of a different promisee and therefore has to be treated as a separate debt. There is another note of 1924 which is also in favour of a different promisee and there is a note of 1925 in favour of the plaintiff's assignor's for a sum made up entirely of interest, but there are no materials to show on which debts that interest accrued due. It seems to follow therefore that except for the amount of Rs. 450 representing the interest included in the principal of the note of 1917, the balance of consideration for Rs. 2100 for Ex. A, the note of 1927 must be deemed to be the original principal of the suit transaction. It seems to follow therefore that the proper way of scaling down this debt is to treat as the original principal the amount of Rs. 2100 less Rs. 450 ; that is to say, Rs. 1650 and award interest at 6¼ per cent. from 1st October 1937 on this sum.

This calculation only applies to the extent to which the defendants are entitled to relief as agriculturists under the Act and that can only be decided after dealing with questions of some complexity.

a The tavazhi to which all the defendants and others who are not parties belong, formed part of a larger tarwad which has been divided as a result of a suit for partition brought by the present defendants 9, 10 and 11 and their mother. The partition decree decides that the tarwad properties are to be divided so as to treat as units certain sub-tavazhis whose shares in the tarwad properties remain undivided. The major tavazhi which is responsible for the present suit debt now consists of a number of sub-tavazhies and a number of individual sharers who under the Marumakathayam Act must be regarded as tavazhis since they have no female ancestor alive. Now it seems to be established, *vide* (1938) 1 M.L.J. 710,[1] that when an individual member of a Marumakathayam family himself constitutes a tavazhi entitled to claim partition, his share is attachable; and it would seem to follow that such a person has b a saleable interest in the family property. If that family property is agricultural land and he is not otherwise disqualified, such a person would be entitled to claim to be an agriculturist for the purposes of Act 4 of 1938. With reference to those groups of individuals each constituting a sub-tavazhi the female ancestor of which is still living, they have no right to claim partition without the consent of that female ancestor and it is reasonable to hold that they have as individuals no saleable interest in the family properties, though for calculating the shares into which the tarwad properties have to be divided, the number of individuals comprised in such groups is taken into consideration and the allotment of shares is per capita. When we turn to the provisions of Act 4 of 1938, we have to consider what is the position regarding this major tavazhi c which is primarily responsible for the suit debt and the individual members of that tavazhi some of whom are certainly agriculturists, one of whom would be an agriculturist were it not for a disqualification by payment of income-tax and others who are apparently not agriculturists because they are junior members of a sub-tavazhi or group and not entitled to claim partition.

It has been contended that S. 14 of Act 4 which prescribes a procedure for dealing with a Hindu family containing agriculturist and non-agriculturist members has no application to a Marumakathayam tarwad or tavazhi. There are two main reasons for seeking to exclude Marumakathayam families from the scope of S. 14. The first is that in the definition of "person" in S. 3 (i) of the Act, the Legislature has enumerated separately an undivided Hindu family and a Marumakathayam or aliyasantana d tarwad or tavazhi, from which it is contended that we should infer that for the purposes of this Act a Marumakathayam family is something different from an undivided Hindu family. The answer which has been suggested is that a Marumakathayam family is not necessarily a Hindu family at all, because it may be a family of Mahomedans and that therefore when the Legislature desired to treat such a family as a person it was necessary to enumerate separately the ordinary undivided Hindu family and the Marumakathayam tarwad or tavazhi which was not necessarily Hindu. From this separate enumeration no inference can therefore be drawn that the term "undivided Hindu family" will not include a Marumakathayam family if that family is Hindu. The other argument is based on the difficulty of working out S. 14 of the Act in the case of a Marumakathayam tarwad. No doubt there are difficulties, but we shall endeavour to show that those difficulties are not insuperable and not so great as to justify the Courts in giving to S. 14 an interpretation other than that which it would naturally bear. e

There are very clear and cogent reasons for holding that S. 14 does apply to a Marumakathayam Hindu family. In the first place, it must, we think, be conceded, that when we talk in general terms of a Hindu family whether divided or undivided and do not exclude any particular type of Hindu family, we should ordinarily be understood as using language sufficiently wide to include a Marumakathayam family. Secondly, S. 14 itself is subject to the provisions of Ss. 5 and 6 of the Act and both these sections specifically refer to an "undivided Hindu family other than a Marumakathayam or aliyasantana tarwad or tavazhi." The exclusion specified in these two sections is made for special reasons which will be apparent on a perusal of those f sections. Now when the Legislature found it necessary to exclude from the category of undivided Hindu families a Marumakathayam tarwad or tavazhi, the exclusion is made by specific language. The natural inference is that when there is no such specific language excluding the Marumakathayam family, the phrase "Hindu family" would ordinarily include a Marumakathayam family which is Hindu by religion. No effective reply has been suggested to this contention. It seems to us necessarily to involve the conclusion that S. 14 must have been intended to apply to a Marumakathayam tarwad or tavazhi unless it is quite impracticable so to apply it.

We will turn now to the practical difficulties. It has been argued that those members of the major tavazhi who are junior members of one of the minor sub-tavazhies and are not entitled to claim partition, g are non-agriculturists because they have no saleable interest in agricultural lands; and yet, when we come to apply S. 14 to them, it is necessary to treat them as having a share in the family properties and such share is liable to be sold by the creditor for their proportionate share of the family debt; that is to say, it is argued that to apply S. 14 in such a case involves a provision for the sale of that which is not a saleable interest. It is also argued that the purchaser who is rash enough to purchase these shares in Court auction will find it impossible to reduce them to possession since many of the sharers are not entitled to claim partition and that the complications resulting from the amended decree would be almost insoluble. It seems to us that most of these difficulties and apparent contradictions can be resolved by interpreting the word "members" in S. 14 as equivalent to "members entitled to a share." h There is after all no reason why persons who are members of an undivided family merely in the sense that they live in the family house and are maintained out of the family assets, should be brought within the scope of S. 14 if they have no share in the family properties; for the object of S. 14 clearly is to work out the liabilities imposed upon the family properties when these liabilities have to be treated in a different way according to the status of the different sharers. If once it is conceded that S. 14 uses the word "member" in the sense of a "member entitled to a share," it would seem to follow that in the Malabar tarwad the "member" would not ordinarily or necessarily be the individual who is merely taken into consideration in counting heads for the purpose of working out the shares on partition to be allotted to the group of individuals which is treated as a unit at the time of partition. There is nothing foreign to the tenor of this Act in regarding a group of individuals as a person. For,

1. ('38) 25 A. I. R. 1938 Mad. 553 : 178 I. C. 525 : (1938) 1 M.L.J. 710, Subramaniam v. Naraina.

the definition in S. 3 (i) expressly provides that a person means an individual and includes an undivided Hindu family or Marumakathayam tarwad or tavazhi. The sub-tavazhi in the present case is a person within the meaning of the Act. There seems to be no reason why the sub-tavazhi, the smallest unit which can claim a share, should not be regarded as the "member" for the purpose of S. 14 and we see no necessary reason for treating as the "member" the individual who along with others comprises this 'person' which collectively is entitled to a share.

No doubt, as has been pointed out by Mr. Govinda Menon for the respondents, the Marumakathayam Act speaks of members of the tarwad in the wider sense as equivalent to those individuals whose heads are counted for the purpose of determining the division of the shares. But we do not think that it follows from this use that when the word 'member' is used in S. 14 of Act 4 of 1938 with specific reference to the shares of those members in the family property, it should not be interpreted in the stricter sense as an individual or group of individuals entitled to a share at partition. Accepting this interpretation, most of the difficulties in applying this S. 14 to a Marumakathayam family disappear. There is no difficulty about the saleability of the share of the member. For, the sub-group is entitled to a share or shares and can claim partition of that share. There is no apparent difficulty which would result from the sale of the share of such a sub-group and it is fairly easy to say whether any particular tavazhi is or is not an agriculturist.

Another difficulty upon which emphasis has been laid also disappears by an interpretation of S. 14 in a way for which there is authority. No doubt if, as was contended in the lower Court, each of the individual sharers was entitled to demand that his individual share should be sold separately for the proportionate amount of the family debt, whether scaled down or not scaled down according to his status, the result in a Malabar family would be great confusion and complexity. But our learned brother Horwill J., has interpreted S. 14 in a way which seems to us to be consistent with its language and which avoids this undesirable result. According to his view, *vide* (1940) 2 M. L. J. 187,[2] when there are in one family agriculturist members and non-agriculturist members, the proper procedure having regard to S. 14 is not to sell each member's share separately for his individual proportionate liability of the debt, but to take together the agriculturist members and sell their collective share of the family property for their proportionate liability as scaled down and to take together the non-agriculturist members of the family and sell together their collective share of the family property for the proportionate share of the family debt as not scaled down. This procedure is simple and as the learned Judge points out, there is no equity in restricting the liability of each individual member to his individual proportionate share of the debt; while the use of the singular word "share" instead of the plural "shares" in cls. (a) and (b) of the section sufficiently indicates an intention that the collective share of each category of members should be jointly liable for what is after all a joint family debt. If this interpretation is accepted—and we do accept it—then the procedure in a Marumakathayam family would be to find out first which members (including in this term any sub-tavazhi entitled to claim partition) are agriculturists and which are non-agriculturists; ascertain how many shares belong to the agriculturist members and how many to the non-agriculturist members and after scaling down the debt hold the agriculturist section of members collectively liable for the proportionate share of the debt as scaled down and the non-agriculturist section of members collectively liable for the proportionate share of the debt as not scaled down. The creditor would thus be required to divide his execution proceedings into two parts, one relating to the scaled down decree and the other relating to the unscaled down decree and so far as family properties are concerned, each of these parts of the decree would be executable against a composite fraction of the family property. There would be no special difficulty either in executing such a decree or in working out the equities among the members of the family after execution.

A further question which has been raised relates to the personal liability of the defendants who have actually executed the suit promissory note. The tavazhi consists of 25 members. Of these 25, only the 13 defendants have actually signed the note. We have already explained how their liability so far as the family properties are concerned, will have to be worked out. It remains to decide whether the personal liability and the liability of their separate properties will be governed by the same principles. Section 14 is by no means clear on this point. When the section says "The creditor shall notwithstanding any law to the contrary be entitled to proceed against the non-agriculturist member or members and his or their share of the family property to the extent only of his or their proportionate share of the debt," what does it mean? In the most literal interpretation, it would seem to mean that whatever the nature of the liability, so long as it is annexed to the family debt, both the personal property of the non-agriculturist and his share of the family property would be liable only to the extent of his proportionate share of the debt. But surely the section cannot be read as imposing a personal liability regardless of the nature of the contract in which the debt is embodied. If the section is intended at all to govern the personal liability of the agriculturist members of a family, we must necessarily read into it some qualifying words to the effect that the creditor shall be entitled to proceed personally only if he can claim a personal remedy against the debtor. It is on the other hand argued that S. 14 has got nothing to do with the remedies of the creditor against the personal or separate property of the members of an agricultural family and that it must be read as relating only to the liability of such a member in respect of his share of the family property. This interpretation also involves the addition of one or two words to the section. We have to read the word "and" in the phrase "member or members and his or their share" as equivalent to "in respect of." There is a great deal to be said for this interpretation of the section having regard to the apparent object with which the section was enacted. Clearly, it was intended to deal with the difficulty of apportioning a liability which was partly scaled down and partly intact to the properties of the family whether undivided or divided. There was no apparent reason why any special process should be applied so far as the separate properties of members were concerned. The natural process is that in respect of his separate properties, the individual member should claim relief according to his status and without reference to the extent of his share in the family properties.

2. ('40) 27 A.I.R. 1940 Mad. 797 : (1940) 2 M.L.J. 187, Jagannath Iyengar v. Subbayya Chettiar.

The apportionment of joint liability between agriculturists and non-agriculturists is really not a matter arising with reference to the personal liability of actual executants.

If it were possible to take the literal meaning of the section as it stands and give it a practical effect without doing violence to basic principles, which there was clearly no intention to violate, we should have no option but to do so. But as we have pointed out, the literal interpretation of this section would involve the creation of a liability which does not exist in the contract, in order to limit a contractual liability in favour of a class of persons whom the Act was not specially designed to benefit. If, on the other hand, we adopt the view that this section was concerned only with the liability of family property, all that is necessary to give effect to that apparent intention is to treat the phrase "member or members and his or their share" as a somewhat inexact way of expressing what was really intended, namely, "member or members in respect of his or their share." We believe that to be the intention of the Act and in view of the apparent impossibility of interpreting the section literally, we have come to the conclusion that this interpretation involves the least deviation from the language and the apparent scope of the section. The result therefore is that in this view the operation of S. 14 will not affect the personal liability of the defendants who have actually executed this note. They will be entitled to scale down the decree so far as their personal liability is concerned, even as they would be entitled to scale down any other debt, not by rendering themselves liable for only a part of the debt, but by being liable for the whole of the debt, subject to such reduction as they may be entitled to if they are agriculturists.

The genealogical table which has been furnished to us seems to make it clear that defendant 2, the tavazhi of four members including defendants 3 and 12 and defendant 6's tavazhi which consists of herself and her five children are non-agriculturists. Defendant 2 is admittedly disqualified by the payment of income-tax and the other two sub-tavazhis just referred to are each entitled to shares of the tarwad property which according to the evidence would make them liable to pay more than Rs. 500 as land revenue. We are not able to accept the contention that because this land revenue is actually being paid by the receiver in the partition suit, it is not a payment by the persons entitled to the properties in respect of which it is paid. The rest of the members of the family appear to be agriculturists. The result therefore is that the plaintiff is entitled to a decree for the full amount of the suit claim with interest at 6 per cent. from the date of the plaint and full costs and subsequent interest against all the defendants personally. The decree so far as the liability of the family properties is concerned will be a joint decree for the proportionate share of the full amount of the debt with costs as against those defendants and tavazhis which are non-agriculturists. As against the agriculturist defendants, the plaintiff will be entitled to a joint decree against their proportionate share of the family properties for the proportionate share of the debt as scaled down in the manner indicated above and proportionate costs in the lower Court. Both parties will bear their own costs in the appeal and in the memorandum of objections.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. (29) 1942 Madras 460

HAPPELL J.

K. C. Kandaswami Mudaliar — *Appellant*

v.

M. A. Palaniswami Goundar — *Respondent.*

Appeal No. 19 of 1940, Decided on 19th January 1942, against appellate order of District Court, Coimbatore, D/- 19th September 1939.

*** Civil P. C. (1908), O. 21, R. 2 — Pre-decree arrangement that decree-holder will not proceed against particular defendant till amount cannot be recovered from others is enforceable — Arrangement prior to suit or pending suit makes no difference—Merely serving notice on other defendants without proceeding further does not fulfil agreement.**

A pre-decretal arrangement that execution should not be taken out against one of the defendants till the decree-holder has not been able to recover the decretal amount from others is an arrangement which does not vary the decree and consequently the arrangement can be pleaded in bar of execution against the particular defendant : ('18) 5 A. I. R. 1918 Mad. 1174 (F. B.) and ('35) 22 A. I. R. 1935 Mad. 860 (F. B.), *Foll.* [P 461 C 2]

There is no difference in principle between an arrangement set up in bar of execution which has been made before the institution of a suit and an arrangement which has been made during its pendency : ('21) 8 A. I. R. 1921 Mad. 616, *Expl. and Disting.* [P 461 C 2]

Simply serving notice on the other defendants but taking no further action to attach their property or realise anything from them when they did not appear does not fulfil the terms of the agreement. [P 462 C 1]

A. C. Sampath Iyengar — for Appellant.

K. Bhashyam Iyengar and R. Desikan — for Respondent.

JUDGMENT. — This appeal raises the question whether in execution of a decree an arrangement between the decree-holder and the judgment-debtor entered into before the suit was filed can be pleaded in bar of execution. The suit in question was O. S. No. 270 of 1938, a suit for the recovery of money from four persons, of whom the present respondent was defendant 1. A decree was passed for the recovery of a sum of Rs. 2223 13-6 with costs against the four defendants jointly and severally. When, however, the plaintiff-appellant proceeded to take out execution, defendant 1 pleaded an arrangement by which the appellant had agreed that he would proceed against defendants 2 and 4 and recover the amount due under the decree from them and that, only if he could not recover from them, would he take steps to recover the whole amount or the balance that was due from defendant 1. Defendant 1's case was that the appellant had consented to this agreement because he had paid a sum of Rs. 700 towards the amount due by him and the other defendants to the appellant, whereas the other defendants had paid nothing. The case of defendant 1 was not, therefore, that he was entitled to a deduction of any amount from the amount sued for and decreed, but that the fact that he had made this previous payment had induced the appellant to enter into the agreement. Both the trial and the lower appellate Courts have found that this agree-

ment was true. The learned District Munsif, however, was of opinion that, although a pre-decretal agreement can be pleaded in bar of execution of a decree, in this case the application was sustainable under the terms of the agreement since the agreement was not that he should exhaust all remedies against the other defendants before he proceeded against the first. The learned Additional District Judge of Coimbatore agreed with the District Munsif that the agreement could be pleaded but holding that before execution could be taken against defendant 1 all remedies must be exhausted against the others, reversed the order of the trial Court that execution should proceed against defendant 1 and allowed the appeal.

The main argument advanced in this appeal is that this is not a case in which, on authority, the pre-decretal agreement can be pleaded. Since the Full Bench decision in 40 Mad. 233[1] it cannot be doubted that pre-decretal arrangements between decree-holders and judgment-debtors in appropriate cases can be pleaded in bar of the execution of the decree. In that case, in holding that the pre-decretal arrangements could be pleaded as a bar to execution of the decree, the majority of the Full Bench rested their decision on the principle of stare decisis. The actual pre-decretal arrangement which in 40 Mad. 233,[1] it was held could be pleaded in bar of execution, was an arrangement that for a certain period after the passing of the decree execution would not be taken against the defendant judgment-debtor. Later cases which followed this decision have made it clear that the general distinction between pre-decretal arrangements that can be pleaded in bar of execution and pre-decretal arrangements that cannot be pleaded in bar of execution is that arrangements cannot be pleaded in bar of execution if they vary or attack the decree but can only be pleaded if they relate to the execution of the decree. It is no doubt not easy in any particular case to determine whether an arrangement varies the decree or not. If the question was one of first impression, it might be said that any pre-decretal arrangement which derogates from the rights given to the decree-holder by virtue of the decree varies that decree and, if that was the principle and test to be applied, it might be difficult to see how a pre-decretal arrangement which prevented a decree-holder from taking out execution immediately against his judgment-debtor, seeing that the decree itself gave him that right, does not amount to a variation of the decree. On the principle of "stare decisis," however the Full Bench in 40 Mad. 233,[1] held that on the facts of the case before them the decree was not varied. What, therefore in this case had to be done was to see whether the agreement is, according to the decided cases, a pre-decretal arrangement which can be pleaded as a bar to the execution of the decree. On the face of it, the facts of the present case, where all that the pre-decretal arrangement has done has been to compel the decree-holder to take out execution as against the other defendants before he proceeds either for the balance or the whole of the decree amount against defendant 1, are not easily distinguishable, from a case in which the agreement was that the appellant should not proceed for a specified time after the date of the decree against the defendant. 40 Mad. 233[1] would appear to be at least as strong a case as the case now before us. There is, however, another Full Bench case which is in point, 58 Mad. 994.[2] In that case it was held that a pre-decretal arrangement that execution should not be taken out against one of the defendants (defendant 3) was an arrangement which did not vary the decree and that consequently the arrangement could be pleaded in bar of execution against defendant. 3. This, it seems to me, is a very much stronger case than the present where the appellant has merely agreed to do what in any case he might have done, namely proceed against defendants 2 and 4 before he proceeded against defendant 1. I am of opinion therefore that the decisions in 40 Mad. 233[1] and 58 Mad. 994,[2] are wide enough, as the learned District Judge has said, to cover the facts of the present case and that the contention of the appellant must fail.

It is also argued for the appellant that this case is distinguishable from 40 Mad. 233[1] and 58 Mad. 994[2] and indeed from other cases which have been cited, because they were cases where the arrangement set up had been entered into during the pendency of the suit whereas the present is a case where the agreement was made before the suit was instituted. There seems to me no difference in principle between an arrangement set up in bar of execution which has been made before the institution of a suit and an arrangement which has been made during its pendency. In both cases the question will be whether the agreement relates to the execution of the decree or whether it has varied or attacked the decree. Learned counsel for the appellant in support of his contention that there is a distinction has relied on 14 M. L. W. 317.[3] That indeed was a case in which the arrangement which was entered into before the suit was instituted was set up, and it was held that it could not be pleaded in bar of execution. It seems clear, however, from the judgment that it was not held that the arrangement could not be pleaded in bar of execution simply because the date of the arrangement was prior to the institution of the suit. The observations of Spencer J. and the reasoning on which his judgment was based would have applied equally to an arrangement come to during the pendency of the suit. It should also be noted that in another case to which I have been referred, viz., 54 Mad. 184,[4] it was observed that whether the arrangement was entered into pending suit or before institution of the suit appears to make little difference. The fact therefore, that the arrangement set up was prior in date to the institution of the suit does not appear to be a reason for distinguishing this case and so differing from the conclusion reached by the learned District Judge.

The last point taken by learned counsel for the appellant is that the learned District Judge should have agreed with the trial Court that in any case the appellant had complied with the terms of the agreement by the action which he had taken. That action was to have notice served on all the defendants. When, however, the petition came on for hearing, defendants 2 to 4 were absent ; the petition was heard as between the appellant and defendant 1 who was represented and no further action was taken against defendants 2 to 4. It is not

1. ('18) 5 A.I.R. 1918 Mad. 1174 : 37 I.C. 836 : 40 Mad. 233 : 32 M. L. J. 13 (F. B.), Chidambaram Chettiar v. Krishna Vathiar.

2. ('35) 22 A.I.R. 1935 Mad. 860 : 158 I. C. 187 : 58 Mad. 994 : 69 M. L. J. 451 (F.B.), Papamma v. Venkayya.

3. ('21) 8 A.I.R. 1921 Mad. 616 : 64 I. C. 148 : 14 M. L. W. 317, Mallayya v. Chinna Kotayya.

4. ('31) 18 A.I.R. 1931 Mad. 399 : 129 I. C. 818 : 54 Mad. 184 : 60 M. L. J. 721, Butchia Chetti v. Tayar Rao Naidu.

necessary here to decide exactly what interpretation should be put on the agreement that the appellant should first proceed against defendants 2 to 4 since it is abundantly clear that simply by serving notice on them and then taking no further action to attach their property or realize anything from them when they did not appear he has not fulfilled the terms of the agreement. In my opinion, therefore the decision of the learned District Judge was right. The appeal is consequently dismissed with costs. Leave to appeal is refused.

C.R.K./R.K. *Appeal dismissed.*

C. P. C.—
('40) Chitaley, S. 47 N. 31.
('41) Mulla, Page 180 Heading "7. Agreement not to execute decree."

A. I. R. (29) 1942 Madras 462

WADSWORTH J.

Venkatasubba Bagavathar, as Secretary to Tirukkurungudi Chatram Ryots' Association on behalf of Ryots — Petitioner

v.

Manager L. F. Chatram, Tirukkurungudu — Respondent.

Civil Revn. Petn. No. 724 of 1940, Decided on 21st November 1941, to revise order of Sub-Collector, Sermadevi, D/- 4th January 1940.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 4 (c)—"By way of loan or otherwise" explained — Sum payable to local authority as rent—Whether rent is contractual or under Estates Land Act—Sum is covered by Exemption in S. 4, cl. (c).

The words "by way of loan or otherwise" should not be read as indicating "by way of loan or some other form of advance." The words "any other sum due" are qualified by the words "by way of loan or otherwise." The object of the qualifying words is to prevent the application of the ejusdem generis rule, which would otherwise apply to the words "any other sum." In order to make it clear that there is no such intention, the words "any other sum" are qualified by the very wide description "by way of loan or otherwise" indicating clearly that the words "any other sum" are read in their natural and wide sense, not restricted by the proximity of the special words preceding. Hence the exemption in S. 4 cl. (c) covers any sum payable to the local authority even though it partakes of the nature of rent. It makes no difference whether the rent in question be an ordinary contractual rent or a rent governed by the special provisions of the Estates Land Act. [P 463 C 1]

(b) Interpretation of statutes — Ejusdem generis.

The ejusdem generis rule should not be applied when the context makes it clear that it was the intention of the Legislature that the general words should be construed generally. [P 463 C 1]

K. E. Rajagopalachari — for Petitioner.

S. Ramachandra Ayyar — for Respondent.

ORDER. — The petitioner here has filed this civil revision petition as secretary to the Tirukkurungudi Chatram Ryots' Association on behalf of the ryots. This association is, I am informed, an unregistered association and clearly the petitioner cannot without some special procedure represent the members of that association. He is, however, one of the ryots affected by the order under revision. In so far as he personally is concerned, the revision petition may be treated as in proper form. The order out of which this revision petition arises deals with the question whether sales under S. 112, Madras Estates Land Act, can proceed in view of the fact that the ryots are claiming to be agriculturists entitled to the benefits of Act 4 of 1938. The order is a comprehensive one governing a large number of cases, but I am concerned with it only in so far as it relates to the liability of the present petitioner. The landholder to whom the rent is payable is the Tinnevelly District Board as trustee of Tirukkuruugudi Chattram. The proceedings in the lower Court seem to have been conducted more by correspondence than by judicial procedure. It would appear that the sale applications were stayed in view of representations that the ryots were entitled to the benefits of Act 4 of 1938. On a report from the manager of the Chattram estate that the matter was governed by the decision of Mockett J. in I. L. R. 1940 Mad. 239,[1] the order now under consideration was passed directing that the sale applications should proceed. The decision on which the learned Sub-Collector relies was one in a case of contractual rent due to a District Board as manager of a Chattram Estate. It seems to me that the question whether the liability of a Chattram estate under the control of the District Board is exempted under S. 4 (c) of Act 4 of 1938 is the same question, whether the liability be in respect of an ordinary contractual rent, which would be a debt under Act 4 of 1938, or whether the liability be in respect of rent under the Estates Land Act which would fall under S. 15 of Act 4 of 1938 and be scaled down not as a debt but as rent.

Two contentions are really open to the applicant for relief. One is that the rent is not payable to the local authority as such but to the Chattram fund of which the local authority is charged with the administration and the other is that a payment by way of rent would not come under the class of liabilities enumerated in S. 4 (c) of the Act. The first contention has been dealt with at length by Mockett J. The second contention was not apparently raised before that learned Judge, though it might have been raised in that case. It seems to me that there are no grounds for doubting the correctness of the decision in the case quoted. The reasoning which appealed to the learned Judge was that under S. 63, Madras Local Boards Act, the management of the trust estates is transferred by the Board of Revenue to the Local Board. Under S. 64, the Local Board is empowered to accept trusts in furtherance of any purpose to which its funds may be applied and in R. 5-B of Sch. 5, Local Boards Act, sub-r. 9 provides that "the District funds shall include income from endowment and trusts under the management of the District Board." From these statutory provisions, it follows that when a Chattram estate has been transferred to the management of the District Board with a view to the application of its funds to purposes to which the District Board's funds may be properly applied, the income of the trust becomes part of the funds of the District Board when received by that Board. From this it follows that when rent, whether contractual or under the Madras Estates Land Act, is

1. ('40) 27 A. I. R. 1940 Mad. 231: 188 I. C. 640: I. L. R. (1940) Mad. 239: (1939) 2 M. L. J. 818, District Board of West Tanjore v. Ponnuswami.

paid to the District Board as manager of the Chattram Estate, it is a payment to the District Board as such of money, which goes into the funds of the District Board, though ear-marked for a particular purpose. It is difficult to resist the inference that a payment of rent in such circumstances would come within the category of "any other sum due to them, by way of loan or otherwise." An argument has been based on the rule of ejusdem generis, it being apparently suggested that the words "by way of loan or otherwise" should be read as indicating "by way of loan or some other form of advance." It seems to me that it is impossible to read these words in such a way.

In cl. (c) we start with an enumeration of "any tax or cess," then follow the words "any other sum due." These words are qualified by the words "by way of loan or otherwise." It seems to me clear that the object of the qualifying words is to prevent the application of the ejusdem generis rule, which would otherwise apply to the words "any other sum." If this clause merely specified "any tax or cess or any other sum" the latter words would have to be read ejusdem generis with the first two classes of payment enumerated. In order to make it clear that there is no such intention, the words "any other sum" are thus qualified by the very wide description "by way of loan or otherwise" indicating to my mind clearly that the words "any other sum" are read in their natural and wide sense, not restricted by the proximity of the special words preceding. There is authority for the view that the ejusdem generis rule should not be applied when the context makes it clear that it was the intention of the Legislature that the general words should be construed generally (*see* Maxwell on the Interpretation of Statutes, Edn. 7 p. 289). I am, therefore, of opinion that the exemption in S. 4 cl. (c) will cover any sum payable to the local authority even though it partakes of the nature of rent, and it seems to me to make no difference whether the rent in question be an ordinary contractual rent or a rent governed by the special provisions of the Estates Land Act which would bring it within the definition of rent under Act 4 of 1938. In this view I dismiss the civil revision petition with costs.

C.R.K./R.K. *Revision dismissed.*

C. P. C.—

(b) ('40) Chitaley, Preamble N. 7 Pt. 31.

A. I. R. (29) 1942 Madras 463

KING AND BYERS JJ.

K. S. V. Ramaswami Mudaliar — *Appellant*

v.

K. L. Dargan, Examiner, Local Fund Accounts, Madras — *Respondent.*

Appeal No. 5 of 1942 (Civil Revn. Petn. No. 642 of 1941, converted into A. A. O. No. 5 of 1942 as per order dated 7th January 1942), Decided on 27th January 1942, against order of Dist. Court, Coimbatore, D/- 23rd September 1940.

(a) Madras Local Boards Act (14 of 1920) — Surcharge—License not issued—Persons allowed still to carry on trade—Order of surcharge is justified.

Where persons are permitted by the President to carry on their trades without ever calling upon them to take a license and pay the requisite license fee, the Panchyat Board has no right of suit in respect of these sums, the reason being that no licenses were actually issued. An order surcharging such items against the President is justified : ('28) 15 A. I. R. 1928 Mad. 682, *Rel. on.* [P 463 C 2]

(b) Madras Local Boards Act (14 of 1920) — Board writing off item as irrecoverable —Board is not Judge to determine whether loss was due to President's negligence or not.

There is nothing in the Act or in the rules relating to surcharges which makes the Board (by writing off certain item as irrecoverable) the judge whether the President has by his negligence caused loss of money to itself or not. [Failure to collect house tax held due to negligence of the President.] [P 463 C 2; P 464 C 1]

(c) Madras Local Boards Act (14 of 1920) — Surcharge— Loss must be established — Difficulties in realization or costs not allowed is not sufficient.

An order of surcharge can be rightly levied only when loss has been clearly established. If the Board is left without any legal remedy, then such loss has been clearly established; but if all that can be argued is that when a legal remedy is resorted to, it is probable that there will be difficulties in realizing the fruits of the decree, or that the Court will not award the actual costs which the Board is compelled to incur, then no present loss has yet been proved and the matter is still hypothetical. [P 464 C 1]

A. C. Sampath Iyengar and T. K. Subramania Pillai — for Appellant.

Government Pleader — for Respondent.

KING J. — The question at issue in this appeal is whether certain items surcharged against the President of the Bhavani Panchayat Board for the official year 1938-39 have been rightly so surcharged or not. The first item refers to a sum of Rs. 35. This sum ought to have been collected by the President, who is the appellant here, from certain persons who carried on trade within the union without taking a license. It is the case for the Government that these persons were permitted by the appellant to carry on their trades without ever calling upon them to take a license and pay the requisite license fee. The learned Additional District Judge of Coimbatore, against whose order this appeal has been filed, holds that the Panchayat Board had no right of suit in respect of these sums, the reason being that no licences were actually issued. If licenses are not actually issued, it cannot be said that any license fee is legally due from persons to whom they ought to have been issued. There is authority for this position in 51 Mad. 866[1] and after some argument it was finally conceded for the appellant that there was no right of suit in respect of this money. We accordingly hold that the order of surcharge in respect of the first item was correct.

The second item is one of Rs. 38 due on account of house tax for the year 1935-36. This was not demanded, and no suit was filed so that during the presidentship of the appellant it had become time-barred. On 31st March 1939, it was written off by the Board as irrecoverable. It was argued that in some way this action of the Board releases the President from all the responsibility in respect of the failure to collect the money. There is nothing, however, in the Act or in the rules relating to surcharges which makes the Board the judge whether the President

1. ('28) 15 A. I. R. 1928 Mad. 682 : 110 I.C. 233 : 29 Cr. L. J. 681 : 51 Mad. 866 : 55 M. L. J. 27, Gopayya, In re.

has by his negligence caused loss of money to itself or not. It is clear in this instance that the failure to collect this money was due entirely to the negligence of the appellant as the evidence is that the persons from whom it was due have been regularly paying their house tax in subsequent years, and there can, therefore, be no acceptance of any plea of their inability to do so in the year in question.

Finally comes a sum of Rs. 129-8-0 which is due from a number of persons who have taken leases of certain vacant sites in the municipal area. According to the rules under the Act their ought to have been written lease deeds executed by them, but owing to the indifference of the appellant in this respect the leases were by word of mouth only. The learned Additional District Judge states that as this is so the Board is precluded from filing any suit. No doubt, that is true if the suit is one for rent specifically so called; but our attention has been called to more than one ruling of this Court in which it has been held that even though there is no written lease, a suit can be filed for damages for use and occupation. The correctness of these decisions has not been challanged by the learned Government Pleader. It follows that the view of learned Additional District Judge that the Board is left without any legal remedy for recovering the money which ought to have been levied from these lessees is wrong. It is argued on behalf of the Government that the failure of the President to take written leases from the lessees will make the filing of suits by the Board a more laborious and costly matter than it would otherwise have been, and in particular stress is laid upon the fact that a large number of individual suits for small sums would have to be instituted. It is also mentioned that it is common knowledge that the costs incurred by a successful plaintiff are usually greater than those awarded him by the Court, and therefore it is argued that the net result of filing these suits will be that the money will not be recovered in full. It seems to us that these are considerations which are foreign to the scope of the decision of this appeal. An order of surcharge can be rightly levied only when loss has been clearly established. If, of course, the Board is left without any legal remedy, then such loss has been clearly established; but if all that can be argued is that when a legal remedy is resorted to it is probable that there will be difficulties in realizing the fruits of the decree, or that the Court will not award the actual costs which the Board is compelled to incur, then no present loss has yet been proved and the matter is still hypothetical. We are accordingly of opinion that in regard to this last item the order of surcharge is not justified. The appeal will accordingly be allowed in respect of the final item and will be dismissed in respect of the first two items. Each party will bear his own costs throughout.

C.R.K./K.S. *Order accordingly.*

A. I. R. (29) 1942 Madras 464

ABDUR RAHMAN J.

In re Vedaranyaswami Devasthanam, represented by Managing Trustee, Sri La Sri Subramania Pandara Sannadhi — Appellant.

Second Appeals Nos. 1008 to 1035 of 1940, Decided on 5th February 1941, against decrees of Dist. Court, East Tanjore at Negapatam, in A. S. Nos. 92 to 119 of 1939, respectively.

Court-fees—Refund— High Court can under S. 107 and S. 151, Civil P. C., help party to get refund of excess court-fee erroneously paid.

Although there is no specific provision in the Court-fees Act, which empowers the Court to order a refund, but the Court may, *ex debito justitiæ* go into these questions, declare that any particular plaint or memorandum of appeal was overvalued and then leave the matter to the revenue authorities for the grant of a refund in accordance with the declaration given by the High Court : ('32) 19 A. I. R. 1932 Mad. 438, *Rel. on.* [P 464 C 2]

The High Court can make a declaration and assist the party to recover the excess court-fee erroneously paid by him under its own order or under orders of Courts subordinate to it. [P 465 C 1]

A. V. Viswanatha Sastri and R. Sundaralingam — for Appellant.

T. Krishna Rao — for the Government.

ORDER. — A batch of twenty eight suits for acceptance of patta and execution of muchilika by the tenants were brought by the landlord in the Court of the Sub-Collector, Negapatam. Under a notification of the Madras Government no court-fee is leviable on such plaints. Appeals were preferred by the landlord from the decree passed by the Sub-Collector to the District Court, East Tanjore. Since the notification granting exemption in regard to plaints was not applicable to appeals, a court-fee of Rs. 10 under Art. 17-B, Sch. 2, Court-fees Act, was paid in regard to each appeal. The landlord not being satisfied with the order passed by the District Judge preferred these second appeals to this Court and since the appellant considered the appeals to be incapable of any valuation, he paid a court-fee of Rs. 25 in regard to each appeal. The office raised the objection that the court-fee paid by the appellant was calculated on a wrong basis and that it should have been paid according to the provisions contained in S. 7 (xi) of the Act. This contention was upheld by the Master of this Court on 31st July 1940 and he ordered that the deficiency in court-fee on appeal should be made up on that basis. There were certain appeals, however, in respect of which he was of opinion that the court-fee had been paid by the appellant in excess. He also found that some of the appeals in the lower appellate Court were undervalued and others overvalued. He, therefore, moved this Court under S. 12 (ii), Court-fees Act, to order the appellant to pay so much additional court-fee as would have been payable by him had the court-fee been rightly affixed and also drew the attention of this Court to the excess court-fee paid by the appellant in other appeals.

There is no specific provision in the Court-fees Act which empowers the Court to order a refund, but decisions are to the effect that the Court may *ex debito justitiæ* go into these questions, declare that any particular plaint or memorandum of appeal was overvalued and then leave the matter to the revenue authorities for the grant of a refund in accordance with the declaration given by this Court. It was so held by a Division Bench of this Court in 55 Mad. 641.[1] Other cases have also followed the same course. It appears to be quite just in the circumstances that while I am called upon to exercise my powers under S. 12 (ii), Court-fees Act, and to order the appellant to make up the deficiency in regard to the court-fee on certain appeals in that

1. ('32) 19 A. I. R. 1932 Mad. 438 : 139 I. C. 131 : 55 Mad. 641 : 62 M.L.J. 541, Thammayya Naidu v. Venkataramanamma.

batch, I should simultaneously consider if he has paid it in excess on other appeals which were preferred by him at the same time. It was suggested by the learned Government pleader that although I might be entitled to pass that order in regard to appeals preferred to this Court, yet I have no such power in regard to the appeals presented to the Subordinate Court and that the order declaring that the court-fee has been paid in excess should be passed by the Court which had entertained the appeals. I am not impressed by that contention. Under S. 107, Civil P. C., every appellate Court is entitled to exercise the same powers and is bound to perform the same duties as were conferred or imposed by the Code on the Courts of original jurisdiction and there is no reason why the orders which could be passed by the lower Court cannot be passed by this Court *ex debito justitiæ*. Section 151 of the Code contains ample powers for that purpose. There is an observation of Wallace J. in the Division Bench case to which I have referred above, which also goes to show that the High Court could make a declaration and assist the party to recover the excess court-fee erroneously paid by him under its own order or under orders of Courts subordinate to it.

Since the Master's decision in regard to the court-fee being leviable under S. 7 (xi), Court-fees Act, was not challenged before me by the learned counsel for the appellant and his decision in regard to cases in this Court where the court-fee is deficient is not only final but correct, I see no reason why the same treatment should not be meted out to the appellant in regard to the cases where relying on a provision of the Court-fees Act, which is now found to be inapplicable, he has paid in excess in the appeals preferred to this Court. As for the appeals preferred before the lower appellate Court, I am bound to order, in view of the provisions contained in clause 12 (ii) of the Act that the deficiency in the court-fee should be made up and I do so order. But, at the same time, I would like to issue a certificate in regard to the appeals both to this and the lower appellate Court in which the court-fee has been paid in excess of what was required under S.7 (xi), Court-fees Act, that they bear an excess court-fee. This would have to be done in regard to each appeal in which an application has been or may be made on behalf of the appellant. The deficiency in court-fee on appeals preferred to the Court of the District Judge of East Tanjore must be made up by the appellant within four weeks on the same principle on which court-fee has been held to be leviable by the master on the appeals preferred to this Court. As for the appeals in which the appellant alleges to have paid court-fee in excess, the matter will be verified by the office on his application in any of the 28 appeals out of this batch and if, having regard to S. 7 (xi), Court-fees Act, excess fee is found to have been paid by him, a certificate or certificates, as the case may be, will be given to him in the terms indicated above. The same order will be passed in regard to the appeals pending in this Court.

C.R.K./R.K. *Order accordingly.*

C. P. C. —
('40) Chitaley, S. 151, N. 4 Pt. 3.
('41) Mulla, Page 480 Pt. (c).

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* A. I. R. (29) 1942 Madras 465

HORWILL J.

Mariasoosai — Petitioner

v.

Arokkiam and another — Respondents.

Criminal Revn. Case No. 810 of 1941 (Criminal Revn. Petition No. 761 of 1941), Decided on 14th November 1941, to revise judgment of City First Class Magistrate, Madura, D/- 23rd May 1941.

* (a) Criminal P. C. (1898), Ss. 422 and 545— On appeal by accused, notice sent to Public Prosecutor—Conviction and compensation order set aside after hearing Public Prosecutor — Absence of notice of appeal to complainant is not irregularity much less illegality.

Where the appeal has been fairly heard after notice to the Crown and after hearing the Public Prosecutor, and where a proper judgment has been written, it would be grossly unfair to require an accused who had been acquitted, to go through a fresh ordeal because the appellate Judge had heard only the Public Prosecutor, which is all that is required under S. 422 and not the complainant's vakil also. As in an ordinary appeal the Legislature intends that notice should go to the representative of the Crown and not to any other party, it is difficult to see how there can be any irregularity—much less illegality—in not giving notice to the complainant merely because he was awarded compensation under S. 545. [P 466 C 1, 2]

Therefore, an order setting aside an order under S. 545 cannot be interfered with for want of notice to the complainant by the appellate Court. Such an order would be automatically set aside upon an order of acquittal in appeal by the accused against his conviction : 26 Mad. 41 (F.B.) and 33 Mad. 89, *Ref.*; ('33) 20 A.I.R. 1933 Mad. 277, *Rel. on*; 1933 M. W. N. 729, *Expl.* [P 466 C 1]

(b) Criminal P. C. (1898), S. 192 — Scope — Charge sheet filed under S. 326, Penal Code — Complaint containing exaggeration of facts and offence being only one punishable under S. 325, Penal Code— Transfer of case from First Class Magistrate to Sub-Magistrate held proper.

A charge sheet was filed under S. 326, Penal Code, but the complaint contained an exaggeration of the facts and the offence was one punishable under S. 325, Penal Code, and not under S. 326, Penal Code :

Held that the action of the District Magistrate in transferring the case from the First Class Magistrate to the Sub-Magistrate was within his jurisdiction. [P 466 C 2]

J. S. Vedamanickam — for Petitioner.

T. S. Vaidhyanatha Iyer — for Respondents.

Public Prosecutor — for the Crown.

ORDER.—The accused in C. C. No. 2448 of 1940 on the file of the Second Class Magistrate of Nilakottai were convicted by that Magistrate and sentenced to pay a fine. Out of the proceeds of the fine, compensation under S. 545, Criminal P. C., was ordered to the complainant.

In appeal, notice went as required under S. 422, Criminal P. C., to the Public Prosecutor; and the conviction was set aside. Consequently, the petitioner, who was the complainant, was unable to realize the compensation ordered to be paid to him by the Second Class Magistrate. He has filed this revision petition in this Court against the order of

acquittal, one of his grounds being that notice should have gone to him. He also urged that as the case was originally taken on the file of the First Class City Magistrate, Madura, the District Magistrate had no jurisdiction to transfer it to the Second Class Magistrate; because the charge sheet revealed an offence punishable only by a First Class Magistrate. He has also raised a number of other objections, which it is unnecessary to set out, because they would afford no ground for interference in revision.

On the first point, there is some conflict of authority as to the circumstances under which an order should be set aside because notice was not given to some person affected by the order. Originally, no provision was made in the Criminal Procedure Code for giving notice to accused persons in applications to set aside an order of discharge; but a Full Bench of this Court in 26 Mad. 41[1] while refusing to lay down a general rule that notice was absolutely necessary, thought that notice of the application against the order of discharge should have gone to the accused on the general principle that an order should not be made to a man's prejudice without giving him an opportunity of being heard. Section 250, Criminal P. C., which permits of an order for compensation to be paid to the accused where the complaint is false and frivolous or vexatious, permits of an appeal, but does not require notice to the person affected, namely, the accused. In 33 Mad. 89,[2] the learned Judges, while expressing the opinion that it was desirable to give notice to the person primarily affected, refused to interfere because no illegality had been committed. There would be no more reason for interfering with an order setting aside an order under S. 545, Criminal P. C., for want of notice to the complainant by the appellate Court. Such an order would be automatically set aside upon an order of acquittal in appeal by the accused against his conviction. In such an appeal, the case of the complainant, upon which would depend the compensation as well as the conviction, is supported, if notice goes as is required under S. 422, Criminal P. C., by the Public Prosecutor; and so the appeal is not heard ex parte as it would be in the case of an appeal against an order under S. 250, Criminal P. C., if notice did not go to the person directly affected. Even where the Magistrate took cognizance of the case on a private complaint, notice of an appeal by the accused goes to the Crown and not to the private party, although if one applied the principle I have been asked to apply here, notice ought to go to the complainant. As in an ordinary appeal the Legislature intends that notice should go to the representative of the Crown and not to any other party, it is difficult to see how there can be any irregularity—much less illegality — in not giving notice to the complainant merely because he was awarded compensation under S. 545 of the Code.

Pakenham Walsh J. in 1932 M. W. N. 722,[3] has pointed out that whereas the Legislature thought fit to amend S. 436, Criminal P. C., so as to give the accused a right to be heard where there was an application to set aside his discharge, it did not think fit to amend S. 250, Criminal P. C., to permit of the appearance of the party interested or the appearance of the person receiving compensation under S. 545, Criminal P. C. The learned Judge therefore refused to interfere. A few months later, however, Burn J. in 1933 M. W. N. 729[4] expressed the opinion that notice should have gone to the complainant in that case; but it is clear that Burn J. was very much influenced by the peculiar facts of that case. He said that the procedure that had been adopted by the Joint Magistrate was grossly unfair. The judgment of that Magistrate seems to have been most unsatisfactory. It appeared that the appeal was about to be dismissed when the Prosecuting Inspector made certain representations to the Court and the accused's pleader was heard long after the case had been finished. I do not think that the learned Judge intended to lay down a general principle applicable to all cases that if notice did not go to the complainant where he had been awarded compensation, this Court should always interfere in revision. Jackson J. in Cr. R. C. No. 431 of 1933 followed the above decision without comment. It seems to me that in a straightforward case like the present, where the matter has been fairly heard after notice to the Crown and after hearing the Public Prosecutor, and where a proper judgment has been written, it would be grossly unfair to require an accused who had been acquitted, to go through a fresh ordeal because the appellate Judge had heard only the Public Prosecutor, which is all that is required under S. 422, Criminal P. C., and not the complainant's vakil also.

Another objection raised by the petitioner is that since the charge sheet was filed under S. 326, Penal Code, the District Magistrate had no jurisdiction to transfer the case to the file of the Sub-Magistrate, who could not dispose of a case under that section. The District Magistrate exercised his powers under S. 192, Criminal P. C., which empowers him to direct a Magistrate of the first class who has taken cognizance of any case, to transfer it for inquiry to any other specified Magistrate who is competent to try the case. This case was referred to the District Magistrate because it was pretty clear to all concerned—including the prosecution—that the complaint contained an exaggeration of the facts and that the offence was one punishable under S. 325, Penal Code, and not under S. 326. In these circumstances, I do not think it can be said that the District Magistrate exceeded his jurisdiction in ordering this case to be transferred to the Sub-Magistrate. The petition is dismissed.

C.R.K./K.S. *Petition dismissed.*

1. ('03) 26 Mad. 41 : 2 Weir 564 (F. B.), Alagirisami Naidu v. Balakrishnaswami.
2. ('10) 33 Mad. 89 : 1 I. C. 79 : 19 M. L. J. 130, Ambakkagari Nagi Reddi v. Basappa.
3. ('33) 20 A. I. R. 1933 Mad. 277 : 138 I. C. 385 : 33 Cr .L. J. 596 : 1932 M. W. N. 722, P. Kalathi Mudali v. Venkatesa Mudali.
4. ('33) 1933 M.W.N. 729, Venkatavarada Iyengar v. Vengai Servai.

Cr. P. C. —
(a) ('41) Chitaley, S. 422 N. 4 Pts. 2-3.
('41) Mitra, Page 1334 N. 1137.
(b) ('41) Chitaley, S. 192 N. 1.
('41) Mitra, Page 617 N. 602.

A. I. R. (29) 1942 Madras 466

WADSWORTH AND PATANJALI SASTRI JJ.

Perumalla Venkayya — Petitioner

v.

Batchu Pullayya — Respondent.

Civil Revn. Petn. No. 1972 of 1941, Decided on 22nd January 1942, to revise decree of Dist. Munsif, Gurzala, in O. S. No. 97 of 1940.

(a) Interpretation of statutes—Test for seeing whether rules are ultra vires or intra vires stated.

The test to apply in considering whether rules are within the powers of the rule-making authority under a statute are: (1) whether the rules are reasonable and convenient for carrying the Act into full effect ; (2) whether the rules relate to matters arising under the provisions of the Act ; (3) whether they relate to matters not in the Act otherwise provided for; and (4) whether they are consistent with the provisions of the Act. The validity of a rule is to be determined not so much by ascertaining whether it confers rights or merely regulates procedure, but by determining whether the rule is in conformity with the powers conferred under the statute and whether it is consistent with the statute, reasonable and not contrary to general principles : (1873) L. R. 5 P. C. 92, *Foll.* [P 467 C 2; P 468 C 1]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 28, Rules under, Rule 9 — Rule 9 is properly framed.

A right of appeal can be conferred by a rule. It is not necessary that there should be an express power in the statute to make rules for that purpose. Rule 9 is one which is a reasonable and convenient qualification of the procedure prescribed, it does not offend against any principle of law and is not inconsistent with anything in the Act itself. It is properly framed for carrying into effect the purposes of the Act and removing difficulties in giving effect to its provisions : ('41) 28 A. I. R. 1941 Mad. 235 (F. B.), *Disting.*; *English cases discussed.* [P 468 C 2]

K. Bhimasankaram — for Petitioner.

M. S. Ramachandra Rao — for Respondent.

WADSWORTH J.—This petition is preferred against a decision under the rules framed by the Provincial Government under S. 28 of Madras Act, 4 of 1938 and promulgated in G. O. No. 2734 (Development) dated 27th October 1939. An objection to the maintainability of the revision petition was raised on the ground that Rule 9 of these rules provides a right of appeal and that when there is a right of appeal there can be no revision. This objection is met by the contention that Rule 9 of the rules is itself ultra vires of the Provincial Government and that, therefore, it must be deemed that there is no valid right of appeal, with the result that the right of revision is the only remedy by an aggrieved person. The question first to be determined is, therefore, whether Rule 9 is beyond the powers of the Provincial Government. We decided yesterday in C. R. P. No. 910 of 1941[1] that the main procedure laid down in these rules for the determination of the amount of a debt other than a decree debt due by an alleged agriculturist by an application to the Court, was a procedure which could properly be prescribed under the rule-making powers conferred by S. 28 of the Act. In disposing of that matter, we refrained from expressing any opinion as to the validity of Rule 9 which prescribes that the order of the Court declaring the amount of the debt under Rule 7 shall be subject to appeal and second appeal as if it were a decree in an original suit. The argument before us is that granting that the enactment of a cheap and expeditious procedure for determining the amount of the debt affected by the provisions of this Act was a regulation for carrying into effect the purposes of the Act or for removing a difficulty in giving effect to the provisions of the Act, it was not a necessary incident of such a procedure to prescribe a right of appeal and that a right of appeal is a substantive right which cannot properly be conferred by a rule and should be implicit in the provisions of the statute itself. A Full Bench of this Court decided in I. L. R. (1941) Mad. 261[2] that Rule 8 of the rules relating to the procedure for dealing with debts embodied in decrees which are to be modified under Act 4 of 1938, was ultra vires on the ground that it adds to the procedure laid down in S. 19 of the Act a power of appeal which the Legislature did not see fit to prescribe. It was observed that in making a rule providing for such appeals the Provincial Government is not making a rule for carrying into effect the purposes of the Act, but it is adding something to the Act. Now the decision of the Full Bench does not in our opinion, affect the disposal of the case before us. We are concerned not with the addition of a right of appeal to a procedure prescribed by the statute but with the insertion of a right of appeal in a procedure prescribed by rules under the statute. When once it is conceded that the Act provides rights without providing a remedy and that the power of the Provincial Government to make rules for carring into effect the purposes of the Act and removing any difficulty in giving effect to its provisions, warrants the promulgation of a procedure such as has been laid down in these rules, can it be said that the qualification of the remedy prescribed by the insertion of a right of appeal is something which is beyond the powers of the Provincial Government?

Mr. Bhimasankaram for the petitioner has contended that a right of appeal is a substantive right which should be granted only by statute and not by rule, or at any rate, if it is to be conferred by a rule, there must be specific authority in the statute itself for the exercise of the rule-making power so as to confer a right of appeal. No definite authority for this view has been quoted. The nearest case to the position for which Mr. Bhimasankaram has been contending is the case in (1863-64) 10 H. L. C. 704.[3] But on examination it does not appear that this decision is really an authority for his contention. In that case the House of Lords were dealing with a statute which conferred upon the revenue side of the Court of Exchequer the power to make rules governing its own procedure and their Lordships held that the rule purporting to have been framed under this rule-making power by the Court giving a right of appeal against its orders to the higher Courts was not within the powers conferred, the reason being that the lower Court could not by a rule affect the jurisdiction of the higher Courts and that any right of appeal must necessarily be conferred by an authority which can bind all the Courts affected by that right. There can be no question that with reference to Act 4 of 1938 the Legislature has conferred upon the Provincial Government the power to make rules which will bind all the Courts of this Presidency. The contention that a right of appeal not being a mere matter of procedure but a substantive right it cannot be conferred by a rule, also seems to lack authority. As has been pointed out by the House of Lords in (1873) L. R. 5 P.C. 92[4] at p. 108 the test to apply

1. *Reported in* ('42) 29 A.I.R. 1942 Mad. 362 : 1942 1 M.L.J. 303, Swayamprabhai v. Muthukrishna.

2. ('41) 28 A. I. R. 1941 Mad. 235 : 198 I. C. 760 : I. L. R. (1941) Mad. 261 : (1941) 1 M. L. J. 164 (F. B.), Nagappa Chettiar v. Annapoorani Achi.

3. (1863-64) 10 H. L. C. 704 : 10 Jur. (N. S.) 446 : 10 L. T. (N. S.) 434 : 4 N. R. 29 : 12 W. R. 641, Attorney-General v. Sillem.

4. (1873) L. R. 5 P. C. 92 : 43 L. J. P. C. 25 : 30 L. T. 45 : 22 W. R. 419, Blackwood v. London Chartered Bank of Australia.

in considering whether rules are within the powers of the rule-making authority under a statute are: (1) whether the rules are reasonable and convenient for carrying the Act into full effect; (2) whether the rules relate to matters arising under the provisions of the Act; (3) whether they relate to matters not in the Act otherwise provided for and (4) whether they are consistent with the provisions of the Act. The validity of a rule is to be determined not so much by ascertaining whether it confers rights or merely regulates procedure, but by determining whether the rule is in conformity with the powers conferred under the statute and whether it is consistent with the statute, reasonable and not contrary to general principles.

No doubt Act 4 of 1938 nowhere contains any provisions for an appeal against a decision under that Act. But equally it contains no indication that an existing right of appeal should be nullified. Apart from the procedure prescribed for the modification of decrees for debt the cancellation of sales and the reduction of undecreed rents, the Act is singularly lacking in provisions prescribing the procedure for giving effect to its substantive provisions. It lays down no procedure for working out the amount of any debt affected by the Act which has not yet come into Court. It would no doubt be open to the creditor to file a suit for the debt leaving it to the Court to determine how the debt is to be scaled down as an incident to the passing of a decree. But this procedure involves the disadvantages that many parties would be driven to file suits when there is no real question at issue between them except as to the way in which the Act is to be worked and the creditor if he files his suit after the date prescribed in the Act would be mulcted in costs if he claims more than is due under the Act. We have held that these circumstances made it most desirable to lay down a simple procedure which could be worked cheaply and speedily whereby either party could get the amount of the debt determined without the necessity of filing an expensive and elaborate suit. No doubt it would have been possible to confine such a procedure to a determination by the trial Court without any right of appeal. But had the rules contained no provision for an appeal, they would have been open to the very serious objection that the determination of the amount of the debt by the ordinary procedure of suit would be subject to appeal and in many cases to second appeal and that the rule providing for such a determination only by the Court of first instance would deprive the parties of their ordinary right of appeal which the law gives. It seems therefore that a most eminently reasonable and desirable feature of any procedure for the speedy and inexpensive determination of the amount of a debt affected by this Act would be the normal right of appeal against the decision. Looked at in this way, it appears that the rule for a right of appeal does not really confer any new right, but preserves a right which exists under the ordinary procedure which is being shortened by the procedure prescribed in the rule.

It cannot, in our opinion, be contended successfully that no right of appeal can be prescribed by rule unless the statute expressly authorises the rule-making authority to provide for rights of appeal. There are very many instances in which the rule-making authority has exercised the power of prescribing or taking away right of appeal in matters covered by the rules. There seems to be a very clear difference between giving a right of appeal under a new procedure enacted by a rule and adding a right of appeal to a statutory procedure which contains no such right. An instance in which a very elaborate code of procedure with a complete system of appeals has been enacted under rule making powers is found in the Agency Rules framed under S. 6, Scheduled Districts Act. Section 6 empowers the local Government to regulate the procedure of the officers who are to administer civil and criminal justice and to direct by what authority any jurisdiction, powers or duties incident to the operation of any enactment for the time being in force shall be exercised or performed. It does not specifically empower the local Government to prescribe what rights of appeal shall be conferred from decisions of these judicial officers. Rules 47 to 49 of the rules framed under this section give a complete series of rights of appeals which have been exercised for many years and have frequently come up before this Court without, so far as we are aware, their validity being questioned. We are therefore unable to accept the contention that a right of appeal is a right which can never be conferred by a rule unless there is an express power in the statute to make rules for that purpose. It seems to us that the rule now in question is one which is a reasonable and convenient qualification of the procedure prescribed, that it does not offend against any principle of law, that it is not inconsistent with anything in the Act itself and that it is properly framed for carrying into effect the purposes of the Act and removing difficulties in giving effect to its provisions. We therefore allow the preliminary objection and hold that an appeal does lie against a decision under R. 7 and that therefore there can be no revision. The petition is dismissed with costs.

C.R.K./R.K. *Petition dismissed.*

A. I. R. (29) 1942 Madras 468

HAPPELL J.

P. N. Madhava Rao, Executive Officer of Perdoor Sri Ananta Padhmanabha Temple—Appellant

v.

C. Vaikunta Kamath and others — Respondents.

Second Appeal No. 116 of 1940, Decided on 12th February 1942, against decree of Sub-Judge, South Kanara, in A. S. No. 70 of 1935.

(a) Civil P. C. (1908), S. 100 — Knowledge of other trustees.

A finding that the other trustees were aware of the transactions and accepted them is a finding of fact and cannot be canvassed in second appeal. [P 469 C 1]

(b) Promissory note — Suit on by holder in due course—It is not permissible to go outside note.

In a suit by a holder in due course it is not permissible to go outside the note. A holder in due course cannot be expected to make enquiries concerning the previous promissory note referred to in the body of the document, and the document itself would merely inform him that the promissory note had been executed in respect of the amount of principal and interest due on a promissory note previously executed by the promisor in favour of the promisee : ('42) 29 A. I. R. 1942 Mad. 92 and ('42) 29 A.I.R. 1942 Mad. 198, *Rel. on*; ('41) 28 A. I. R. 1941 Mad. 417 (F.B.), *Disting.* [P 469 C 2]

K. Y. Adiga — for Appellant.

K. P. Sarvothama Rao — for Respondents.

JUDGMENT. — The question in this second appeal is whether the promissory note Ex. A dated 12th June 1930 executed by one of the trustees of the Sri Anantha Padhmanabha Devaru Temple of Perdur is binding on the temple itself. The suit out of which this appeal arises was brought in the Court of the District Munsif of Udipi by an assignee of the promissory note, and the suit was defended by the other trustees of the temple who contended that the money borrowed under the promissory note had not been borrowed for the necessary purposes of the temple and that the executant of it had not pledged the credit of the temple but only his own credit. The learned District Munsif gave a decree against defendant 1, the executant of the promissory note, alone on the grounds that there was no necessity for the temple to borrow, that the executant was not competent to bind the temple without the authority of the other trustees and also on the ground that on the face of it the promissory note did not create any liability as against temple funds. On appeal, however, the learned Subordinate Judge of South Kanara amended the decree of the lower Court so as to entitle the plaintiff-assignee to recover the amount decreed from the temple funds in the hands of the present appellants-trustees. The learned Subordinate Judge seems to have treated the suit rather as if it was a suit on the debt than a suit on the promissory note, and he did not seriously consider the question whether on the face of it the promissory note Ex. A bound the funds of the temple. He found that the promissory note had been executed by defendant 1, Venkappa Hegde, with the implied authority of the other trustees who were aware of the transactions and accepted them on behalf of the temple. He also held, on the authority in 60 M.L.J. 90,[1] that even though at the time of the borrowing the temple had some cash in hand, the value of the goods supplied to the temple, provided they were appropriated for the purposes of the temple, could be recovered.

Some argument was advanced on behalf of the appellants to the effect that as an assignee of the promissory note the respondent-plaintiff was not entitled to go behind it and rely on the debt. It is not necessary, in my opinion, to consider this question since it is plain from the issues framed and the judgment of the trial Court that the suit was on the promissory note and not on the debt. It has also been urged that the finding of the learned Subordinate Judge that the other trustees were aware of the transactions and accepted them was not warranted by the facts. This, however, in my opinion, is a finding of fact on the part of the learned Subordinate Judge and cannot now be canvassed. Essentially, the question is whether on the face of the document, Ex. A, the funds of the temple are liable in respect of the sum borrowed. Exhibit A runs as follows :

"Pronote, executed on 12th June 1930, in favour of Vittal Malya, residing at Perduru magne, Kaska Petai, Udipi taluk, by Venkappa Hegde, Adalthedar, of Perduru, Sri Anantha Padmanabha Devara Bhandara, nephew of Alangaru Dummanna Hegde, and residing at Majkuru Perduru village, in the (aforesaid) taluk.

The amount of principal and interest due to you until now under the pronote previously executed by me in your favour on 13th June 1927, is Rs. 736-2-6. Hence I shall, hereby, on demand, promise to pay either to you or to the person who produces this pronote with your order thereon, the said amount together with interest thereon at Rs. 12-8-0 per cent. per annum. The consideration hereof has been completely received in the aforesaid manner. To this effect is this pronote executed affixing two one-anna stamps.

12-6-1930

(Signed on two one-anna stamps) Venkappa Hegde,
Adalthedar, P. Alangaru."

The body of the document quite clearly binds the executant and not the temple. It is, however, argued for the appellants that on a reasonable construction of the document, the description of the promisor at the beginning of the note and the description of him after his signature as "Adalthedar" can leave no room for doubt that he was signing on behalf of the temple. There can be no question that authority is against this contention : *vide* 5 M.L.W. 323[2] and 97 I.C. 433.[3] It is, however, argued by the learned counsel for the appellants that the earlier decisions are no longer good law in view of the decision of the Full Bench of this Court reported in I.L.R. (1941) Mad. 513.[4] In my opinion, the present case is not covered by that decision. In the Full Bench case, it was manifest that a man would not describe himself as agent and power of attorney holder for his wife unless he was purporting to act for her, and there were other indications, if the document was read as a whole, on the face of the document that the promisor was acting on behalf of his wife and was not pledging his own credit. It cannot be said in the case of the promissory note (Ex. A) now in question that the Preamble and the word "Adalthedar" are manifestly not mere words of description. No doubt if it was permissible to go outside the note, it would be found that the reference to the "pronote previously executed by me on 13th June 1927," was to a promissory note under which money had been borrowed for the temple. It also would be found that at any rate some of the money borrowed had been utilized for the purposes of the temple. It is, however, clearly not permissible to go outside the note. A holder in due course cannot be expected to make enquiries concerning the previous promissory note referred to in the body of the document and the document itself would merely inform him that the promissory note Ex. A had been executed in respect of the amount of principal and interest due on a promissory note previously executed by the promisor in favour of the promisee.

Apart from the cases cited already, two cases recently decided by King J. seem to me in point: 54 M.L.W. 470,[5] 54 M.L.W. 472.[6] In the first case the promissory note executed by the trustee contained the recital that repayment was to be made "from out of the properties of the said temple," and as there was no question of the necessity for

1. ('30) 17 A.I.R. 1930 Mad. 1009 : 128 I. C. 716 : 60 M.L.J. 90, Venkatabalagurumurthi Chettiar v. Balakrishna Odayar.

2. ('18) 5 A.I.R. 1918 Mad. 533 : 38 I. C. 172 : 32 M.L.J. 259 : 5 M. L. W. 323, Swaminatha Iyer v. Srinivasa Iyer.

3. ('26) 13 A. I. R. 1926 Mad. 1199 : 97 I. C. 433, Krishnaswami Naidu v. Venikalingam Pillai.

4. ('41) 28 A. I. R. 1941 Mad. 417 : 195 I. C. 561 : I. L. R. (1941) Mad. 513 : (1941) 1 M. L. J. 441 (F.B.), Sivagurunatha v. Padmavathi.

5. ('42) 29 A. I. R. 1942 Mad. 92 : (1941) 2 M.L.J. 587 : 54 M.L.W. 470, Devaraya Reddiar v. Arunachala Goundar.

6. ('42) 29 A.I.R. 1942 Mad. 198 : (1941) 2 M.L.J. 568 : 54 M. L. W. 472, Ekambara etc. Temples v. Arunachala Gounder.

the loan, it was only argued that the temple was not liable because the other trustees had not joined in executing the note and that the sanction of the temple committee had not been obtained. King J. rejected these two contentions put forward and held that the temple properties were liable. In the second case, although the money is stated in the note to have been borrowed "for the preliminary expenses of the Panguni Uthram festival in the said temple," because there was a formal covenant to repay without any reference to the temple funds, it was held that the temple properties were not liable. The second case, in my opinion, as the purpose of the borrowing was stated, is a stronger case as against the temple than the present. None the less the decision was in favour of the temple and, with respect, I agree with the decision. The decree of the District Munsif's Court will, therefore, be restored, and the appeal is allowed with costs here and below. Leave to appeal is refused.

C.R.K./R.K. *Appeal allowed.*

C. P. C.—
(a) ('40) Chitaley, Ss. 100 & 101, N. 52 Pt. 4.
('41) Mulla, Page 366 Pt. (a).

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* A. I. R. (29) 1942 Madras 470

MOCKETT AND KUNHI RAMAN JJ.

M. S. Palaniappa Mudaliar—Appellant

v.

Official Liquidator, Pasupathi Bank Ltd., Coimbatore — Respondent.

Appeal No. 421 of 1940, Decided on 2nd February 1942, against order of Dist. Court, Coimbatore, D/- 26th February 1940.

*** Companies Act (1913), S. 184 — Contributories — Application by father for shares as guardian of minor daughter — Shares issued in minor's name—Father cannot be placed in list of contributories.**

Where an application is made by the father as guardian of his minor daughter for shares and the company issues shares to and registers shares in the name of the minor describing her as a minor the transaction is void on the face of it, the father of the minor who has signed the application cannot be deemed to have contracted for the shares and cannot be placed on the list of contributories : I. L. R. (1939) Lah. 299 ; (1872) 13 Eq. 566 ; (1875) 19 Eq. 588 and (1907) 1 Ch. 582, *Expl. and Disting.* [P 470 C 1,2 ; P 471 C 1]

W. S. Krishnaswami Naidu — for Appellant.

MOCKETT J.—This civil miscellaneous appeal is from an order of the learned District Judge of Coimbatore made in an application under S. 184, Companies Act, to settle the list of contributories. He was concerned with the 18th contributory. He has, by his order, placed the father of the 18th contributory on the list and the latter appeals. We have before us very little material ; but it is evident that the following essential facts were not in dispute. An application was made by M. S. Palaniappa Mudaliar as guardian of his minor daughter Meenakshi for shares and the company issued shares to and registered shares in the name of Meenakshi describing her as a minor. This transaction was void on the face of it. An application for shares cannot be a necessity for a minor ; but the bank evidently regarded it as a valid transaction and the Official Liquidator claimed against the minor for contribution when the company went into liquidation. The minor through her father Palaniappa Mudaliar filed an affidavit setting up her minority and disclaiming any personal responsibility. There was a reply by the Official Liquidator in which he contended that if the minor is not liable, the father of the minor who signed the application must be deemed to have contracted for the shares and should be placed on the list of contributories. The learned District Judge accepted this contention and has made an order against the father of the 18th contributory, the minor Meenakshi Ammal. He based his decision on I.L.R. (1939) Lah. 299.[1] In that case, Young C. J. and Monroe J. made an order against the father of a contributory who had applied on behalf of his son, who, in fact, was a minor. It is not stated that the son's minority was revealed. The learned Judges decided in favour of the liquidator relying on the English cases. They pointed out that in the case of *Pugh and Sharman*, (1872) 13 Eq. 566,[2] the Vice-Chancellor had held that a person who contracted in the name of another not being a legal entity must be deemed to have contracted personally. In that case, which was before the Married Women's Property Act of 1891, an applicant had applied for shares in the name of a married woman, not revealing that fact to the company. Malins V. C. held that he was liable and that it was quite clear that Sharman intended to become the owner of the shares and derive from them all the benefits that they could give. *Richardson's case*, (1875) 19 Eq. 588,[3] was a case where shares were registered in the name of the minor boy's father, the fact of minority not being revealed to the company and who signed the minor's name, which, of course, he had no authority to do. In (1907) 1 Ch. 582[4] (*Massey and Giffin's case*), Parker J. discussed *Sharman's case*, (1872) 13 Eq. 566[2] and *Richardson's case*, (1875) 19 Eq. 588[3] and described them as being cases in which there was in reality some contractual relation between the company and the person whose name it was sought to be placed on the register. As the learned Judge points out at p. 589 :

"Both these decisions, which are based on the ground that the person on the register was merely an alias of the person whom it was sought to put on the register in his place, appear to me to be clearly distinguishable from *King's case*, (1871) 6 Ch. 196[5] where the man whom it was sought to put on the register was altogether a stranger to the company."

No case has been cited in which the facts or principle involved are similar to this now before us. There is no suggestion that the Pasupathi Bank Ltd. were unaware of the contributory's minority ; they knew they were being invited to contract with a minor and they thought fit to contract with the minor. The application by Palaniappa Mudaliar was made on behalf of his minor daughter. There

1. ('39) 26 A.I.R. 1939 Lah. 515 : 185 I. C. 176 : I.L.R. (1939) Lah. 299 : 41 P. L. R. 739, In the matter of the Muslim Bank of India Ltd., Lahore.
2. (1872) 13 Eq. 566 : 41 L. J. Ch. 580, In re Hercules Insurance Co.
3. (1875) 19 Eq. 588 : 44 L. J. Ch. 252 : 32 L. T. 18 : 23 W. R. 467, In re Imperial Mercantile Credit Association.
4. (1907) 1 Ch. 582 : 76 L. J. Ch. 290 : 96 L. T. 493 : 14 Manson 66 : 51 S. J. 266, In re National Bank of Wales Ltd.
5. (1871) 6 Ch. 196 : 40 L. J. Ch. 361 : 24 L. T. 599 : 19 W. R. 549, In re Great Wheal Busy Mining Co.

is nothing on the record to show that he had at any time intended to become a subscriber of the company. There is no evidence that any of his money was used for the purpose. It seems to be clear that the contract was made by both sides under complete misapprehension as to the law, but no misapprehension whatever as to the facts. Under the law it was void. We do not think that either *Sharman's case*, (1872) 13 Eq. 566[2] or *Richardson's case*, (1875) 19 Eq. 588[3] are of any assistance to the Official Liquidator. The distinction drawn by Parker J. between cases where the contributory was held to be contracting under an alias and cases where there was never any intention on the part of the person sought to be made a contributory to become a subscriber or of the company to treat him as a subscriber as in this appeal seems to be entirely applicable. The Official Liquidator has not appeared to support the judgment of the lower Court but we have had the advantage of an interesting argument and a consideration of all the relevant authorities from the learned counsel for the appellant, Mr. W. S. Krishnaswami Naidu. In our view, this appeal should be allowed with costs which will be paid by the Official Liquidator out of the assets of the bank.

C.R.K./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Madras 471

HAPPELL J.

Chinnaswami Naidu — Appellant

v.

Ramaswami Naidu — Respondent.

Appeal No. 63 of 1941, Decided on 27th January 1942, against order of Dist. Court, Salem, D/- 8th March 1940.

Madras Village Courts Act (1 of 1889 as amended in 1937), Ss. 77, 73 — Village Court not making complaint under S. 476, Criminal P. C.—District Court is empowered to exercise powers under Criminal P. C., Ss. 476 and 195 (3).

In cases where the Village Court has not itself made a complaint or rejected an application under S. 476, the Court empowered to exercise the powers conferred under S. 476 as explained by S. 195 (3) is the District Court. [P 472 C 1]

D. Ramaswami Iyengar — for Appellant.

K. V. Ramachandra Iyer — for Respondent.

JUDGMENT. — The appellant was the defendant in a suit brought against him in the Panchayat Court of Kadayampatti. That suit was dismissed on the ground of the non-appearance of either of the parties. The appellant however after the suit had been dismissed by the Panchayat Court, filed a petition in the District Munsif's Court, Sankari, praying that a complaint should be made by the District Munsif to a Criminal Court against the respondent-plaintiff in the suit in the Panchayat Court on the ground that the promissory note was forged. The District Munsif was of opinion that he had no jurisdiction to entertain this petition and dismissed it. On appeal to the District Court, Salem, the learned District Judge also held that the District Munsif had no jurisdiction to make a complaint under S. 476, Criminal P. C. The appellant, however, had also filed a petition in the District Court asking the learned District Judge to make a complaint of the criminal offence alleged on the ground that the District Court was the Court to which the Panchayat Court was subordinate within the meaning of S. 476A, Criminal P. C.; read with S. 195 (3). The learned District Judge was of opinion that he had no jurisdiction to entertain the application for the reasons that the Village Courts Act did not provide for the application of S. 476, S. 476A or S. 476B, Criminal P. C., to a Village Court.

The judgment of the learned District Judge was pronounced in 1940 and it is clear that he has fallen into error because he did not make use of a copy of the Village Courts Act which contained the amendment made to S. 77 of the Act in 1937. In fact it is not the case that the Act does not provide for the application of S. 476 to Village Courts; on the contrary, the Act as amended in 1937 specifically provides in S. 77 that "the provisions of Ss. 403, 476, 476A and 476B, Criminal P. C., shall apply to a Village Court." In view therefore of the error made by the learned District Judge owing to the fact that his attention was not called to the amendment made to S. 77 of the Act in 1937, the only course, it would seem, is to set aside the order of the lower Court and remand the petition for disposal on merits. It has, however, been argued for the respondent that, although it is true that Ss. 476, 476A and 476B, Criminal P. C., apply to a Village Court, none the less the District Court is not the Court which within the meaning of S. 476A, Criminal P. C., read with S. 195 (3) can make a complaint with reference to a criminal offence alleged to have been committed in relation to a proceeding in a Panchayat Court. Section 476A provides that the powers conferred by S. 476, sub-section (1) on civil, revenue and criminal Courts in respect of proceedings in those Courts may be exercised by the Court to which any such Court is subordinate provided that the subordinate Court has neither made a complaint under S. 476 nor rejected an application for the making of a complaint. Section 195 (3), Criminal P. C., provides that "a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a civil Court from whose decrees no appeal ordinarily lies to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such civil Court is situate."

It is contended for the appellant that the Court to which the Panchayat Court in this case is subordinate within the meaning of these sections is the District Court for the reason that no appeals are provided for by the Village Courts Act from the decrees of Village Courts. Section 73, Village Courts Act, provides that the District Munsif may, on a petition duly presented, set aside a decree passed by a Panchayat Court on the ground of corruption, gross partiality or misconduct of the Village Court or of its having exercised a jurisdiction not vested in it by law, and the section ends : "Except as provided in this section, every decree and order of a Village Court shall be final." The argument advanced for the respondent is that there is no magic in the word 'appeal' as opposed to the word 'petition' and that as the District Munsif's Court is the Court which is empowered to hear such applications against the decrees of Village Courts which can be presented under the provisions of the Act, it should be held to be the appellate Court in respect of the Panchayat Courts within its jurisdiction. In support of this contention I have been referred to a Full Bench decision of this High Court reported in (1937) 1 M.L.J. 453.[1] In that case the Full Bench

1. ('37) 24 A.I.R. 1937 Mad. 385 : 168 I. C. 561 : I.L.R. (1937) Mad. 616:(1937) 1 M.L.J. 453 (F.B.), Chidambaranadar v. Ramanadar.

a no doubt held that the word "appeal" occurring in Art. 182 (2), Limitation Act, was wide enough to cover a civil revision petition. It is clear however that the Full Bench was concerned only with the meaning of the word "appeal" in Art. 182 (2), Limitation Act, since it was pointed out that though a wide interpretation of the word "appeal" could be given for the purposes of this article, the word is used in other articles of the Limitation Act in a more restricted sense. In any case the wording of S. 195 (3), Criminal P. C., has only to be examined closely for it to be manifest that the contention advanced for the respondent cannot be accepted. Section 195 (3) says that, "a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court."

b It is impossible to say that appeals ordinarily lie from decisions of a Panchayat Court to the District Munsif's Court within the territorial jurisdiction of which it is situate in face of the fact that the Village Courts Act specifically states that except as otherwise provided by S. 73 no appeal shall lie from decrees of Village Courts; and it is also not possible to say that appeals can lie from "appealable decrees or sentences" of Village Courts since Village Courts do not pass appealable decrees or sentences by virtue of the provision of the Village Courts Act itself. I have no doubt, therefore, that in cases where the Village Court has not itself made a complaint or rejected an application under S. 476, Criminal P. C., the Court empowered to exercise the powers conferred under S. 476 as explained by S. 195 (3), Criminal P. C., is the District Court. That being so, the order of the learned District Judge must be c set aside and the petition remanded to be determined on its merits in accordance with law. Costs of this appeal will abide the result.

C.R.K./R.K. *Case remanded.*

Cr. P.C. —
('41) Chitaley, S. 195, Notes 18 and 19.
('41) Mitra, Page 664, N. 631.

A. I. R. (29) 1942 Madras 472

KING AND HAPPELL JJ.

J. P. Rego — Appellant

v.

Ananthamathi and others—Respondents.

Appeal No. 113 of 1940, Decided on 9th Janu- d ary 1942, against order of the Sub-Judge, South Kanara, D/- 27th July 1939.

(a) Civil P. C. (1908), S. 144—Person attaching decree is representative of original decree-holder—He is party within S. 144 and is liable to make restitution.

A person who has attached a decree is the representative of the original decree-holder and will be liable, in an appropriate case, to make restitution under the provisions of S. 144. He is, in fact, a 'party' within the meaning of S. 144 : ('30) 17 A. I. R. 1930 Mad. 787, *Rel. on.* [P 473 C 1, 2]

(b) Civil P. C. (1908), Ss. 144 and 151 — Power to order restitution is not confined to cases strictly falling within S. 144 — Court can order restitution under S. 151 — Power under S. 151 should be exercised on principle and not arbitrarily — Whether power under S. 151 should be invoked depends on facts of each case—*P* obtaining mortgage decree against *D* and in execution putting mortgaged property e to sale and purchasing it himself — On deposit by *D* under O. 21, R. 89 sale set aside — *T* who held decree against *P* attaching portion of deposit and obtaining payment — Mortgage decree set aside on appeal by *D* — Court held could order restitution by ordering *T* and *P* to refund amounts withdrawn by them from deposit by *D*.

The powers of a Court in ordering restitution after a decree has been varied or reversed are not confined to cases which fall strictly within the provisions of S. 144. The inherent jurisdiction vested in it by virtue of S. 151 may be invoked to order restitution where an order of Court would otherwise do injury to one of its suitors : *Case law relied on.* [P 473 C 2]

The inherent jurisdiction vested in the Court must be exercised in each individual case in accordance with principles and not arbitrarily. Whether the inherent powers of the Court to order restitution should be invoked in a particular case, must depend on the facts of that case. [P 474 C 1]

P in execution of his mortgage decree brought the mortgaged property to sale and purchased it himself for Rs. 7200. *D* the defendant, however, deposited the requisite sum under O. 21, R. 89, a sum which, with incidental charges amounted to Rs. 11,470-10-5 and the sale was set aside. Pending the appeal to the High Court by *D* against the mortgage decree *T* who held a decree against *P* applied for the attachment of Rs. 9000 out of the sum of Rs. 11,470 in Court. Attachment was ordered and the amount was paid to him. Subsequently the High Court delivered its judgment in the appeal by *D* and set aside *P*'s mortgage decree. On *D*'s application for restitution of the sum of Rs. 11,470 deposited by him under O. 21, R. 89 :

Held that in view of the equities of the case the Court could under S. 151 order restitution as claimed by *D* by ordering *T* to refund the amount of Rs. 9000 and *P* to refund the amount of Rupees 2470 : ('37) 24 A. I. R. 1937 Mad. 95, *Rel. on.* [P 474 C 2]

G. A. Pais — for Appellant.

K. Srinivasa Rao — for Respondents.

JUDGMENT. — The question in this appeal relates to the restitution by the appellant of a sum of Rs. 9000 with interest to respondents 1 to 3. The sum in question was paid to him in these circumstances. O. S. No. 42 of 1931 on the file of the Subordinate Judge of South Kanara was a suit to enforce a mortgage executed by defendant 1 in favour of the plaintiff. Defendants 2 and 3 in the suit belonged to the same joint family as defendant 1, but relief was sought by the plaintiff against defendant 1 alone on the ground that the property mortgaged was the self-acquired property of defendant 1 and that he had taken the amount advanced under the mortage for his own purposes. The contention of the defendants was that the property was family property and that there was no family necessity for the loan secured by the mortgage of it. The suit was decreed for the plaintiff on 10th August 1932 and in execution of his decree he brought the property to sale and purchased it himself for Rs. 7200. The defendants, however, deposited the requisite sum under the provisions of O. 21, R. 89, a sum which, with incidental charges amounted to Rs. 11,470-10-5, and the sale was set aside. The appellant held a decree (in O. S. No. 71 of 1930) against the plaintiff in O. S. No. 42 of

1931 and in R. E. P. No. 126 of 1935 he applied for the attachment of Rs. 9000 out of the sum of Rs. 11,470 in Court. Attachment was ordered. The appellant then applied for the transfer of the attached sum of Rs. 9000 to his execution petition in O. S. No. 71 of 1930. The transfer was ordered on 7th August 1935, and on the same date payment of this sum of Rs. 9000 to him was made.

Meanwhile, an appeal (A. S. No. 21 of 1933) was pending in the High Court against the decree in O. S. No. 42 of 1931. Judgment in this appeal was delivered on 9th November 1937. It was held that the mortgaged property was family property, and, as it had never been the plaintiff's case that the mortgage was for purposes binding on the family, the result was that the suit was dismissed. Relying, therefore, on the decree of the High Court appellants 1 to 3 in O. S. No. 42 of 1931 applied as petitioners in E. P. No. 170 of 1938, the petition out of which the present appeal arises, for restitution of the sum of Rs. 11,470 deposited by them under the provisions of O. 21, R. 89 with interest. They prayed (i) for the recovery of the whole amount of Rs. 11,470 from the plaintiff in O. S. No. 42 of 1931 with interest at six per cent. from 5th April 1935 till 5th September 1938 and (ii) for the recovery of Rs. 9000 from the present appellant with interest at six per cent. from 26th July 1935 to 5th September 1938. The learned Subordinate Judge directed that the plaintiff should refund a sum of Rs. 2470-10-5 with interest at 5 per cent. from 5th April 1935 until the date of payment, and that the present appellant should refund the sum of Rupees 9000 with interest at 5 per cent. from 9th August 1935 until the date of payment. The appeal now under consideration is by the decree-holder in O. S. No. 71 of 1930 to whom the sum of Rs. 9000 was paid. Defendants 1 to 3 in O. S. No. 42 of 1931 are respondents 1 to 3 in the appeal, and the plaintiff in that suit is respondent 4. They will hereinafter be referred to by the designation of respondents 1 to 4 respectively. We have not received in the determination of this appeal any assistance from the order of the learned Subordinate Judge for the reason that his consideration of the petition has proceeded on a mistake of fact which is fundamental in regard to the issue involved in the case. In para. 5 of his order he states that the appellant attached the decree in O. S. No. 42 of 1931. This is not correct. The appellant did not attach the decree. He attached part of the sum deposited under O. 21, R. 89 which, if the attachment had not been made, would have been payable to respondent 4. Section 144, Civil P. C., reads:

"Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

There is clear authority 53 Mad. 796[1] that a person who has attached a decree is the representative of the original decree-holder and will be liable, in an appropriate case, to make restitution under the provisions of S. 144. He is in fact a 'party' within the meaning of the section. As, however, the present appellant did not attach the decree he is not a party to it. His position is merely that of a third party to whom, by order of Court indeed; and that is important, money otherwise payable out to the decree-holder has been paid which, if it had remained in his hands, there is no doubt that the decree-holder would have been obliged to restore. The question, therefore, is whether in law a person in the position of the appellant, not in any technical sense a party to the decree, can be compelled to make restitution of the money paid to him. Apart from 53 Mad. 796[1] which need not be again referred to, other cases cited which relate to the exercise by Courts of their inherent powers in cases which do not strictly fall within the scope of S. 144, Civil P. C., are 55 All. 221,[2] 42 M.L.J. 308,[3] 38 Mad. 36,[4] 57 Mad. 849[5] and A.I.R. 1937 Mad. 95.[6] The effect of these decisions, and others might, if necessary, be cited, is beyond question that the Courts in ordering restitution after a decree has been varied or reversed have not considered themselves to be confined to cases which fall strictly within the provisions of S. 144, Civil P. C. They have considered that the inherent jurisdiction vested in them by virtue of S. 151, Civil P. C., may be invoked where an order of Court would otherwise do injury to one of its suitors. 55 All. 221[2] was a case in which in execution of a simple money decree, the decree-holder purchased the shares of the judgment-debtors in certain joint family properties.

There were, however, other decree-holders entitled to rateable distribution and the amounts due to them were paid out of the sale price. Subsequently, it was held on appeal that a partition set up by the judgment-debtors was valid so that most of the properties were released from the sale. The decree-holder then sought to recover by way of restitution the excess amounts paid to the attaching decree-holders. It was held that, even if S. 144 did not apply, the Court could grant restitution in exercise of its inherent powers under S. 151, Civil P. C. 42 M. L. J. 308[3] is a case relied on for the appellant since in that case it was held that restitution should not be ordered. The facts were that certain properties attached and brought to sale in execution of a decree were purchased by strangers to the decree and the sale proceeds were rateably distributed among persons holding decrees against the same judgment-debtor. Subsequently in proceedings instituted by certain claimants the properties were held to belong to a trust and they were recovered from the auction purchasers. In these circumstances an application by the auction purchasers for the refund of the purchase money distributed among the decree-holders entitled to rateable distribution was dismissed and the appeal from the order of the lower Court was also dismissed. We do not think

1. ('30) 17 A. I. R. 1930 Mad. 787 : 127 I. C. 643 : 59 M. L. J. 225 : 53 Mad. 796, Anganna Reddi v. Subbaraya Chettiar.
2. ('33) 20 A.I.R. 1933 All. 218 : 144 I. C. 492 : 55 All. 221 : 1933 A. L. J. 60, Ambalal v. Rangopal Madhoprasad.
3. ('22) 9 A.I.R. 1922 Mad. 228 : 67 I. C. 369 : 42 M.L.J. 308, Raja Rao v. Ananthanarayana Chetti.
4. ('16) 3 A.I.R. 1916 Mad. 745 : 17 I. C. 420 : 38 Mad. 36 : 23 M. L. J. 513, Govindappa v. Hanumantappa.
5. ('34) 21 A. I. R. 1934 Mad. 320 : 150 I. C. 934 : 57 Mad. 849 : 67 M. L. J. 49, Palaniappa Chettiar v. Ramanathan Chettiar.
6. ('37) 24 A. I. R. 1937 Mad. 95 : 167 I. C. 67, Ratnaji Chandanmal v. Ramakrishnayya.

that this case helps the appellant. In the first place it should be noted that neither Ayling O. C. J. nor Venkatasubba Rao J. who delivered separate but concurring judgments, seems to have doubted that a Court could, in a proper case, order restitution even though the case did not fall strictly under S. 144, Civil P. C. The decision was that in the circumstances of the case before the Bench the provisions of S. 151, Civil P. C., could not be invoked in favour of the auction purchaser; and the reason for the decision as stated by Ayling O. C. J. was that the extraordinary powers conferred by S. 151 should not be invoked where the equities were evenly balanced to cover an order "which only sets right one injustice by the infliction of another, or, as it is said, robs Peter in order to pay Paul." In the second place the facts were different from the facts in the present case. The question was as to the equities between third parties, and the injustice done to the auction purchasers could only be set right by doing an equal injustice to the decree-holders. 57 Mad. 849[5] again is a case in which the inherent powers of the Court were invoked and restitution ordered although the case did not fall within the scope of S. 144, Civil P. C., but again the facts in this case are distinguishable from the facts in the present case.

In short the three cases which we have so far considered, since the facts are different, do not afford any assistance in the determination of the question whether the case now under consideration is a proper case for the application of the provisions of S. 151, Civil P. C. As already stated, we have no doubt that the powers of a Court to order restitution are not confined entirely to cases which fall under S. 144; but, whether the inherent powers of the Court to order restitution should be invoked in a particular case, must depend on the facts of that case. The fourth case, however, A. I. R. 1937 Mad. 95[6] seems to us to be directly in point. In that case *A* had brought a suit against *B* for possession of property. Pending the trial of the suit, *B* deposited one year's mesne profits, but *A* was not allowed to draw these profits on the ground that he had not asked for future profits. *A* appealed, but while his appeal was pending *C* who held a decree against *B* attached the mesne profits in Court and they were paid out to him. *A* succeeded in his appeal and on an application by him the Court ordered restitution of the money paid to *C*. Venkataramana Rao J. confirmed the order of the lower Court and dismissed *C*'s appeal. On the facts before us we are unable to see that the position of *C* differs from the position of the appellant in the present case. The inherent jurisdiction vested in the Court must no doubt be exercised in each individual case in accordance with principle and not arbitrarily. The principle on which Venkataramana Rao J. based his decision was that there was inherent jurisdiction in the Court to call back money paid, owing to an erroneous view, to a person not entitled to it. The decision in A. I. R. 1937 Mad. 95[6] is that of a single Judge, but with respect we find ourselves in agreement with it and with the principle on which it is based. In the present case the order transferring the sum of Rs. 9000 to R. E. P. No. 126 of 1935 in O. S. No. 71 of 1930 was correct and the order directing payment of that sum to the appellant was also correct on the assumption that the decree passed by the Court in O. S. No. 42 of 1931 was right. It transpired, however, that the decree was wrong and, that being so, the order directing the transfer of the money and the payment of it to the appellant were also wrong. We are, therefore, of opinion that if there are no other circumstances affecting the equities as between respondents 1 to 3 and the appellant it was the duty of the Court to set right the wrong done to its suitors (respondents 1 to 3) by reason of its own errors. We are not prepared, however, at this stage to dismiss the appeal, since the learned Subordinate Judge did not apply his mind to the question whether a relief of an equitable or discretionary nature should or should not be granted and there may be facts affecting the grant of such a relief of which we are not aware. Sir William Ayling in 42 M. L. J. 308[3] in refusing to grant relief by way of restitution took into account the fact that the decree held by the decree-holders had become time-barred, and in this case learned counsel have been unable to tell us whether the appellant's decree against respondent 4 is time-barred or not. This is only one instance of a circumstance which might affect the grant of relief by way of restitution. There may be others.

We, therefore, set aside the order of the lower Court in so far as it affects the appellant and remand the case for determination on merits in accordance with law and in the light of the observations contained in this judgment. Costs here and below will abide the result.

C.R.K./G.N. *Order accordingly.*

C. P. C. —
(a) ('40) Chitaley, S. 144, N. 11 Pt. 2.
('41) Mulla, Page 457 Pt. (m), Page 468 Pt. (n) and Page 831 Pt. (k).
(b) ('40) Chitaley, S. 144, N. 34 Pts. 2 and 8.
('41) Mulla, Page 453 Pt. (l).

A. I. R. (29) 1942 Madras 474

VENKATARAMANA RAO J.

Suragouni Vemanna — Appellant

v.

Thunga Sanjeeva Reddi and another — Respondents.

Second Appeal No. 600 of 1939, Decided on 3rd October 1941, against decree of Dist. Court, Cuddapah, in A. S. No. 22 of 1937.

(a) Provincial Insolvency Act (1920), Ss. 38 and 39 — Object of Act — Debtor adjudicated — All remedies of creditor become subject to provisions of Act — Creditor has right to receive pro rata distribution of proceeds of insolvent's property equally with other creditors.

The object of the insolvency law is to provide equal distribution of the insolvent's property among all the creditors and to prevent an undue advantage being taken by any creditor to the detriment of other creditors. Therefore when the debtor is adjudged insolvent all remedies which the creditor and his assignee pending the insolvency proceedings had in respect of the debt due by the insolvent become subject to the provisions of the Provincial Insolvency Act. His right is therefore to receive a pro rata distribution of the proceeds of the insolvent's property equally with the other creditors of the insolvent: ('31) 18 A.I.R. 1931 All. 162 (F. B.), *Rel. on.* [P 476 C 1]

(b) Provincial Insolvency Act (1920), S. 39 before amendment of 1935 — Construction — Creditor's name and debt entered in schedule under S. 33 — Composition is binding on creditor.

If in the schedule framed under S. 33, a creditor's name is entered in the said schedule, it will be binding on him so far as his debt is concerned. What is required under the section is that there must be an entry of the name of the creditor and the debt due to him in the said schedule : ('34) 21 A. I. R. 1934 Mad. 529 ; ('35) 22 A. I. R. 1935 Mad. 602 and 69 M. L. J. 793, *Approved* ; ('29) 16 A. I. R. 1929 Mad. 157, *Not approved.* [P 476 C 2]

(c) Provincial Insolvency Act (1920), S. 33 and S. 39 before amendment of 1935—Under S. 33 Court can dispense with formal proof if debt is otherwise established and enter name of creditor in schedule — Insolvent admitting debt in insolvency petition and in addition admitting and mentioning it in application for composition—Court approving composition and entering name of creditor in schedule under S. 33—Debt held must be deemed to have been proved and admitted by Court though no formal proof was given—Composition held binding on creditor.

Under section 33 it is obligatory on a creditor to tender proof of his debt and if he omits to do so, the Court may ignore him till he takes steps to comply with the provisions of the Act to get his debt admitted in the schedule. But there is nothing to prevent the Court from admitting the debt relying on the admission of the insolvent in his petition or on any other evidence before it and entering his name in the schedule. Formal proof may be dispensed with if the Court is of opinion that the debt has been otherwise sufficiently established.

[P 476 C 2 ; P 477 C 1]

All the creditors excepting *A* who was ex parte signified their assent to the composition. In addition to the admission of the *A*'s debt in the insolvency petition, the insolvent also admitted that debt and mentioned the amount owing to *A* in his application for composition. The other creditors did not raise any objection in regard to the genuineness of that debt or otherwise. The Court before passing the final order approving the composition and annulling the order of adjudication directed that the dividend due and payable to *A* in pursuance of the composition should be deposited into Court and such a deposit was made :

Held that though no formal proof was tendered by *A* the debt must be deemed to have been proved and admitted by the Court and even if S. 39 as it stood before it was amended governed the right of *A*, he must be held to be bound by the composition having regard to the fact that his name was entered in the schedule prepared under section 33.

[P 477 C 1]

(d) Interpretation of statutes—Statutes concerning procedure apply to pending proceedings unless such operation is excluded—No litigant has vested right in procedure.

It is a well settled rule of law that statutes concerned with judicial procedure unless such operations be excluded affect judicial proceedings pending at the time such statutes come into force. No litigant has got a vested right in procedure : 21 Bom. 822 and (1864) 10 H. L. C. 704, *Rel. on.*

[P 477 C 1]

(e) Provincial Insolvency Act (1920), S. 39 as amended in 1935 and S. 38—Ss. 38 and 39 deal with procedure—S. 39 itself does not confer any right of action—Amended S. 39 therefore applies to pending proceedings—Object of amendment — Legislature intended section 39 to be retrospective.

Sections 38 and 39 of the Act deal essentially with procedure and prescribe what procedure the Court should follow when an application for composition is presented to it. Section 39 itself does not confer any right of action. A mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a right accrued under or by virtue of the said repealed statute. Therefore, since S. 39 dealt only with the procedure, the amended section will apply to the proceedings pending at the time it came into force. The object of the Legislature in amending S. 39 was to bring it into line with the provisions of the English Bankruptcy Act and the Presidency Towns Insolvency Act by providing that a composition approved by the Court would be binding on all the creditors. In view of the declared policy of the Act that no creditor should be given undue advantage and the debtor should not be harassed once the composition is accepted the Legislature must be taken to have intended the section to be retrospective and that it should apply to pending proceedings.

[P 477 C 1, 2 ; P 478 C 1]

(f) Provincial Insolvency Act (1920), S. 39 — On acceptance of proposal Court does not become functus officio — It retains control to see that composition is given effect to.

On the acceptance of the proposal by the Court, it does not become functus officio, but retains control to see that the composition is given effect to.

[P 477 C 2]

S. Rajagopalachari — for Appellant.

K. Krishnaswami Iyengar — for Respondents.

JUDGMENT.—This second appeal arises out of a suit to recover a sum of Rs. 850 due under a promissory note dated 21st August 1932 executed by defendant 1 in favour of defendant 2 who assigned it to the plaintiff on 10th February 1935. On the date of the assignment there was an application to adjudge defendant 1 an insolvent. That application was filed by defendant 1 himself on 4th February 1935 and in the list of debts which he showed as owing by him he specified the amount due under the said promissory note as one of the debts. On 27th July 1935 an application was made to the Court to consider a proposal for composition of the debts. A notice was issued to defendant 2 who received it on 9th September 1935. The present plaintiff also was aware of the said notice and the fact of the said application being pending. But neither defendant 2 nor the plaintiff took any steps in regard thereto. That petition came on for hearing on 29th February 1936 when the Court adjourned it to 14th March 1936 for deposit of certain amounts into Court. This was accordingly done and as the conditions laid down in S. 38, Provincial Insolvency Act, were complied with, the Court accepted the composition on 4th April 1936 and annulled the adjudication under S. 39 of the Act. The present suit has been filed on 7th July 1936 for recovery of the debt. Both the lower Courts have taken the view that the order approving the composition binds the plaintiff and is a bar to the maintenance of the suit. This view is canvassed by the plaintiff-appellant. Both the lower Courts in support of their decision relied on the language of Sec. 39 of the Act which provides that the composition shall be binding on all the creditors so far as it relates to any debts due to them from the debtor and provable under the Provincial Insolvency Act. The contention of the plaintiff-appellant is that when the application for composition was filed, Sec. 39, Provincial Insolvency Act, as it then stood, provided that the composition shall be

binding on the creditors entered in the schedule prepared under Sec. 33 of the Act, that S. 39 was amended by Act 10 of 1935, that his rights should be governed by the law as it stood before the amendment and that therefore since he had not proved his debt, his right of action to sue the insolvent on the insolvency being annulled remained unaffected by the amendment of the section. The question is whether this contention is tenable.

As observed by Sen J. in 53 All. 239[1] at p. 245, the insolvency law is merely an administrative or adjectival law. The object of the law is to provide equal distribution of the insolvent's property among all the creditors and to prevent an undue advantage being taken by any creditor to the detriment of other creditors. Therefore, when defendant 1 was adjudged insolvent all remedies which defendant 2 and the plaintiff had in respect of the debt due by the insolvent became subject to the provisions of the Provincial Insolvency Act. His right was therefore to receive a pro rata distribution of the proceeds of the insolvent's property equally with the other creditors of the insolvent. Section 33 of the Act enjoins upon every creditor to tender proof of his debt by producing evidence of the amount and particulars thereof. A duty is cast on the Court to determine the persons who have proved themselves to be creditors of the insolvent and frame a schedule of such persons and debts. Until the discharge of the insolvent, he can tender proof of his debt and the Court can enter his name in the schedule to enable him to obtain the benefits under the Act. If he omits to do so, he loses his right to share in the rateable distribution and if the insolvent obtains an order of discharge his remedy is completely lost. The Act also provides a method by which the insolvent can obtain a release from his debts by compounding his debts and making a proposal for composition in respect thereof. A creditor is entitled to get the benefit of that composition if the composition is approved by the Court. After adjudication a debtor cannot settle privately with his creditors, but is obliged to follow the procedure prescribed by the Act, and the Act prescribes what procedure should be followed when an application is made by the insolvent for the compounding of his debts and that procedure is prescribed by Ss. 38 and 39 of the Act. Section 39 of the Act, before the amendment, ran thus :

"If the Court approves the proposal, the terms shall be embodied in an order of the Court, and the Court, shall frame a schedule in accordance with the provisions of S. 33, the order of adjudication shall be annulled, and the provisions of S. 37 shall apply, and the composition or scheme shall be binding on all the creditors entered in the said schedule so far as relates to any debts entered therein."

It will be seen from this section that after the Court has approved the proposal, it was required to embody the terms of the proposal in the order and also to frame a schedule in accordance with the provisions of S. 33 and annul the order of adjudication. As has already been pointed out, what the Court should do under S. 33 is to frame a schedule of creditors who have proved their debts in accordance with the provisions of the Act. The effect of the order is stated to be that the composition scheme shall be binding on all the creditors entered in the said schedule so far as it relates to any debts entered therein. There was a conflict of view in regard to the operation of order under S. 39 before it was amended. In 56 M. L. J. 458[2] Wallace and Thiruvenkatachariar JJ., took the view that once a proposal was accepted by the Court and the terms were embodied in an order of Court, it would be binding on all the creditors whether they had proved their debt or not and whether their debts were included in the schedule framed under S. 33 or not. In doing so they dissented also from a decision of the Lahore High Court in 95 I. C. 204,[3] which took the view that a creditor who has not proved his debt and ignored the insolvency proceedings was not bound by the composition and that he, on annulment of the adjudication could sue the insolvent for recovery of his debt. But the view taken in 56 M. L. J. 458[2] was dissented from in 57 Mad. 1082[4] by Ramesam and Cornish JJ. They expressed their agreement with the view in 95 I. C. 204[3] and held that the creditor in the case with which they were dealing was not precluded from filing a suit, remarking "the Court not having prepared a schedule as required by S. 39, that section strictly does not apply." Their view was followed by Beasley C. J. in 42 M. L. W. 399,[5] and K. S. Menon J. in 43 M. L. W. 333.[6] If I may say so with respect, this view is in consonance with the plain language of the section. If in the schedule framed under S. 33 a creditor's name is entered in the said schedule, it will be binding on him so far as his debt is concerned. What is required under the section is that there must be an entry of the name of the creditor and the debt due to him in the said schedule. The contention of the appellant is that since he has not proved his debt, he will not be bound by the order passed under that section. The question is whether this contention is tenable.

A few facts are necessary to be stated to appreciate this contention. In this case a schedule was prepared in accordance with S. 33 of the Act, as will appear from the report showing the amount claimed by each creditor and admitted by him. Though defendant 2 has not proved his debt, still the amount due to him was shown and admitted by the Official Receiver and his report was considered by the Court before the final order was passed and the schedule was accepted by the Court. There was in effect a compliance with the procedure prescribed under S. 39 in that a schedule was framed in accordance with the provisions of S. 33. According to the plain language of S. 39, since the name of defendant 2 and the debt due to him are entered in that schedule, the composition will be binding on him. But what is contended is that that schedule is not a schedule which will be valid and binding on him because he has not proved his debt. Under S. 33, it is obligatory on a creditor to tender proof of his debt and if he omits to do so, the Court may ignore him till he takes steps to comply with the provisions of the Act to get his debt admitted in the schedule. But there is nothing to prevent the Court

1. ('31) 18 A.I.R. 1931 All. 162 : 135 I.C. 119 : 53 All. 239 : 1931 A.L.J. 122 (F.B.), Anand Prakash v. Narain Das.
2. ('29) 16 A.I.R. 1929 Mad. 157 : 115 I. C. 815 : 56 M. L. J. 458, Kamireddi Timmappa v. Devasi Harpal.
3. ('26) 13 A.I.R. 1926 Lah. 489 : 95 I. C. 204 : 27 P. L. R. 588, Khalilul Rahman v. Ram Sarup.
4. ('34) 21 A.I.R. 1934 Mad. 529 : 153 I. C. 916 : 57 Mad. 1082 : 67 M. L. J. 843, Gopalu Pillai v. Kothandarama Ayyar.
5. ('35) 22 A.I.R. 1935 Mad. 602 : 159 I. C. 689 : 42 M. L. W. 399, Thangeswara Chettiar v. Ramamurthi Chetti.
6. ('36) 69 M.L.J. 793 : 159 I.C. 865 : 43 M.L.W. 333, Govindaswami Mudaliar v. Appu Mudaliar.

from admitting the debt relying on the admission of the insolvent in his petition or on any other evidence before it and entering his name in the schedule. Robson in his book on Bankruptcy dealing with proof of debts under the Bankruptcy Act of 1883, where the provisions regarding proof of debts are similar to those in Act 5 of 1920, points out that proof may be dispensed with if the Court is of opinion that the debt has been otherwise sufficiently established: *vide* 1894 Edition, page 229. In this case all the creditors excepting defendant 2 who was ex parte signified their assent to the composition. In addition to the admission of the debt in the insolvency petition, the insolvent also admitted the debt and mentioned the amount owing to him in his application for composition. The other creditors did not raise any objection in regard to the genuineness of this debt or otherwise. The Court before passing the final order approving the composition and annulling the order of adjudication directed that the dividend due and payable to defendant 2 in pursuance of the composition should be deposited into Court and such a deposit was made. Therefore though no formal proof was tendered by the plaintiff, the debt must be deemed to have been proved and admitted by the Court. It is only on that basis a dividend was declared in his favour. It seems to me therefore that even if S. 39 as it stood before it was amended should govern the right of the plaintiff, he must be held to be bound by the composition having regard to the fact that his name was entered in the schedule prepared under S. 33.

I shall also consider whether the amended section should not be held applicable to the plaintiff. The contention of the plaintiff is that he has a vested right to file a suit against the insolvent on the annulment of the order of adjudication and that right of action has been taken away by the amendment and retrospective operation cannot be given to the enactment since it affects a right of action which accrued to him under the old S. 39. The question is whether this contention is tenable. Sections 38 and 39 of the Act deal essentially with procedure and prescribe what procedure the Court should follow when an application for composition is presented to it. It is a well settled rule of law that statutes concerned with judicial procedure unless such operations be excluded affect judicial proceedings pending at the time such statutes come into force: *vide* 21 Bom. 822[7] at p. 826 and no litigant has got a vested right in procedure. As pointed out in (1864) 10 H. L. C.704:[8]

"The right of the suitor is to bring the action and to have it conducted in the way and according to the practice of the Court in which he brings it; and if any Act of Parliament, or any rule founded on the authority of the Act of Parliament, alters the mode of procedure, then he has a right to have it conducted in that altered mode. That, therefore, takes away nothing. The right of action does not constitute a title to keep all the consequences of the right as they were before. It gives the right to have the action conducted according to the rules then in force with respect to procedure."

Therefore when an application for composition was presented on 27th July neither the debtor nor the creditor had a vested right to have that proceeding conducted in any particular mode. When the Legislature chooses to alter the procedure, both the debtor and the creditor must be held bound by it. Section 39 itself does not confer any right of action; nor when the application for composition was presented on 27th July did any right accrue to any creditor. A creditor who chooses not to prove his debt may expect that if an order as contemplated by S. 39 as it then stood were to be passed, he would not be precluded from filing a suit against the insolvent debtor. It is a privilege which he may obtain in a certain contingency. There cannot be said to be a taking away of any right vested or accrued in him.

In 1895 A. C. 425[9] the Lord Chancellor pointed out that a mere right existing at the date of a repealing statute to take advantage of the provisions of the statute repealed is not a right accrued within the meaning of a saving clause, which saved all rights accrued under or by virtue of the said repealed statute. Therefore it seems to me that since the enactment deals only with the procedure the amended section will apply to the proceedings then pending. By the amendment, the Court was relieved of the obligation to frame a schedule in accordance with S. 33. The plaintiff must be deemed to be bound by an order under the amended section. Even if I am not correct in this view, I am of the opinion that the object of the Legislature was to make the enactment retrospective. Under S. 38 which has not been amended, when a proposal for composition is made to a Court, a notice is issued to all the creditors and that proposal had to be considered by all the creditors and must be accepted by a majority which is prescribed under cl. (2). If such a majority of the creditors accept the proposal, cl. (2) provides that the proposal should be deemed to be duly accepted by the creditors, whether they assented to the proposal or not, and the Court considers the proposal not in the interests of the creditors only who have proved their debts, but in the interests of all the creditors and only when it is of opinion that it is beneficial to the general body of creditors that it accords sanction to the proposal. On the acceptance of the proposal by the Court, it does not become functus officio, but retains control to see that the composition is given effect to and S. 40 distinctly provides that if it finds that a debtor is not bona fide with reference thereto, it can readjudge the debtor insolvent and annul the composition. When once the Court passes an order under S. 39, the legal effect must be that it should be binding on all the creditors, because S. 38 (2) says the composition must be deemed to be accepted by all the creditors. The corresponding provisions of the English Bankruptcy Act and the Presidency Towns Insolvency Act distinctly provide that the effect of approval by the Court of the composition is that it is binding on all the creditors. In enacting Act 5 of 1920, there was an inadvertent omission to bring that section into line with the English Bankruptcy Act on which Act 3 of 1909 and Act 5 of 1920 were based. Mulla in his book on "Law of Insolvency" observes thus at page 254:

"Under the Provincial Insolvency Act, 1907, an order of discharge released the insolvent from 'all debts entered in the schedule' and it was therefore appropriate that in the case of a composition also the debts to be barred should be the debts entered in the schedule prepared by the Court under S. 27 (7) of that Act. Under the Act of 1920 an order of discharge releases the insolvent from 'all debts pro-

7. ('97) 21 Bom. 822, Gangaram v. Punamchand.
8. (1864) 10 H. L. C. 704 : 10 Jur. 446 : 10 L. T. 434, Attorney-General v. Sillem.
9. (1895) 1895 A. C. 425 : 64 L. J. P. C. 167 : 11 R. 466 : 72 L. T. 402, Abbot v. Minister for Lands.

vable under the Act.' It looks as if the Legislature while enlarging the operation of an order of discharge under the Act of 1920 lost sight of the provisions of S. 39 of the Act of 1920."

The object of the Legislature was to bring S. 39 into line with the provisions of the English Bankruptcy Act and the Presidency Towns Insolvency Act by rectifying the obvious omission. In view of the declared policy of the Act that no creditor should be given undue advantage and the debtor should not be harassed once the composition is accepted, it seems to me that the Legislature intended the section to be retrospective and it should apply to pending proceedings. I am therefore of the opinion that the decree passed by both the lower Courts is correct. In the result this appeal is dismissed with costs. Leave to appeal refused.

C. R. K./G. N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 478 (1)

LEACH C. J. AND BYERS J.

Yendamuri Subba Rao—Petitioner

v.

Kovvuri Tata Reddi —Respondent.

Civil Revn. Petn. No. 1180 of 1941, Decided on 11th February 1942, to revise order of Sub-Judge, Cocanada, D/- 18th November 1940.

Civil P. C. (1908), O. 44, R. 1, Proviso—Court is not bound but should hear party before rejecting application.

It is not necessary for the Judge to hear the party filing an application for permission to file an appeal in forma pauperis before passing orders of rejection. But it will tend to maintain confidence if Judges do give applicants an opportunity of being heard, being careful, of course, not to allow them to travel beyond the documents referred to in the proviso to R. 1 of O. 44: C.M.P. No. 3601 of 1914 and ('36) 23 A.I.R. 1936 Mad. 101, *Rel. on*; ('41) 28 A.I.R. 1941 Mad. 49, *Approved.* [P 478 C 2]

G. Balaparameswari Rao — for Petitioner.

LEACH C. J.—This petition raises the question whether a person who files an application for an order permitting him to file an appeal in forma pauperis is entitled to be heard in support of the application. Two Judges of this Court, Sadasiva Iyer J., and Wadsworth J., have held that he is not entitled to be heard. On the other hand Patanjali Sastri J., has held that he is. Order 44, R. 1 states that a person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may apply to be allowed to appeal as a pauper, subject in all matters, including the presentation of the application, to the provisions relating to suits by paupers, in so far as those provisions are applicable. Then follows this proviso :

"Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust."

There is here a mandatory provision requiring the Court to reject the application unless upon reading it and the judgment and decree appealed from, it considers that it is contrary to law or usage having the force of law or is otherwise erroneous or unjust. In C. M. P. No. 3601 of 1914,[1] Sadasiva Iyer J., refused to hear counsel and dismissed the application after perusing it and the judgment and decree complained of. The learned Judge quoted with approval the observations of Jenkins C. J. in 28 Bom. 451,[2] where the learned Chief Justice observed that the proviso was a very necessary safeguard introduced by the Legislature for the benefit of litigants who found themselves opposed by paupers and the Court should be careful to see that the proviso is satisfied. The opinion of Wadsworth J. was expressed in 59 Mad. 805[3] where he pointed out that the proviso contains no indication that it is either necessary or desirable for the Judge to hear the party before passing orders of rejection. The contrary opinion expressed by Patanjali Sastri J. is to be found in the order passed by him in (1940) 2 M.L.J. 570.[4] There the Judge considered it "difficult to see how such a proceeding can be disposed of except in conformity with the fundamental principle in all judicial procedure that no order should be made without notice to the parties who will be prejudicially affected by the order and without affording them a reasonable opportunity of being heard." I consider that the opinions expressed by Sadasiva Iyer J. and Wadsworth J. correctly state the law. At the same time, I share the satisfaction of Patanjali Sastri J. that the practice of the Courts in this Presidency in dealing with applications of this kind has been to hear the applicant. While there is no necessity in law to do so, it will tend to maintain confidence if Judges do give applicants an opportunity of being heard, being careful, of course, not to allow them to travel beyond the documents referred to in the proviso to R. 1 of O. 44. The petition will be dismissed, but as the respondent has not appeared, there will be no order as to costs.

BYERS J.—I agree.

C.R.K./R.K. *Petition dismissed.*

1. C. M. P. No. 3601 of 1914, In re Paramasivam Pillai.

2. ('04) 28 Bom. 451 : 6 Bom. L. R. 442, Sakubai v. Ganpat Ramakrishna.

3. ('36) 23 A. I. R. 1936 Mad. 101 : 159 I. C. 718 : 59 Mad. 805 : 69 M.L.J. 781, Kanthimathi Ammal v. Ganesa Iyer.

4. ('41) 28 A. I. R. 1941 Mad. 49 : 195 I. C. 867 : I.L.R. (1941) Mad. 389 : (1940) 2 M.L.J. 570, Subbayya Nadar v. Anjaneyalu.

C. P. C. —
('40) Chitaley, O. 44 R. 1, N. 6 Pt. 7.
('41) Mulla, Page 1209 Pt. (q).

A. I. R. (29) 1942 Madras 478 (2)

LEACH C. J. AND KUPPUSWAMI AYYAR J.

V. Ramaswami Ayyangar and another — Appellants

v.

S. M. A. M. AR. Arunachalam Chettiar and others — Respondents.

Appeals Nos. 67, 69, 74 and 106 of 1939, Decided on 15th January 1942, against decrees of Sub-Judge, Devakottai, D/- 9th September 1938.

Banker and customer — Firm with *A* and *B* as partners formed in Madras carrying on business at Laithieu in French Cochin China — Plaintiff depositing certain amount with firm and suing to recover same in British India — *B* pleading his adjudication by Court of Saigon in French Indo China in bar—*A* pleading payment by him of $1,10,525 representing total liabilities of firm under French law including amount in

suit to Official Assignee of Saigon—Contract in respect of deposit held governed by French law as deposit was made in Saigon in dollars and was repayable there in dollars—*B's* adjudication held took away plaintiff's right to sue him — Payment by *A* to Official Assignee of Saigon operated to discharge liability in respect of deposit — Decision of Court of appeal in Saigon holding *A* liable for interest only upto date of *B's* adjudication held must be accepted — Trial Court's order while (erroneously) decreeing plaintiff's suit directing *A* to pay plaintiff court-fee on plaint and half pleader's fee and also directing defendants to bear their own costs held proper in circumstances of case.

A suit was filed in British India to recover Rs. 46,538 alleged to be due in respect of a sum deposited with a firm carrying on business at Laithieu in French Cochin China. This firm had been formed at Pallathur in the Madras Presidency by *A* and *B* as partners for the purpose of carrying on business at Laithieu. *B* admitted that the deposit had been made, but pleaded his adjudication as insolvent by the Court of Saigon in French Cochin China in bar. *A* pleaded that he had paid $1,10,525 representing total liabilities of the firm under the French law including what was due in respect of the deposit in suit to the Official Assignee of Saigon :

Held that (1) the contract in respect of the deposit was governed by the French law, the deposit having been made in Saigon in dollars and the money being repayable there in dollars. The rights and liabilities of the parties must in all respects be decided according to the French law ; [P 480 C 1]

(2) the adjudication of *B* in Saigon took away the right of the depositor to institute a suit against him: 23 Mad. 458 and ('17) 4 A. I. R. 1917 Mad. 989, *Rel. on* ; [P 480 C1]

(3) the payment made by *A* to the Official Assignee of Saigon operated as a discharge of the liability in respect of the deposit and hence the suit must fail. The debt being recoverable in Laithieu and a French Court of competent jurisdiction having compelled *A* to make payment, the depositor could not ask the Court in British India to make him pay twice over. The question whether the Official Assignee could be regarded as the authorised agent of the depositor to receive payment did not arise; [P 480 C 1, 2]

(4) the Court of appeal in Saigon having held that *A* was only liable for interest upto the date of *B's* adjudication and the rights and liabilities of the parties being governed by the French law that decision must be accepted, on the question of interest ; [P 480 C 2]

(5) when the suit was instituted, *A* had not paid $1,10,525 to the Official Assignee of Saigon and therefore there was reason for the institution of the suit. Consequently, the order as regards costs passed by the trial Court while (erroneously) decreeing the plaintiff's suit ordering *A* to pay the plaintiff's court-fee on the plaint and half the pleader's fee and also directing the defendants to bear their own costs was a proper one. [P 481 C 1]

B. Sitarama Rao and V. Ramaswami Iyer — for Appellants.

K. Rajah Iyer, K. S. Rajagopalachari, V. Ramaswami, N. Rajagopala Iyengar and M. S. Vaidhyanatha Iyer — for Respondents.

LEACH C. J. —These four appeals arise out of separate suits filed in the Court of the Subordinate Judge of Devakottai. They all raise the same questions ; they were heard together and were decided by the Subordinate Judge in one judgment. It will be convenient to adopt the same course here ; but we propose to deal with Appeal No. 67 of 1939 in the first instance as our conclusions in that case will govern the decrees to be passed in the other three appeals. Appeal No. 67 of 1939 arises out of O. S. No. 193 of 1936 which was instituted on 2nd December 1936. The suit was brought by one Arunachalam Chettiar, who died before the hearing. In consequence the executors of his will were substituted as the plaintiffs, but at a later stage the present appellants, the receivers of Arunachalam's estate, were also made plaintiffs, since when they have carried on the litigation. The suit was filed to recover Rs. 46,538-6-9, alleged to be due in respect of a sum deposited on 8th July 1930 with the Chettiar firm of N. M. S. Rm. carrying on business at Laithieu in French Cochin China. This firm had been formed at Pallathur in this Presidency by defendants 1, 2, 3 and 4 (respondents 1, 2, 3 and 4) and one Alagappa Chettiar who died in 1931. It was formed for the purpose of carrying on business at Laithieu. On 19th March 1934, the deposit was renewed. The period was one of 90 days and the money became payable to the depositor on 17th June 1934.

In order to carry on business in French Cochin China, registration of the firm was necessary, and for this purpose defendant 3 was declared to be the proprietor. On 12th March 1936, defendant 3 was adjudicated a bankrupt in Saigon. In their written statement defendants 1 and 2 denied that they were partners in the firm and averred that defendant 3 was the sole proprietor of the business. Defendant 3 admitted that the deposit had been made, but pleaded his adjudication in bar. Defendant 4 did not appear and the case proceeded against him ex parte. The case against the legal representatives of Alagappa was abandoned in the trial Court.

On 24th August 1938, defendant 1 filed an additional written statement pleading that he had paid $1,10,525 to the Official Assignee of Saigon. This sum represented the total liabilities of the firm under French law, calculated in dollars. Admittedly the amount included what was due in respect of the deposit in suit, with interest calculated upto the date of the adjudication of defendant 3. The Official Assignee of Saigon had moved the Court for the adjudication of defendants 1 and 4. This application was filed after the adjudication of defendant 3. The bankruptcy Court dismissed the application but on appeal, the Court of Appeal at Saigon held that defendants 1 and 4 were jointly and severally liable "for the debts left by Raman Chettiar as managing partner." At the same time the Court of Appeal was of the opinion that there was no ground for the adjudication of defendants 1 and 4, nor of the firm. As a result of this judgment, which was delivered on 31st December 1937, defendant 1 was called upon by the Official Assignee of Saigon to pay the $1,10,525 and he took out process to enforce the demand. Consequently, defendant 1 was compelled to make the payment. It is his case that the payment operated to discharge him from all liability in respect of the deposit.

The Subordinate Judge considered (i) that the business carried on at Laithieu in the firm name of N. M. S. Rm. did not belong to defendant 3 alone, but was carried on by defendants 1, 2, 3 and 4 and Alagappa in partnership until Alagappa's death; (ii) that after Alagappa's death, the business was certainly continued, but he left undecided the ques-

a tion whether defendant 2 could be regarded as one of the continuing partners; (iii) that the firm's liability in respect of the deposit had been discharged by the payment of defendant 1 of the $1,10,525 to the Official Assignee at Saigon; and (iv) that the adjudication of defendant 3 in itself operated as a bar to the suit against him.

It is conceded on behalf of the appellants that the contract in respect of the deposit is governed by French law, the deposit having been made in Saigon in dollars and the money being repayable there in dollars. It is also a common ground that the adjudication of defendant 3 in Saigon took away the right of the depositor's representatives to institute a suit against him. There are, in fact, decisions of this Court directly bearing on the question: 23 Mad. 458[1] and 40 Mad. 581.[2] The appellants say however that they are entitled to maintain the suit against the b other partners of the firm as defendant 1 did not pay the $1,10,525 to a person who under Indian law could be regarded as the authorized agent of the depositor and, therefore, there had in law been no repayment of the deposit. In these circumstances they contend that they are entitled to a decree against the solvent partners for the full amount with interest to date of suit, calculated in rupees at the rate of exchange ruling on the date when the deposit fell due. They advance the further contention that even if the money paid by defendant 1 to the Official Assignee of Saigon can be regarded as covering the deposit and interest thereon upto the date of the adjudication of defendant 3, they are entitled to a decree for interest on the principal sum from the date of the adjudication upto the date of the decree for which they pray. The rights and liabilities of the parties must in all respects be c decided according to French law and if the payment made by defendant 1 to the Official Assignee of Saigon operates as a discharge of the liability in respect of the deposit, the suit must fail. In (1923) 1 K. B. 673,[3] Bankes L. J. said:

"If the debt is situate, or in other words if it is properly recoverable, in this country, then it would be discharged by payment under an order of our Courts and the garnishee need have no fear of being required to pay it a second time; but if the debt is situate, that is properly recoverable, in a foreign country, then it is not discharged by payment in this country under an order of the Courts of this country, and the debtor may be called upon to pay it over again in the foreign country."

In the same case, Atkin L. J. said:

d "The plaintiffs having got judgment by an order of the Court now seek to get execution by attaching a debt which to my mind clearly 'arises' and 'is situate' within the territorial limits of the jurisdiction of the English Courts, if there is any difference between the two expressions. Those Courts have statutory power to order execution to issue against such property, and by our law, and by the principles of private international law, such process when executed has the effect of discharging the person who owes the debt thus attached from further liability to pay it."

In delivering the judgment of the Privy Council in 1938 A.C. 224[4] Lord Wright observed: e

"The proper law of the contract means that law which the English or other Court is to apply in determining the obligations under the contract. English law in deciding these matters has refused to treat as conclusive, rigid or arbitrary, criteria such as *lex loci contractus* or *lex loci solutionis*, and has treated the matter as depending on the intention of the parties to be ascertained in each case on a consideration of the terms of the contract, the situation of the parties, and generally on all the surrounding facts. It may be that the parties have in terms of their agreement expressed what law they intend to govern, and in that case prima facie their intention will be effectuated by the Court. But in most cases they do not do so. The parties may not have thought of the matter at all. Then the Court has to impute an intention, or to determine for the f parties what is the proper law which, as just and reasonable persons, they ought or would have intended if they had thought about the question when they made the contract."

In the present case it is admitted that the contract between the depositor's representatives and the N. M. S. Rm. Firm is governed by French law. On the facts, any other conclusion would not be reasonable. The debt being recoverable in Laithieu and a French Court of competent jurisdiction having compelled defendant 1 to make payment, the appellants cannot ask this Court to make him pay twice over. It is not a question whether the Official Assignee can be regarded as the authorised agent of the depositer to receive payment. This question does not arise. We concur in the finding of the Subordinate Judge that the payment must g be regarded as a payment in discharge. The plea that defendant 1 is liable for interest on the principal sum from the date of the adjudication of defendant 3 is on no firmer basis. The Court of appeal in Saigon held that defendant 1 is only liable for interest upto that date, and the rights and liabilities of the parties being governed by French law, this decision must be accepted. It has been stated at the Bar that an appeal was filed from the decision of the Court of appeal in Saigon to the *Cour de cassation* in Paris, but it is not known whether steps are being taken to prosecute it. In any event until it has been reversed, the decision of the Court of appeal in Saigon must be accepted as stating the French law correctly. It may be mentioned that no attempt has been made to show that the decision of that Court is in any way erroneous. It follows that we concur also in the decision of the h Subordinate Judge that the payment made by defendant 1 to the Official Assignee at Saigon must be deemed to operate as a payment in full discharge. The appeal fails and is dismissed with costs in favour of the contesting respondents.

Memoranda of cross-objections regarding the order for costs passed by the Subordinate Judge have been filed by respondents 1 and 2. The Subordinate Judge ordered defendants 1 and 4 to pay the plaintiffs the court fee on the plaint and half the pleader's fee and also directed the defendants to bear their own costs. It is admitted that if the deposit had not been repaid, a suit for its recovery would lie in the Subordinate Court, although the decision would be governed by French law. When

1. (1900) 23 Mad. 458 : 10 M. L. J. 39, Murugesa Chetti v. Annamalai Chetti.
2. ('17) 4 A.I.R. 1917 Mad. 989 : 35 I. C. 918 : 40 Mad. 581 : 31 M. L. J. 386, Narayana Chettiar v. Veerappa Chettiar.
3. (1923) 1 K. B. 673 : 92 L.J.K.B. 600 : 128 L.T. 809 : 67 S. J. 423 : 39 T. L. R. 179, Swiss Bank Corporation v. Boomische Industrial Bank.
4. (1938) 1938 A.C. 224 : 107 L.J.P.C. 5 : 54 T.L.R. 5 : (1937) 4 All.E.R. 206, Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd.

the suit was instituted defendant 1 had not paid $1,10,525 to the Official Assignee of Saigon and therefore there was reason for the institution of the suit. In these circumstances, we consider that the order with regard to costs passed by the Subordinate Judge was a proper one. The memoranda of cross-objections will be dismissed with costs, one set. As no different considerations arise in the other three appeals, they must also be dismissed with costs and the memoranda of cross-objections which have been filed there will likewise be dismissed with costs (one set in each appeal). In App. No. 106 of 1939, the sons of Alagappa Chetty have been wrongly impleaded as parties because the claim against their father was given up in the lower Court. They will be given separate costs which we fix at Rs. 100.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 481

KUNHI RAMAN J.

Municipal Council, Nellore —

Petitioner

v.

Mohamed Sabash Khan Saheb —

Respondent.

Civil Revn. Petn. No. 286 of 1941, Decided on 30th January 1942, to revise order of Dist. Munsif, Nellore, D/- 31st August 1940.

(a) Madras District Municipalities Act (5 of 1920), Rules under, R. 7 — Auction by municipality for collecting dues from market—Highest bidder at auction contrary to agreement refusing to enter into formal contract prescribed by rules of municipality—Municipality cancelling auction and holding fresh one — R. 7 does not apply.

Where in the case of an auction by the municipality for collecting the dues from a market, the highest bidder contrary to the agreement between the parties refuses to enter into the formal contract prescribed by the rules of the municipality and the municipality cancels the auction and holds a fresh auction which it was entitled to do under the agreement, the stage contemplated by R. 7 cannot be said to have been reached and hence R. 7 can have no application at all. [P 481 C 2]

(b) Madras District Municipalities Act (5 of 1920 as amended by Act 15 of 1933), S. 69 (1) Proviso—Contract by municipality falling within proviso — Signature of Commissioner is sufficient.

The wording of S. 69 (1) Proviso indicates that in the case of municipalities falling within its scope it would be sufficient if the contract is signed by the Commissioner. Additional signatures of two councillors referred to in S. 69 (1) are not necessary.

[P 481 C 2; P 482 C 1]

K. Krishnaswami Iyengar — for Petitioner.

K. Kuppuswami — for Respondent.

ORDER. — The point for decision in this case relates to the construction of S. 69 (1), Madras District Municipalities Act. The section is worded as follows :

"Every contract made by, or on behalf of a council whereof the value or amount exceeds (one hundred rupees) shall be in writing and except in the case of contracts made under the provisions of sub-section (3) of section 68 shall be signed by two municipal councillors: Provided that in the case of municipalities included in Sch. 9 or notified under sub-section (1) of section 12C, every such contract shall be signed by the commissioner."

The question is whether in the case of municipalities referred to in the proviso, contracts should be signed by two councillors as well as the Commissioner. The suit in the present case was filed by the Municipal Council of Nellore, the petitioner in this civil revision petition. It was for recovering Rs. 250 as damages from the defendant-respondent on the ground that he was the highest bidder at an auction for collecting the dues from a market but had subsequently refused to enter into the formal contract prescribed by the rules of the municipality. One of the conditions of the agreement between the parties was that when a contingency similar to that in the present case arose, it was open to the municipality to cancel the auction already held and conduct a fresh auction and that the defendant-respondent should be responsible for any consequent loss. Prior to the auction, the defendant-respondent has deposited, as required by the rules, a sum of Rs. 50. Owing to his failure or refusal subsequent to the acceptance of his bid to enter into the formal contract prescribed by the rules, the municipality exercised its right of cancelling the original auction at which the respondent was the highest bidder and held a fresh auction. At the re-auction, the highest bid secured fell short of the defendant-respondent's original bid by Rs. 250. A suit was therefore filed against the respondent for recovering this sum of Rs. 250. The learned District Munsif who tried the suit has arrived at the conclusion that the plaintiff is not entitled to a decree, because the contract relied on by the plaintiff-petitioner did not conform to the provisions of S. 69, Madras District Municipalities Act, read above and R. 7 of the rules framed under the Madras District Municipalities Act of 1920. According to this rule, the authority competent to enter into a contract determined with reference to the amount of the bid that has been accepted shall enter into a contract with the person whose bid has been accepted and settle the terms and conditions subject to which the lease is to be granted.

The stage contemplated by this rule had not been reached in the present case, because the defendant had refused to enter into the contract. At the trial, he was in effect taking advantage of his own wrong in not complying with this rule by pleading that there was no contract in existence as contemplated by this rule. There is a fallacy in this contention, because the contract relied on by plaintiff was that which resulted from the acceptance of the defendant's bid and not the one which should follow that event. Therefore, the rule has no application to the present case which has to be determined with reference to the terms of S. 69 (1) of the Act. The respondent's learned advocate's argument is that according to S. 69 (1) it is necessary that every contract should be signed by two Municipal Councillors. In the present case, it is conceded that the proviso to S. 69 (1) will apply to the Municipality since it is included in Sch. 9. According to the proviso, contracts with such municipalities shall be signed by the Commissioner. The respondent's learned advocate argues that they must in addition be signed by two councillors as well. The petitioner's learned advocate on the other hand argues that in the case of the municipalities described in the proviso, there is no need for two municipal councillors to sign contracts. It would be sufficient if they are signed by the Commissioner instead of two councillors referred to in sub-s. (1). This contention of

the petitioner's learned advocate is well founded, because the wording of the proviso indicates that in the case of municipalities falling within its scope, it would be sufficient if the contract is signed by the Commissioner.

If this contention is accepted, then there is no difficulty, because the three documents, Exs. C1, D and E1 show that all the formalities prescribed by the statute have been complied with in respect of the contract on which the suit was based. Exhibit C1 is the Bid List signed by the respondent and the Commissioner of the petitioner Corporation, the respondent being declared to be the highest bidder. Exhibit D is the confirmation of the acceptance of the respondent's bid by the municipality which is signed by the chairman of the municipality. Exhibit E1 is the communication to the respondent of the resolution passed by the municipality accepting his bid. These three documents, in my view, constitute the contract in the present case, and it is in conformity with the requirements of S. 69. The result is that the respondent became bound to follow up his bid at the auction which was accepted by the municipality by executing the prescribed lease deed in respect of which he was declared to be the successful bidder. Since he did not do this, he became liable, according to his contract with the municipality, to forfeit his deposit and also to bear the loss sustained by the municipality at the subsequent re-sale by auction. The trial Court has held that in assessing the damages the advance of Rs. 50 paid by the respondent must be taken into consideration and deducted from the amount claimed as damages. This view is not contested by the petitioner's learned advocate. As found by the trial Court, the total loss sustained by the municipality was Rs. 250. Deducting the advance of Rs. 50 paid by the respondent the amount of damages for which he is liable is Rs. 200, for which there must be a decree in favour of the petitioner municipality with proportionate costs both here and at the trial. The claim with regard to the balance must be dismissed, but in the circumstances without costs.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 482

WADSWORTH J.

V. P. Kesava Menon—Petitioner

v.

C. Achuthan Nair—Respondent.

Civil Revn. Petn. No. 734 of 1940, Decided on 19th December 1941, to revise decree of Sub-Judge, Ottapalam, in S. C. S. No. 239 of 1938.

Madras Agriculturists Relief Act (4 of 1938), Ss. 9 and 8 — Family debt renewed in various documents by different coparceners — Any member of family liable for that debt can get it scaled down on basis of original liability by which he was bound throughout all renewals — Liability of executant coparcener can be traced back to earlier documents.

In the case of a family debt renewed in various documents by different coparceners, any member of the family liable for that debt may get the debt scaled down on the basis of the original liability by which he was bound as a member of the family throughout all the various renewals actually executed by different coparceners. The liability of the coparcener who actually executes the note for a family debt can be traced back to earlier documents executed by other coparceners on behalf of the family : ('41) 28 A.I.R. 1941 Mad. 59 and ('41) 28 A.I.R. 1941 Mad. 202, *Rel. on*; ('42) 29 A.I.R. 1942 Mad. 456, *Expl.* [P 482 C 2]

N. Gopala Menon and V. Karunakara Menon — for Petitioner.

D. A. Krishna Variar — for Respondent.

ORDER.—This civil revision petition arises out of a decree on a promissory note executed by defendant 1 as karnavan of a Malabar tarwad. The plaintiff sued defendant 1 as the karnavan of the tarwad and all the defendants as members of the tarwad liable as such for the family debt. The debt has a long history and it goes back to a series of transactions entered into by a previous karnavan on behalf of the tarwad. Defendant 1 has executed only the last two promissory notes, he not being the karnavan at the time of the earlier transactions. The lower Court has scaled down the debt with reference to the original principal of Rs. 400 advanced in 1923 as against the junior members of the tarwad to the extent of their interest in the tarwad properties. He has worked out the liability of defendant 1 on a different basis, treating him as an individual who became liable for the debt for the first time when he signed the antecedent note Ex. B of 1933. The debt as against defendant 1 has been scaled down under S. 9 by reduction of the interest to 5 per cent.

No doubt this is a possible way of working out the consequences of the Act. But it is not the way which has commended itself to this High Court. In two cases (1940) 2 M.L.J. 651[1] and (1940) 2 M.L.J. 786[2] a Bench, of which I was a member, has indicated that when there is a family debt renewed in various documents by different coparceners, any member of the family liable for that debt may get the debt scaled down on the basis of the original liability by which he was bound as a member of the family throughout all the various renewals actually executed by different coparceners. In the many cases following these decisions, it has never been recognised that the liability of the coparcener who actually executes the note for a family debt is not to be traced back to earlier documents executed by other coparceners on behalf of the family.

It has been suggested that in a recent decision A. S. No. 266 of 1939[3] where the Bench had to deal with the complications arising from the application of S. 14 of the Act to a Malabar tarwad, a different principle has been adopted. It seems to me that this is not the case. In that judgment the Bench came to the conclusion that for the purpose of S. 14 as applied to a Malabar tarwad, the Court had to divide up the family liability into two lots, one the liability of the agriculturist members and the other the liability of the non-agriculturist members and scale down the proportionate share of the debt due from the agriculturist members and make the non-agriculturist members jointly liable for their proportionate share of the unreduced family debt. And in dealing with this subject, the Bench points out that S. 14 is not concerned with any debt other than a family debt and that the personal liability of the executant members is not to be apportioned

1. ('41) 28 A. I. R. 1941 Mad. 59 : 196 I. C. 276 : (1940) 2 M.L.J. 651, Doraikannu Odayar v. Veerasami Padayachi.
2. ('41) 28 A.I.R. 1941 Mad. 202 : (1940) 2 M.L.J. 786, Periakaruppan Chettiar v. Appaji Naidu.
3. *Reported in* ('42) 29 A. I. R. 1942 Mad. 456 : (1942) 1 M. L. J. 418, Nalanunni v. Dakshayani Amma.

in the manner laid down under S. 14. In dealing with this subject, the judgment observes :

"The operation of S. 14 will not affect the personal liability of the defendants who have actually executed this note. They will be entitled to scale down the decree so far as their personal liability is concerned, even as they would be entitled to scale down any other debt, not by rendering themselves liable for only a part of the debt but by being liable for the whole of the debt subject to such reduction as they may be entitled to if they are agriculturists."

I can find nothing in this judgment to warrant the inference that when the personal liability of the executant members who are agriculturists is being scaled down as prescribed in this passage, those executant members would not be entitled to trace their liability back to earlier documents under which they were liable not as executants but as members of the debtor family. In the result, therefore, I allow the civil revision petition with costs and amend the decree of the lower Court so as to make defendant 1 personally liable only for the amounts for which the decree has been passed against the tarwad with proportionate costs.

C.R.K./G.N. *Petition allowed.*

A. I. R. (29) 1942 Madras 483

LEACH C. J. AND BYERS J.

Gali Rama Naidu and another — *Appellants*

v.

Muppala Gangi Reddi and others — *Respondents.*

Second Appeals Nos. 910 and 1071 of 1940, Decided on 11th February 1942, against decree of Dist. Court, Chittoor, in A. S. Nos. 151 and 172 of 1939.

(a) Provincial Insolvency Act (1920), Ss. 53 and 54—Application by Official Receiver under Ss. 53 and 54 dismissed — Appeal — Appellate Court has no jurisdiction to annul order of adjudication passed against insolvent — Trial Court alone can deal with it unless it came before appellate Court.

In an appeal by the Official Receiver against the dismissal of his application under Ss. 53 and 54 it is not open to the District Judge in those proceedings to annul the order of adjudication passed against the insolvent. The Judge having seisin of the insolvency proceedings is the trial Judge and he alone can deal with such a matter unless it came before the District Judge on appeal. [P 484 C 1]

(b) Civil P. C. (1908), S. 100 — Finding as to nature of transaction is conclusive in second appeal.

The findings of the lower Court with regard to the nature of the transaction are conclusive in second appeal. [P 484 C 1]

(c) Limitation Act (1908), S. 14—Application by Official Receiver to set aside transfers by insolvent under Ss. 53 and 54, Provincial Insolvency Act, dismissed — On appeal by Official Receiver District Judge directing that proper remedy was suit by creditors under S. 53, T. P. Act, for declaration of transfers as void — Suit by *A*, one of creditors under S. 53, T. P. Act— *A* claiming to deduct time spent in prosecution of appeal before District Judge—S. 14, Limitation Act, held did not apply—Suit under S. 53, T. P. Act, held could have been filed during pendency of insolvency proceedings.

In the insolvency proceeding the Official Receiver applied for setting aside transfers by the insolvent under Ss. 53 and 54, Provincial Insolvency Act. The Court held that the transfers were bona fide and dismissed the application. On appeal, the District Judge directed that the proper remedy was a suit by the creditors under S. 53, T. P. Act, for declaration that the transfers were void. In the suit by *A*, one of the creditors under S. 53, T. P. Act, the plaintiff claimed to deduct the time spent in the prosecution of the appeal before the District Judge:

Held that S. 14, Limitation Act, did not apply. Although the Official Receiver who had initiated the proceedings to set aside the transfers under Ss. 53 and 54, Provincial Insolvency Act, represented the creditors it could not be said that *A* was prosecuting those proceedings. The cause of action in the suit by *A* fell within the provisions of another Act, the Transfer of Property Act. [P 484 C 2]

Moreover, the suit which was filed by *A* as the result of the order of the District Judge could have been filed by him during the pendency of the insolvency proceedings: ('41) 28 A. I. R. 1941 Mad. 903 (F. B.), *Rel. on.* [P 484 C 2]

(d) Limitation Act (1908), S. 14—Insolvency proceedings whether outside S. 14 *(Quære)*.

Whether proceedings in insolvency are completely outside the scope of S. 14. [P 484 C 2]

A. C. Sampath Iyengar, A. Bhujanga Rao and D. R. Krishna Rao — for Appellants.

P. V. Rajamannar and K. Subba Rao — for Respondents.

LEACH C. J.—These two second appeals have been referred to a Bench for decision as a question of limitation arises and there is no direct authority on the point. An examination of the record discloses an unfortunate state of affairs. Respondents 2 and 3 are the sons of one Muneappa Naidu, who died in the month of February 1931. The father and the sons were joint. On 29th January 1931, a fortnight before the death of Muneappa, he and his sons disposed of the whole of the family property. By a registered conveyance they transferred to the appellant in S. A. No. 910 of 1940 part of the family estate and the rest of it to the appellant in S. A. No. 1071 of 1940. The consideration for the transfer first mentioned was said to be Rs. 2000 and for the second Rs. 1000.

On 5th December 1931, respondents 2 and 3 were adjudicated insolvents by the Subordinate Judge of Chittoor, on a petition filed by respondent 1 and two other creditors. The transfers to the appellants were made the basis of the order of adjudication. The order of adjudication was passed without opposition. Respondent 2, in fact, agreed to the adjudication. At that time respondent 3 was a minor and therefore the order of adjudication, so far as he was concerned, was invalid. On 21st April 1934 the Subordinate Judge annulled his adjudication.

On 22nd August 1933, the Official Receiver filed an application under Ss. 53 and 54, Provincial Insolvency Act, in which he asked for an order setting aside the conveyance to the appellant in S. A. No. 910 of 1940 and a similar application in respect of the conveyance to the appellant in S. A. No. 1071 of 1940. By an order dated 3rd March 1936, the Subordinate Judge held that the transactions had been entered into bona fide and that con-

sideration had passed. Consequently, he dismissed the petitions. The Official Receiver appealed to the District Judge of Chittoor, who took an unusual course. Instead of hearing the appeal on the merits, he decided to annul the adjudication of respondent 2 on the ground that he had not applied for his discharge within the time allowed by the order of adjudication and indicated that the creditors should institute a suit for the setting aside of the conveyances under S. 53, T. P. Act. The District Judge's reason for adopting this course was that, if the appeal was allowed, it would mean that the creditors would only get a third interest in the properties conveyed to the present appellants. The father's estate was not being administered in insolvency, and the adjudication of the younger son had been set aside. The appeals before the District Judge were concerned merely with the validity of the orders passed by the Subordinate Judge on the applications made by the Official Receiver under Ss. 53 and 54, Provincial Insolvency Act, and therefore it was not open to the District Judge in those proceedings to annul the order of adjudication passed against respondent 2. The Judge having seisin of the insolvency proceedings was the Subordinate Judge of Chittoor and he alone could deal with such a matter, unless it came before the District Judge on appeal. The District Judge directed that the Official Receiver should drop all proceedings relating to the estate of respondent 2 and having indicated that the proper course for the creditors to adopt was to file a suit for a declaration that the alienations made on 29th January 1931 were void under S. 53, T. P. Act, he added :

"As at present advised, I am of opinion that the time taken up in prosecuting the remedy in the Insolvency Court may be deducted when calculating the period of limitation for filing such a suit."

The article of the Limitation Act which applies is Art. 120 and the period is six years. The District Judge's order was passed on 14th December 1936, and if a suit under S. 53, T. P. Act, had been filed by respondent 1 immediately it would have been in time; but he did not take action until 4th May 1937, when he instituted the present suit in the District Munsif's Court for a declaration that the conveyances were void as against the creditors under that section. Subsequently, the suit was transferred to the Court of the Subordinate Judge, who tried it. The present appellants contended that the suit was barred by the law of limitation, having been filed more than six years after the date of the conveyances. The Subordinate Judge overruled this objection and held that partial consideration had passed, but that the transactions were not entered into bona fide. On this footing he decreed the suit. The present appellants appealed to the District Judge who agreed with the Subordinate Judge on the question of limitation and that the transfers were not entered into bona fide; but he disagreed with him on the question whether consideration had passed. In the opinion of the District Judge no consideration at all had passed. Respondent 1 had filed a cross appeal in which he objected to the finding of the Subordinate Judge that partial consideration had passed. The result was that the appellants' appeal was dismissed and that of respondent 1 was allowed. The appeals now before the Court are from the decrees passed by the District Judge on this occasion. The findings of the District Judge with regard to the nature of the transaction are conclusive and the Court is merely concerned with the question whether the suit was filed within time. The District Judge considered that S. 14, Limitation Act, applied and that the suit was in time. In my judgment it is manifest that S. 14, Limitation Act, does not apply here. Sub-section (1) of that section says :

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Now, in the first place, the plaintiff in the present suit was not the petitioner in the proceedings in the Insolvency Court. The petitioner there was the Official Receiver, and although the Official Receiver represents the creditors it cannot be said that the present plaintiff was prosecuting those proceedings. The person who was prosecuting the proceedings was the Official Receiver, who was asking that the transfers be set aside under the provisions of Ss. 53 and 54, Insolvency Act, which refer to transactions which are void as against the Official Receiver. Here the cause of action falls within the provisions of another Act, the Transfer of Property Act. Moreover the suit which was filed by respondent 1 as the result of the order of the District Judge of 14th December 1936 could have been filed by him during the pendency of the insolvency proceedings : *see* (1941) 2 M. L. J. 684.[1]

Mr. Sampath Ayyangar has contended that S. 14 can have no application to any insolvency matter and has referred us to the decision of this Court in 44 M.L.J. 303.[2] It is not necessary to decide whether proceedings in insolvency are completely outside the scope of S. 14, because in any event the section cannot be called in aid by respondent 1 in respect of the present suit, which means that it was filed out of time. Therefore both the appeals will be allowed and the suit will be dismissed with costs throughout (one set). It is certainly regrettable that the creditors are not able to get the benefit of any of the property unlawfully conveyed to the appellants on 29th January 1931. Had it not been for the unfortunate opinion expressed by the District Judge with regard to the applicability of S. 14, Limitation Act, when he was dealing with the appeals arising out of the petitions filed by the Official Receiver the position might have been very different.

BYERS J. — I agree.

C.R.K./G.N. *Appeals allowed.*

1. ('41) 28 A.I.R. 1941 Mad. 903 : 197 I.C. 599 : I.L.R. (1942) Mad. 1 : (1941) 2 M.L.J. 684 (F.B.), Chidambaram Chettiar v. Sellakumara Goundan.
2. ('23) 10 A.I.R. 1923 Mad. 462 : 72 I.C. 488 : 44 M.L.J. 303, Ayyaparaju v. Venkatakrishnayya.

C. P. C. —
(b) ('40) Chitaley, Ss. 100 and 101 N. 52 Pt. 4.
('41) Mulla, Page 366 Pt. (a).
Limitation Act —
(c) ('42) Chitaley, S. 14 N. 11: *see* Pts. 6 and 10 and Note 18.
('38) Rustomji, Page 238 Pt. 7; Page 239 Note "Cause of action . . . . . identical" and Page 255 Note "Good faith and diligence."

A. I. R. (29) 1942 Madras 485

MOCKETT AND KUNHI RAMAN JJ.

Muhammad Mahamood Hussain Faroki alias Chan Basha — Appellant

v.

Syed Abdul Huq alias Sabju Saheb, Minor by Guardian, Syed Miah Saheb — Respondent.

Appeal No. 369 of 1938, Decided on 30th January 1942, in forma pauperis against decree of Sub-Judge, Nellore, in O. S. No. 12 of 1936.

(a) Mahomedan law — Religious office — Woman can hold office unless duties are such as cannot be performed by her or deputy — This bar arises from special custom or usage and not by Mahomedan law — Onus to prove exclusion of woman is upon those pleading it — Woman held not disqualified from holding khatibaship.

There is no general rule of Mohamedan law prohibiting a woman from holding a religious office. A woman can hold a religious office unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy. Such a prohibition arises, if at all, from local custom or usage and not by an injunction of Mahomedan religion or law. Consequently, under the Mahomedan law unless it can be shown by custom or usage that a special religious office depending upon the personality of an individual which cannot be deputised cannot be held by a woman there is no other prohibition upon her. The burden of establishing that a woman is precluded from holding a particular office is on those who plead the exclusion : 34 Cal. 118 (P.C.) and ('19) 6 A.I.R. 1919 Mad. 202, *Rel. on* ; 3 Mad. 95, *Ref.* [P 486 C 1]

[Woman in Nellore District held not disqualified from holding the office of Khatiba.] [P 486 C 1]

(b) Succession — Hereditary office — There is no room for disposing of its rights and duties by assignment and settlement.

If an office is governed by the hereditary principle in the matter of succession it follows that there is no room left for disposing of the rights and duties of that office by assignments and settlements. The property or an office which descends hereditarily cannot at any time be diverted according to the whim of any particular holder : ('35) 22 A.I.R. 1935 Mad. 1040, *Rel. on.* [P 486 C 2]

(c) Custom — Proof—Uncontested cases are very good proof of alleged custom.

Uncontested cases in which a custom was alleged to exist are very good proof of any alleged custom, for the greater the strength of the custom the less probability is there of anybody attempting to controvert it : ('26) 13 A.I.R. 1926 Lah. 210, *Rel. on.* [P 487 C 1]

Ch. Raghava Rao and K. Subramanian — for Appellant.

K. Bhashyam Ayyangar and S. P. Rajabathar — for Respondent.

MOCKETT J. — The plaintiff is the appellant. He sues for a declaration that he is entitled to succeed to the office and profits of the position of Khatib in Jumma Masjid Nellore Mosque. As I am generally in agreement with a great deal of the judgment of the lower Court, it will be possible to deal with this appeal briefly. Exhibit A is a certified extract from the inam register of "Nellore Village" and is dated 19th December 1860. The inam was registered as being for performing the services of reading prayers in the Jumma Mosque and it is stated that the services had been performed. In column 10 it is shown that the tenure is "hereditary" and "to be so long as the service is performed." It was granted by the Nabob in 1799 and the original grantee was Abdul Huq. There is printed in the record the pedigree of the line of Khatibs which was filed by defendant 10 who is the respondent in this appeal. All the persons who are of importance are shown. The position at the time of the suit was that Khader Muhi-ud-din the Khatib had died in 1931 and he had been "succeeded by his elder sister Sakina Bi. At that time apart from Sakina Bi there was alive the plaintiff the son of a deceased sister of Khader Muhi-ud-din. Another sister Bimajan is alive with her children, three sons, of whom defendant 10 in this suit Abdul Huq is the youngest. The plaintiff Chan Basha challenges the right of Sakina Bi to succeed her brother Khader Muhi-ud-din stating that the Khatibship should go to him by descent.

Before the written statement was filed Sakina Bi died. But Abdul Huq defendant 10 pleads that Sakina Bi rightly inherited and that he is entitled to be the Khatib having been nominated by Sakina Bi to that position. At the time of argument it was generally accepted that the office of Khatib is accurately described in para. 4 of defendant 10th's written statement namely that "it is an office held by a person who is to lead the congregations and preach in the Jumma Mosque on every Friday and on Ramzan and Bakr-id days." The particular form of worship is known as the Jumma Namaz. In the lower Court there were two main controversies. (1) It was contended by the plaintiff that Sakina Bi by reason of her sex was disqualified from holding the sacred office of Khatib. (2) That assuming her to be qualified, the custom in the family showed that the succession to the office was governed by lineal male primogeniture and that therefore the plaintiff was entitled to succeed. Defendant 10 contended that Sakina Bi as a woman was not disqualified from holding the office and that the office descended by custom according to lineal primogeniture whether male or female. In other words, as the eldest descendant she was entitled to succeed after the death of her brother. Defendant 10 also contended, as he was bound to do, that the Khatib for the time being was entitled to nominate his or her successor and that he rightly held the office under such nomination.

The question whether Mahomedan women are disqualified from holding sacred offices has been the subject of decision in several cases. In 34 Cal. 118,[1] the Judicial Committee dealt with the position whether (1) a woman can succeed to a mutwalliship which involved the performance of religious duties. At p. 126 Sir Arthur Wilson discussing the proceedings in the lower Court made the following observations :

"Those learned Judges agreed with Chitty J. in thinking that there is no legal prohibition against a woman holding a mutwalliship, when the trust by its nature, involves no spiritual duties such as a woman could not properly discharge in person or by

1. ('07) 34 Cal. 118 : 11 C. W. N. 297 : 5 C. L. J. 134 : 4 L. B. R. 66 : 34 I. A. 46 (P. C.), Shahoo Banoo v. Aga Mohamed Jafar Bindaneem.

deputy. And it appears to their Lordships that there is ample authority for that proposition."

In 41 Mad. 1033[2] Abdur Rahim and Seshagiri Ayyar JJ. held that, as decided by the Privy Council, there is no general rule of Mahomedan law prohibiting a woman from holding a religious office and that such a religious office can be held by a woman under the Mahomedan law unless there are duties of a religious nature attached to the office which she cannot perform in person or by deputy. The learned Judges emphasise that such a prohibition arises, if at all, from local custom or usage and not by an injunction of Mahomedan religion or law. They held that the burden of establishing that a woman is precluded from holding a particular office was on those who plead the exclusion. Abdur Rahim J. seems to have considered that the decision in 3 Mad. 95[3] did not go beyond the facts in that particular case and that on the evidence the Court must be taken to have held that the woman concerned could not hold the office of Mujavar. The question whether the office could be performed by a deputy was not discussed. It seems to me that the decisions of this Court in 41 Mad. 1033[2] and of the Judicial Committee in 34 Cal. 118[1] are comprehensive. It is difficult to think of any religious office which a woman cannot hold if she is permitted to hold it by a deputy. Neither of the learned counsel was able to give an example of any religious office which could not be performed through the medium of a deputy. As a matter of convenience, there is nothing to be said against the notion once it is accepted that a religious office descends, because it is obvious that the possibility that the deputy specially nominated by a woman may satisfactorily perform the office is at least equal to the possibility that the person to whom the office descends may be equally qualified. It will therefore appear to be the law that unless it can be shown by custom or usage that a special office depending upon the personality of an individual which cannot be deputised cannot be held by a woman there is no other prohibition upon her. So far as this Court is concerned the matter is concluded by authority.

There is no evidence on the record from which one can say that this woman was specially disqualified for this particular office. In fact there was evidence that in this district (Nellore) a khatibship was held by a woman: Exs. 18 and 19. I therefore agree with the learned trial Judge that by reason of her sex Sakina Bi was not disqualified. But that does not decide the appeal. It has been pleaded in para. 5 of the plaint in this case that according to the custom of this institution the office devolved upon the nearest and eldest male relation of the deceased holder. By his written statement, defendant 10 alleges in para. 5 that "succession in cases of this sort is regulated by the rules relating to succession by lineal primogeniture." Both sides are therefore agreed that on the death of an office holder his successor takes by descent. But the plaintiff alleges that it must be by male descent and that that was the custom. I am satisfied on the evidence and the probabilities that the plaintiff is entitled to succeed. An examination of the pedigree shows that in spite of opportunities for the custom or rule relied on by the defence to operate, the descent has always been to the male line. The original donee Abdul Huq was succeeded by his son Sulaiman Sahib. Sulaiman Sahib was succeeded by Abdul Huq his eldest son. This Abdul Huq had two daughters, a daughter by name Vazeda Bi and another. But on his death, his younger brother Yasin Sahib succeeded and on the death of Yasin Sahib his son Abdul Huq alias Baba Mia succeeded. Fatima Bi, this Abdul Huq's sister, appears to have quarrelled with her brother. The result was a suit evidenced by Ex. B, brought by Abdul Huq against his sister Fatima Bi and others in which the claim put forward by Fatima Bi that she was entitled to perform the khabit service jointly with the plaintiff and to enjoy the profits jointly with him, was negatived. There was no claim, it must be observed, that she was entitled to succeed to the office. But still more significant is the fact that at the time of the death of Abdul Huq, Sakina Bi, through whom the present defendant 10 claims, was alive. She did not succeed to the office but her younger brother Khader Muhi-ud-din. Khader Muhi-ud-din had the misfortune to be a leper and for many years the office of Khatib had been performed by his deputy. He died in 1931. There is a dispute as to the exact date because the genuineness of Ex. 4, the nomination deed, has been attacked in this case. According to defendant 10 he sent his petition marked Ex. 7 (a) to the Collector of Nellore with a view no doubt to evidencing that he had nominated his sister Sakina Bi to the office of Khatib. The office was to be performed by a proxy during the minority of defendant 10 described as Sakina Bi's foster-son, who was to hold the office when he became a major. Within a few hours of Ex. 7 (a) Khader Muhi-ud-din died. I do not consider it necessary in this case to decide whether Ex. 7 (a) was a genuine document or not. This was a hereditary office by reason of a grant, Ex. A, by which the tenure was stated to be hereditary. I agree with Curgenven and K. S. Menon JJ. in 69 M. L. J. 722[4] at p. 725 that :

"If the hereditary principle is to be observed, it follows that there is no room left for disposing of those rights and duties by assignments and settlements."

It is clear to me on the evidence that shortly before the death of Khader Muhi-ud-din there was the greatest activity in his branch of the family directed towards keeping this Khatibship away from the plaintiff. Had Sakina Bi been entitled under the custom to succeed, she would have done so before Khader Muhi-ud-din. Any nomination by him, had she thought fit to stand aside, was wholly unnecessary. I do not think that it ever occurred to any one until this suit that this office did not go by succession to the lineal male descendants. The consciousness of that fact led to the execution of Ex. 7 (a) and Ex. 4, elaborate devices, in my view, in order to defeat the plaintiff. It has not been possible for learned counsel for the respondent to support the so-called nomination by any substantial argument. In the absence of clear authority, I cannot accept the proposition that property or an office which descends hereditarily can at any time be diverted according to the whim of any particular holder. Defendant 10 is constrained to support his right by nomination because Sakina Bi being dead, it must follow that according to defendant 10's own case apart from nomination, Bimajan would succeed. But she has not been brought on the record. I am quite satisfied on the evidence that the plaintiff's case that there was a

2. ('19) 6 A. I. R. 1919 Mad. 202 : 51 I. C. 489 : 41 Mad. 1033, Munnavaru Begam v. Mir Mahapalli.

3. ('81) 3 Mad. 95, Mujavar Ibrahim Bibi v. Mujavar Hussain Sheriff.

4. ('35) 22 A.I.R. 1935 Mad. 1040 : 159 I. C. 694 : 69 M. L. J. 722, Hakim Khan v. Sahibjan Sahib.

custom in this family by which this office descended lineally to the eldest male descendant has been amply established. With respect to the learned trial Judge, I am unable to agree with him as stated in para. 14 of his judgment that from the fact that there was no contest by the daughter of the earlier Abdul Huq, it must be assumed that it was probable that she did not insist on her rights. I respectfully agree with Le Rossignol J. in 7 Lah. 124[5] at p. 127 that : " . . . . . it must be obvious that uncontested cases are very good proof of any alleged custom, for the greater the strength of the custom the less probability is there of anybody attempting to controvert it."

I am unable to understand how the fact that the operation of a custom has not been resisted can be used as an argument that such a custom did not exist. It is to be observed that the learned Judge based his decision on the finding that the special rule of succession set up by either side was not made out and that therefore the general rule of succession under the Mahomedan law prevails. It is not clear to what rule of Mahomedan law the learned Judge refers. If descent to this office is to be judged by the rules of succession of Mahomedan law, the office would be divided among several persons, which is neither side's case. It is however clear in this case from Ex. A that the office was hereditary and it is reasonable to suppose that by custom the office would go to an individual as a matter of convenience. The custom in this family was that the office was to be held by the lineal male descendant or nearest and eldest male member of the family. That such a custom is reasonable can hardly be doubted. The women of this family observe gosha and no one suggested that a woman could have herself performed the duties of Khatib. I am satisfied that there is ample material on the record from which it is clear that the plaintiff should by custom have succeeded on the death of Khader Muhi-ud-din. In this view of the position, this appeal should be allowed with costs, here and below. The court-fee will be paid by plaintiff out of the income of the Khatibship.

KUNHI RAMAN J. — I agree.

C.R.K./G.N. *Appeal allowed.*

5. ('26) 13 A. I. R. 1926 Lah. 210 : 95 I. C. 337 : 7 Lah. 124 : 27 P. L. R. 154, Sham Das v. Mt. Moolo Bai.

A. I. R. (29) 1942 Madras 487

WADSWORTH AND PATANJALI SASTRI JJ.

Sri Rajah Ravu Sri Krishnayya Rao alias Sri Rajah Ravu Venkata Kumara Mahipati Krishna Surya Rao Bahadur Garu and another — *Appellants*

v.

Rajah Saheb Meharban-I-Dostan Sri Rajah Ravu Venkata Kumara Mahipati Surya Rao Bahadur Garu, Maharajah of Pittapuram — *Respondent.*

Appeals Nos. 246 and 252 of 1937 and 330, 364 and 365 of 1938, Decided on 11th December 1941, against preliminary decree of Sub-Judge, Coconada, D/- 4th March 1937.

(a) Madras Estates Land Act (1 of 1908), Ss. 3 (5) and 67 and S. 3, Rules under, R. 2 — Object.

The object underlying Ss. 3 (5) and 67 and R. 2 framed under S. 3 is to provide machinery for the smooth management of an estate pending settlement of disputes relating thereto by a competent civil Court so as on the one hand to enable the rents falling due during the pendency of the disputes to be duly collected without being allowed to get time-barred and, on the other, to enable the tenants to obtain a valid discharge on payment of the rent, whichever party may ultimately succeed in establishing his claim in the civil Courts. [P 490 C 2]

(b) Madras Estates Land Act (1 of 1908), Ss. 3 (5) and 67 and S. 3, Rules under, R. 2 — Collection of rents and profits of estate by person recognized as landholder by Collector under Act — Suit by true owner for account and payment of rents and profits against landholder — Collection by landholder is not wrongful—Art. 109, Limitation Act, does not apply — Suit is governed by Art. 120, Limitation Act—Right to sue accrues each time rents and profits are received by landholder.

The person who is "recognized" by the Collector as "landholder" for all or any of the purposes of the Act becomes thereby clothed with full authority to do all acts required to be done for such purpose or purposes, and such acts are binding upon whichever party is ultimately held by a civil Court to be entitled to the possession of the estate. And if it is found that the person so recognized is not entitled to possession, he will be liable to deliver possession of the estate and pay over the rents and other sums received by him, subject to all just allowances, to the person who is declared by the civil Court to be so entitled. He will be liable to account for the rents and profits received as if he were a trustee although there can be no question of trust or strict fiduciary relationship between parties who claim the estate adversely one to the other. The position of the person recognized by the Collector as landholder for the purposes of the Act is essentially different from the case of a person who takes possession under colour of a decree of Court which is afterwards reversed; for, the latter cannot be regarded as authorized to collect the rents on behalf of the rightful claimant as he cannot give a valid discharge, and the receipt of the profits by him, however bona fide and excusable, cannot be regarded as other than wrongful. The receipt of profits and rents by the person recognized as landholder by the Collector, therefore, cannot be regarded as wrongful and hence Art. 109, Limitation Act, has no application to a suit by the true owner for an account and payment of rents and profits against the person recognized as landholder by the Collector. Such suit is governed by Art. 120, Limitation Act : ('39) 26 A. I. R. 1939 P. C. 178, *Expl.* [P 490 C 2]

Since S. 67, Madras Estates Land Act, does not affect any remedy which the true owner may have against the landholder recognized by the Collector, the true owner can sue the defendant for an account of the profits received from the estate whenever such profits are received, the Collector's order notwithstanding. A right to sue accrues to the plaintiff each time the defendant receives the rents and profits as landholder, and, therefore, the plaintiff's claim to recover the profits received more than six years before the suit must be treated as barred by time. The bar will apply both to receipts and to the

claims for expenses : 11 All. 47 (P. C.), *Disting.* [P 491 C 1]

If the person recognized as landholder enters upon management of the estate under an arrangement that he should collect the rents of the estate and render an account of such collections to the rival claimant if the latter was declared to be true owner of the estate in the pending litigation, the right to sue for profits, no doubt, will accrue to the true owner on the conclusion of the pending litigation : ('36) 23 A. I. R. 1936 Mad. 170, *Approved.* [P 492 C 1]

But when there is no such agreement the right to sue accrues each time the recognized landholder under the Act receives rents and profits : ('41) 28 A. I. R. 1941 Nag. 181, *Ref.* [P 492 C 1]

(c) Limitation Act (1908), S. 3—Limitation—Exemption from — Court cannot invent new ground not recognized by statute — Rights of parties subjected to adjudication by Court — Limitation for other suits based on those rights cannot necessarily be computed from date of their final determination.

The Courts have no power, on considerations of hardship or equity, to invent new grounds of exemption from the bar of limitation, not recognized by the statute : 35 All. 227 (P. C.), ('35) 22 A. I. R. 1935 P. C. 85, ('20) 7 A. I. R. 1920 Mad. 1 (F. B.) and ('33) 20 A. I. R. 1933 Mad. 418 (F. B.), *Rel. on.* [P 491 C 2]

Where the rights of parties have been subjected to adjudication by a competent civil Court, it cannot be said that limitation for other suits based on such rights should necessarily be computed from the date of their final determination : 11 All. 47 (P. C.) and 12 M. I. A. 244 (P. C.), *Expl.* [P 491 C 2]

(d) Madras Estates Land Act (1 of 1908), Ss. 3 (5) and 67 — When Court can grant interest independently of Interest Act—Suit by true owner for account and payment of rents and profits against person recognized as landholder under Madras Act — Plaintiff's claim held attracted Court's equitable jurisdiction to award interest.

The proviso to S. 1, Interest Act, authorizes the Court to award interest independently of the provisions of the Interest Act, in cases in which the Court of equity exercises jurisdiction to allow interest. In order to invoke the rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give a specific performance: ('38) 25 A.I.R. 1938 P.C. 67 and ('29) 16 A.I.R. 1929 P.C. 185, *Rel. on*; ('30) 17 A.I.R. 1930 Mad. 727, *Ref.* [P 492 C 2]

Having regard to the provisions of Ss. 94 and 95, Trusts Act, the person recognized as landholder by the Collector for the purposes of the Madras Estates Land Act is under a liability to account for the profits received by him as if he were a trustee for the true owner. Hence, in a suit by the true owner for rents and profits against the landholder the plaintiff's claim attracts the equitable jurisdiction of the Court to award interest. [P 492 C 2; P 493 C 1]

(e) Mesne profits — Court in its discretion allowing certain per cent. allowance for collection expenses — Appellate Court will not interfere with discretion unless it is arbitrary and unreasonable — Discretion in allowing 10 per cent. held properly exercised.

Where in a claim for mesne profits the Court in its discretion allows certain per cent. allowance for collection expenses the appellate Court will not interfere with the lower Court's discretion unless it is shown to have been exercised arbitrarily or unreasonably. (Discretion in allowing 10 per cent. allowance for collection expenses held properly exercised.) [P 493 C 1]

(f) Mesne profits — Zamindari estate — Expenses of rent suits must be regarded as expenses of management — Deduction of certain percentage allowed for expenses of management — Further deduction for expenses of rent suits under head "law charges" cannot be allowed — Expenses incurred in litigation occasioned by special circumstances ought to be allowed separately — Expenses incurred in survey and preparation of record of rights also must be allowed separately.

Suits and other proceedings for recovery of rent are a normal feature of zamindari administration and it will not be unreasonable to regard the expenses relating to them as expenses of management of the estate. When a deduction on a percentage basis has been allowed for such expenses a further deduction on account of rent suits under the head "law charges" cannot be allowed. But litigations occasioned by some special circumstances such as a suit for damages for loss caused by floods occasioned by a railway embankment or a suit for fixation of proper rent in respect of a tenancy stand on a different footing and the expenses relating to them cannot be regarded as expenses ordinarily incidental to the management of a zamindari. When such litigations were instituted on justifiable grounds and proved beneficial to the estate credit must be allowed for the expenses incurred in respect of them so far as the claim is not barred by limitation. Account also must be taken of the amount recovered as damages. Survey and preparation of record of rights cannot be regarded as acts ordinarily done in the course of the management of a zamindari. They are special operations carried out once and for all and result in great benefit to the estate. The expenses relating to them are in the nature of the capital expenditure incurred for the benefit of the estate and credit must be allowed for such expenses, so far as the claim is not barred by limitation. [P 493 C 2; P 494 C 1]

(g) Practice — Appeal—Suits for accounts — Appeals from preliminary and final decrees by plaintiff and defendant heard together — Point raised in any appeal may be dealt with as arising in either of appeals.

Where the appeals by the plaintiff and the defendant from the preliminary and final decrees in a suit for accounts have been heard together any point raised may be dealt with as arising in one or other of the appeals as may seem appropriate. [P 494 C 1]

T. R. Venkatarama Sastri and N. A. Krishna Ayyar — for Appellants.

Advocate General, K. Rajah Ayyar, Ch. Raghava Rao, K. Subramaniam and D. Narasaraju — for Respondent.

PATANJALI SASTRI J.—These are connected appeals arising out of a suit brought by two plaintiffs against the Maharajah of Pithapuram (hereinafter referred to as the defendant) for an account and payment of the rents and profits and other sums collected by him from a zamindari estate known as

Gollaprolu and situate in the Godavari District, during a period of about 11 years and 8 months from 12th January 1924 upto 7th September 1935. The plaintiffs estimated the amount due at Rupees 7,38,000 which they seek to recover with interest at 9 per cent. per annum from the respective dates of collection. The main defence was one of limitation in regard to sums received more than three years prior to the suit. The Court of the Subordinate Judge of Coconada which tried the suit overruled the plea and passed a preliminary decree dated 4th March 1937 directing the defendant to render an account of all sums received by him during the whole period but disallowing the claim for interest. The accounts were taken in due course and a final decree was passed on 25th March 1938. Appeal No. 252 of 1937 has been brought by the defendant against the preliminary decree challenging the decision on the question of limitation and Appeal No. 246 of 1937 is a cross-appeal by the plaintiffs raising the question of interest and certain other minor objections in regard to the same decree. Appeals Nos. 330, 364 and 365 of 1938 are appeals preferred against the final decree by the defendant, plaintiffs 1 and 2 respectively.

The suit is an offshoot of an earlier litigation which after a protracted and somewhat chequered career culminated in His Majesty's Order in Council dated 15th July 1935 in P. C. A. No. 44 of 1930 adjudging in effect that the present plaintiff 1 is the lawful proprietor of the said Gollaprolu estate. It is unnecessary for the purposes of these appeals to state the facts relating to that litigation except in brief outline. The present defendant brought that suit in 1915 for a declaration that plaintiff 1's adoption by Rani Ramayamma, the Zamindarini of Gollaprolu (hereinafter called the Rani), was invalid and he (the defendant) was the nearest reversioner entitled to succeed to the estate on her death. The District Court, Rajahmundry, after an elaborate trial decreed the suit in October 1920 declaring the adoption to be invalid. While an appeal against that decree preferred by the present plaintiff 1 was pending, the Rani died on 24th October 1923. Thereupon the defendant herein filed an application before the Collector of Godavari for the registry of the estate in his name as the proprietor thereof after the death of the Rani, the adoption having been held to be invalid by a Court of law. He also filed an application before that officer under S. 3, cl. (5), Madras Estates Land Act (1 of 1908), for "recognizing" him as the "landholder" of the estate for the purposes of that Act. The present plaintiff 1 filed a counter petition claiming that the estate should be registered in his name on the allegations that the District Court's decision declaring his adoption invalid could not be regarded as final, as he had appealed therefrom, and that, since the date of his adoption, he had been in possession of the estate jointly with the Rani till her death and thereafter jointly with plaintiff 2, to whom the Rani had devised by her will her half share in the estate which was given to her absolutely under an ante-adoption agreement. Two other persons who also set up rival claims to the estate made a similar application for recognition as landholders. These disputes were settled by the Collector by an order dated 12th January 1924 wherein he "recognised" the defendant as the landholder for the purposes of the Act, and the defendant accordingly entered upon possession of the estate and began to collect the rents and profits thereof. It may be mentioned here that an attempt was made in the Court below to show that the defendant had taken possession of the estate after the Rani's death by getting the tenants to attorn to him even before the Collector's order, but the learned Subordinate Judge found against him on the point and that finding has not been questioned before us.

The appeal preferred by plaintiff 1 against the decree of the District Court, Rajahmundry, declaring his adoption to be invalid was in due course heard by a Division Bench of this Court in October 1926 and as the Judges differed, an appeal was filed under the Letters Patent which was heard and disposed of by a Bench of three Judges in March 1928 where again there was a difference of opinion, the majority finding against the validity of the adoption and confirming the decree of the Court below. Plaintiff 1 thereupon preferred an appeal to His Majesty in Council which was heard in 1933 on the question whether certain evidence relating to the sonship of the defendant which had been excluded as inadmissible in the Courts here was admissible or not. Their Lordships held that it was admissible and had been wrongly excluded, and remitted the case for a fresh finding on the question after taking that evidence also into consideration. In April 1934, this Court submitted its finding, on a consideration of the whole evidence, that the defendant was an aurasa son of his father, and their Lordships finally disposed of the appeal in June 1935 holding that plaintiff 1's adoption by the Rani was valid and dismissing the defendant's suit. The formal order in Council was issued, as already stated in July 1935. On application subsequently made by the plaintiffs, the Collector of Godavari cancelled the order whereby he recognised the defendant as the landholder, and directed the registry of the estate in the names of the plaintiffs recognising them as the landholders thereof. This was on 7th September 1935. The plaintiffs having thus obtained possession of the estate brought the suit now under appeal in October 1935 for recovery of the rents and profits received by the defendant during the period of his possession and management of the estate in pursuance of the Collector's order dated 12th January 1934.

The learned Subordinate Judge was of opinion that the defendant having entered into possession of the estate in pursuance of the Collector's order subject to the ultimate decision of the pending litigation between the parties, was, during the period of his possession as "landholder" in the position of a quasi trustee coming under S. 94, Trusts Act, analogous to that of a party interim receiver in a suit or the holder of a succession certificate granted under S. 373, Succession Act. He held accordingly that the receipt of profits by the defendant was not wrongful and that Art. 109 of Sch. 1, Limitation Act, on which the defendant relied was not applicable to the case.

The learned Advocate-General who appeared for the defendant in these appeals challenged the correctness of this conclusion and contended that as the defendant was denying the plaintiffs' title to the estate and setting up a rival claim as the nearest reversionary heir entitled to succeed thereto, there could be no question of any fiduciary relationship between the parties, and that inasmuch as he received the rents and profits under an adverse claim of title which he ultimately failed to establish, such receipt was wrongful within the meaning of Art. 109, Limitation Act. This article prescribes for a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant a period of three years from the time when the profits are received. This being a suit for the profits of immovable property

belonging to the plaintiffs, the article would apply if the profits could be said to have been wrongfully received by the defendant, and the claim for rents and profits received more than three years before the suit would be clearly barred. The main debate at the Bar accordingly centred round the question whether, having regard to all the circumstances of the case, the defendant's receipt of the rents and profits was wrongful, the plaintiffs endeavouring to show that it was not, while the defendant maintained that it was.

The learned Advocate-General drew attention to the previous history of the article and contended that in the Limitation Acts of 1871 and 1877, the language used in col. 3 of Art. 109 read with col. 1 clearly indicated that the receipt of profits by a person in possession under a decree of Court which was subsequently set aside on appeal was considered to be wrongful. He submitted that this position was in no way altered under the present Act notwithstanding the omission from col. 3 of the words "or where the plaintiff had been dispossessed by a decree afterwards set aside on appeal, when he recovers possession," as the omission was merely due to the enactment of the Civil Procedure Code in the same year providing an exclusive remedy for restitution in such cases by way of an application under S. 144. Reference was made to several decisions including the decision of the Privy Council in 43 C.W.N. 897,[1] which no doubt support this view. It seems to us, however, that it does not follow that the receipt of the profits by the defendant as land-holder recognised by the Collector for the purposes of the Madras Estates Land Act should also be considered to be wrongful. In our opinion, the true nature of such receipt has to be determined with reference to the scope and effect of the Collector's order having regard to the relevant provisions of that Act. It will be convenient here to call attention to these provisions. Section 3, cl. (5) says :

(3) "In this Act, unless there is something repugnant in the subject or context :

* * * *

(5) "Landholder" means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor in title or of any order of a competent Court or any provision of law.

Where there is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of this Act or between two or more joint landholders as to which of them is entitled to proceed and be dealt with as such landholder, the person who shall be deemed to be the landholder for such purposes shall be the person whom the Collector subject to any decree or order of a competent civil Court may recognise or nominate as such landholder in accordance with rules to be framed by the local Government in this behalf."

Rule 2 of the rules framed under this section provides :

"In cases of disputes between persons claiming against each other the ownership of the estate or the part thereof in question or any smaller interest therein conferring a right to present possession, the Collector shall make a summary inquiry into their respective claims and recognise as landholder the claimant who in his opinion is prima facie entitled to the present possession of the estate or part thereof in question," and S. 67 provides :

"Where rent is due to a landholder, the receipt for any payment on that account of the person recognised or nominated under sub-s. (5) of S. 3 as the landholders for the purpose of receiving rent or of the person authorised to receive the rent shall be a sufficient discharge for the rent, and the person liable for the rent shall not be entitled to plead in defence to a claim by a person so recognised or nominated that the rent is due to a third person. But nothing in this section shall affect any remedy which any third person may have against the landholder so recognised or nominated."

It is manifest that the object underlying these provisions is to provide machinery for the smooth management of an estate pending settlement of disputes relating thereto by a competent civil Court so as on the one hand to enable the rents falling due during the pendency of the disputes to be duly collected without being allowed to get time barred and, on the other to enable the tenants to obtain a valid discharge on payment of the rent, whichever party may ultimately succeed in establishing his claim in the civil Courts. For this purpose, the Collector is empowered to make a summary enquiry under the rules made in that behalf and recognise as landholder the person who is prima facie entitled to the present possession of the estate, and the person so recognised is authorised to demand and collect the rent giving a valid discharge therefor. In other words, the person who is "recognised" by the Collector as "landholder" for all or any of the purposes of the Act, becomes thereby clothed with full authority to do all acts required to be done for such purpose or purposes, and such acts are made binding upon whichever party is ultimately held by a civil Court to be entitled to the possession of the estate. And if it is found that the person so recognised is not entitled to possession, he will be liable to deliver possession of the estate and pay over the rents and other sums received by him, subject to all just allowances, to the person who is declared by the civil Court to be so entitled. In other words, he will be liable to account for the rents and profits received as if he were a trustee (*see* Ss. 94 and 95, Trusts Act), although there can be no question of trust or strict fiduciary relationship between parties who claim the estate adversely one to the other. This, we conceive, is the position under an order made by the Collector recognising a person as landholder for the purposes of the Madras Estates Land Act, and it is essentially different from the case of a person who takes possession under colour of a decree of Court which is afterwards reversed; for, the latter cannot be regarded as authorised to collect the rents on behalf of the rightful claimant as he cannot give a valid discharge, and the receipt of the profits by him, however bona fide and excusable, cannot be regarded as other than wrongful.

We are therefore of opinion that the receipt of the profits by the defendant under the Collector's order dated 12th January 1934 was not wrongful and that Art. 109 of Sch. 1, Limitation Act, does not apply to the facts of this case. No other article having been suggested as being applicable, the suit must fall within Article 120 under which the time begins to run when the right to sue accrues. The question accordingly arises as to when the plaintiffs' right to sue for the profits received by the defendants accrued. It must be remembered that the defendant was setting up title to estate in himself and his claim had been held to be valid by a com-

1. ('39) 26 A. I. R. 1939 P. C. 178 : 182 I. C. 548 : 43 C. W. N. 897 (P. C.), Mian Firoz Shah v. Mohammad Akbar Khan.

petent Court. It must also be borne in mind that the Collector's order recognising him as landholder was based upon that adjudication, though an appeal had been preferred therefrom. It is thus clear that the defendant throughout received the rents and profits of the estate in his own alleged right and not in acknowledgment of the plaintiffs' right. No doubt we have expressed the view that having regard to the provisions of S. 67 the legal effect of the Collector's order recognising the defendant as landholder of the estate was to make his receipt binding on the plaintiffs and, therefore, lawful and not wrongful even in the absence of the legal title in the defendant, but this is subject to the important proviso contained in that section itself that any remedy which the true owner may have against the landholder recognized by the Collector shall not be affected. The result is that the plaintiffs could have sued the defendants for an account of the profits received from the estate whenever such profits were received, the Collector's order notwithstanding. In other words, a right to sue accrued to the plaintiffs each time the defendant received the rents and profits as landholder, and it follows that the plaintiffs' claim to recover the profits received more than six years before the suit is barred by time. The bar will apply both to receipts and to the various claims for expenses. In support of the view taken by the lower Court that no portion of the suit claim is barred, Mr. Venkatarama Sastri, the learned counsel for the plaintiffs, advanced two lines of argument. Firstly, he urged that the plaintiffs could not have successfully maintained a suit for the profits so long as the decision of the trial Court in the previous litigation negativing their title to the estate stood unreversed, and as the plaintiffs' title was upheld only in their appeal to the Privy Council, their right to sue for the profits received by the defendant in the interim accrued once for all only after His Majesty's Order in Council was issued in July 1935. Reliance was placed on the following observation of their Lordships of the Judicial Committee in 11 All. 47[2] at page 56:

"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not."

That was a case where a debtor entered into an arrangement with his creditor whereby certain villages were to be sold to the latter and the debt was to be set off against the price but the arrangement fell through, a suit for specific performance by the debtor having been ultimately dismissed. When the creditor subsequently sued for the debt within three years of this decree, but more than three years after the debt became due, the debtor who was previously insisting that the debt had been paid by virtue of the contract pleaded the bar of limitation. Their Lordships overruled the plea holding that the decree imposed a new obligation on the debtor to pay the amount of the debt either under S. 65, Contract Act, by way of restoring the advantage received under the agreement of sale which was discovered to be void or as money paid upon an existing consideration which afterwards failed. Their Lordships pointed out that it was common ground to both disputants that there was a contract made between them for the sale of the villages and the retention of the debt by the debtor as part payment of the price, their difference having related to other matters, and they accordingly took the view that until the agreement had been ultimately brought to an end by a decree of Court, the creditor was in the position of a person whose claim had been satisfied by the substitution of the land for the debt. In such circumstances it might have been a "perfectly vain litigation" if the creditor had filed a suit on the basis of the old debt due on dealings between the parties; for, if the contract was upheld he could only have the lands and if, as it happened, it was found to be unenforceable, he would be entitled to recover the amount due on a new and distinct basis. We are therefore of opinion that the observations relied upon must be understood with reference to the facts of the particular case and not as laying down a general rule that whenever a person finds an impediment in the way of his successfully asserting his right to relief, his cause of action is suspended and the course of time interrupted until such impediment is removed or that a fresh cause of action arises on its removal. The other decision 12 M. I. A. 244[3] relied on by Mr. Venkatarama Sastri is more or less of the same type. A patni taluk was sold for arrears of rent but the sale was subsequently set aside for some irregularity and the landlord had to refund the amount realized to the purchaser. He subsequently sued for the same arrears and their Lordships held that the suit was not barred though instituted beyond the prescribed period computed from the original cause of action for the rent, the ground of decision being that the original claim for rent having been satisfied by the patni sale, there was a fresh cause of action on the setting aside of the sale and the refund of the purchase money, in respect of which the landlord was entitled to a fresh period of limitation. These decisions, do not, in our opinion, support the general proposition contended for before us, that where the rights of parties have been subjected to adjudication by a competent civil Court, limitation for other suits based on such rights should be computed from the date of their final determination. On the other hand, their Lordships have more than once pointed out that Courts have no power, on considerations of hardship or equity, to invent new grounds of exemption from the bar of limitation, not recognized by the statute : *see* 35 All. 227,[4] 57 All. 242[5] at p. 250, 43 Mad. 185[6] and 56 Mad. 490[7] where the subject is more fully discussed.

In the present case there is nothing to warrant the view that His Majesty's order in Council dismissing the defendant's previous suit "brought about a new state of things and imposed a new obligation" on the defendant. It did no more than declare plaintiff 1's pre-existing title to the estate by holding his adoption by the Rani to be valid and it cannot be said that this adjudication gave rise to a fresh cause of action for the plaintiffs to sue for the

2. ('89) 11 All. 47: 15 I. A. 211: 5 Sar. 260 (P. C.), Basu Kuer v. Dhum Singh.

3. ('67-69) 12 M.I.A. 244: 11 W.R. 5: 2 Beng. L.R. 10: 2 Suther 173 : 2 Sar. 424 (P. C.), M. Ranee Surno Moyee v. Shooshee Mokhee Burmonia.

4. ('13) 35 All. 227: 19 I. C. 291: 40 I. A. 74: 11 A. L. J. 389 (P. C.), Soniram v. Kanhayalal.

5. ('35) 22 A. I. R. 1935 P. C. 85: 155 I.C. 205: 57 All. 242: 62 I. A. 80 (P. C.), Maqbul Ahmed v. Onkar Pratap Narainsing.

6. ('20) 7 A. I. R. 1920 Mad. 1: 54 I. C. 66: 43 Mad. 185: 38 M. L. J. 1 (F. B.), Muthukorakki Chetty v. Madar Ammal.

7. ('33) 20 A. I. R. 1933 Mad. 418: 143 I. C. 1: 56 Mad. 490: 64 M.L.J. 664 (F. B.), Tripura Sundaramma v. Abdul Khader.

entire profits received by the defendant. It is true that any suit for profits brought by the plaintiffs during the pendency of the previous litigation could not be decreed so long as the decision of the District Court, Rajahmundry, upholding the defendant's title to the estate stood unreversed, and would have been stayed under S. 10, Civil P. C., pending the final determination of the question of title in the earlier litigation; but to suggest—as learned counsel for the plaintiffs did—that the plaintiffs were not bound to institute such a futile suit would seem rather to beg the question ; for it could hardly be regarded as futile when it was necessary under the law to institute such suit, if only to be stayed, in order to save the plaintiffs' claim from the bar of limitation.

The next contention of Mr. Venkatarama Sastri was that, having regard to the circumstances under which the defendant was recognised by the Collector as landholder, he must be regarded as having assumed management of the estate as an interim receiver during the pendency of the previous litigation on the understanding that he should account for the rents and profits received in the course of such management in case the plaintiffs' title was upheld, or, in other words, that the defendant was liable on the basis of a contract, to render an account of the profits received by him during the whole period of his management. The learned counsel urged that the defendant having alleged in para. 9 of his application to the Collector (Ex. B-I), "that it is just that he should be recognised as the landholder for the purposes of the Madras Estates Land Act subject to the ultimate result of the litigation now pending," and the Collector having nominated him as landholder on the basis of such allegation, the defendant must be deemed to have been placed in management on the terms that he should account for the profits at the termination of the litigation in case it went against him, and cited the decision of one of us reported in A. I. R. 1936 Mad. 170.[8] In that case, the parties to a pending litigation regarding the validity of a will agreed that the defendant who was already in possession of the land in dispute should retain possession till the termination of the litigation and then deliver possession to the plaintiff with mesne profits in case the latter's claim to the property under the will was upheld. The plaintiff having succeeded in establishing his title, brought a suit for an account of the profits and, on a plea of limitation being raised, it was held that Art. 120 applied and the right to sue accrued only on the adjudication of the Court on the question of title. This decision would no doubt have application here if it was established that the defendant entered upon management of the estate under an arrangement that he should collect the rents of the estate and render an account of such collections to the plaintiffs if the latter succeeded in the pending litigation. But we do not consider that the defendant undertook any such liability in this case, when he got himself recognised as land-holder by the Collector.

The statement in para. 9 of Ex. B-I as to the recognition as landholder being subject to the ultimate result of the pending litigation amounts to nothing more than a reference to the proviso contained in S. 3, cl. (5) itself which expressly provides that the Collector's order shall be subject to any decree or order of a competent civil Court. Whether the defendant said so or not, the Collector's order (Ex. F) could operate only subject to the result of the pending litigation, and we are unable to spell out of the allegations in Ex. B-I any undertaking by the defendant to account for the profits received by him as landholder. Nor can we import into the Collector's order, even reading it with the defendant's application as we were asked to do any implied terms as to such accounting. The decision cited has therefore no application to the facts of this case. On the other hand, the Nagpur High Court held in A. I. R. 1941 Nag. 181[9] that even in case of a person who was placed in management of certain properties under an express agreement that possession should be delivered back after the conclusion of a litigation then pending, the right to sue for an account of the profits arose under Art. 120, Limitation Act, not at the termination of the litigation but at each receipt of the profits, and that the claim for profits received more than six years prior to the suit was barred. However that may be, there is no basis here, as we have already observed, for the suggestion that there was an undertaking by the defendant to render an account of the profits on the termination of the previous litigation in favour of the plaintiffs, and we accordingly reject this contention.

In the plaintiffs' cross-appeal, only two questions were argued before us. In the first place, it was urged that the learned Subordinate Judge erred in disallowing the plaintiffs' claim to interest on the profits collected by the defendant. The learned Subordinate Judge held that as the plaintiffs did not sue for "mesne profits" which as defined in the Civil Procedure Code, would include interest, but sued only for an account of the rents and profits received by the defendant, they were not entitled to claim interest under the Interest Act (32 of 1839) and he relied on 53 Mad. 549=A. I. R. 1930 Mad. 727[10] in support of that view. There was considerable divergence of opinion in the Courts in India as to when interest could be awarded independently of the provisions of that Act which contained a proviso to the effect that "interest shall be payable in all cases in which it is now payable by law." It is now settled, however, by the decision of the Privy Council in I. L. R. (1938) 2 Cal. 72,[11] that the proviso authorizes the Court to award interest in cases in which the Court of equity exercises jurisdiction to allow interest. Their Lordships quote the observation of Lord Tomlin in 1929 A. C. 631[12] at p. 640 where he said :

"In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give a specific performance."

The test would therefore seem to be whether in the particular case a Court of equity would recognize the claim for interest ? We have already held that having regard to the provisions of Ss. 94 and

8. ('36) 23 A. I. R. 1936 Mad. 170 : 161 I. C. 843, Sitaramaswami v. Mahalakshmamma.

9. ('41) 28 A. I. R. 1941 Nag. 181 : I. L. R. (1942) Nag. 92, Sri Mahadeoji v. Baldeo Prasad.

10. ('30) 17 A I.R. 1930 Mad. 727 : 127 I. C. 630 : 53 Mad. 549 : 59 M. L. J. 358, Nanchappa Goundan v. Ittichathara Mannadiar.

11. ('38) 25 A. I. R. 1938 P. C. 67 : 173 I. C. 15 : 65 I. A. 66 : I. L. R. (1938) 2 Cal. 72 : 32 S. L. R. 374 (P. C.), Bengal Nagpur Railway Co. Ltd. v. Ruttanji Ramji.

12. ('29) 16 A.I.R. 1929 P. C. 185 : 119 I. C. 615 : 1929 A. C. 631 : 98 L. J. P. C. 146 : 141 L. T. 370 (P.C.), Maine and New Brunswick Electrical Power Co., Ltd. v. Hart.

95, Trusts Act, the defendant is under a liability to account for the profits received by him as if he were a trustee for the plaintiffs. The plaintiffs' claim therefore attracts the equitable jurisdiction of the Court to award interest in such cases and we hold accordingly that the plaintiffs are entitled to interest at 6 per cent. per annum on the net profits received by the defendant.

The next point argued relates to the allowance of 10 per cent. of the collections made by the defendant as expenses of management. It was contended that such a consolidated allowance without reference to the actual expenses of management shown in the defendant's accounts is unwarranted, and that an account should be taken of actual charges. It was, however, represented by the plaintiffs' learned counsel that his clients were prepared to accept this allowance if it included what are called "law charges" which the defendant claims separately in his appeal from the final decree, and as we are holding that the bulk of the law charges, namely, all those relating to the proceedings for recovery of rent must be regarded as covered by this percentage allowance, the point loses much of its importance. It appears, however, that though a separate establishment was maintained for the estate in question, its management was supervised and controlled by the higher officers of the defendant's own Pithapur Zamindari such as the Dewan, Engineer, etc. The learned Subordinate Judge has apparently in view of the difficulty of working out a just allocation of the salaries of those officers which were borne entirely by the Pithapur Zamindari and in order to avoid a protracted enquiry into the various items of expenses shown in the accounts fixed a percentage allowance to cover all expenses of management including such supervision charges as a matter of administrative convenience. Reference was made in this connection on behalf of the defendant in 62 I. A. 53[13] at p. 62 where in dealing with a case arising in Bengal their Lordships observed at p. 62 that a ten per cent. allowance for expenses of collection was customary in ascertaining mesne profits and that it was not necessary to adduce evidence regarding the actual expenses of collection. We are of opinion that, having regard to all the circumstances of the case, the course adopted by the learned Subordinate Judge has much to commend it, and we are not prepared to interfere with his discretion as it has not been shown to have been exercised arbitrarily or unreasonably.

Turning now to the appeals preferred against the final decree, we find that though the two plaintiffs have filed separate appeals, they raise the same questions for consideration while the defendant has raised certain other objections to the final decree in his appeal. We will now proceed to deal with the various points argued in these appeals. The first point raised relates to a sum of Rs. 17,408-12-7 representing the arrears of rent which fell due prior to the death of the Rani. The learned Advocate-General contended that this amount though collected by the defendant under colour of the Collector's order stood on a different footing from the collections made in respect of rents falling due subsequently to such order, as the Collector's order had no retrospective operation over such arrears, and that the suit so far as it relates to this sum must be deemed to be one for profits wrongfully received by the defendant within the meaning of Art. 109, Limitation Act. It is not necessary to enter into this question in view of our decision that the plaintiffs are not entitled to claim profits received more than six years prior to the suit as admittedly the whole of this amount was collected before that period.

The next point relates to what has been called the "law charges." In the course of his possession and management of the estate, the defendant had to file suits from time to time for recovery of the rents due from tenants and thus to incur various expenses incidental to Court proceedings. The defendant had also occasion to institute the suits of a special character, one against a railway company for damages due to floods caused by the railway embankment and the other against certain persons called the Chelikani family for a declaration that the lower rate of rent fixed by a previous landholder in respect of the lands in their possession was not binding upon the defendant under S. 26, Madras Estates Land Act. The suit against the railway company resulted in a decree for the payment of Rs. 4164-15-4 by the company which was duly recovered and it appears that a sum of rupees 1127 was paid out of the amount recovered to certain tenants as their share of the compensation for the damage caused to their holdings. The defendant's accounts show that the expenses incurred in connexion with the first of these litigations amounted to Rs. 2355-9-0 and that those relating to the second amounted to Rs. 7438-8-3. There is no dispute about these figures. The plaintiffs, while they claim the rents recovered through Court as well as the sum of Rs. 4164-15-4 referred to above less Rs. 1127 paid to the tenants, contend that the defendant is not entitled to the deduction of the expenses incurred in connexion with the rent suits and the two litigations referred to above on the ground that all these expenses must be deemed to be included in the 10 per cent. deduction for expenses of management allowed under the preliminary decree.

The judgment under appeal is by no means free from obscurity in regard to this item. In one place (para. 29) the learned Subordinate Judge would seem to disallow the claim for these expenses, but in another place (paras. 32 and 47) he would seem to allow their deduction to the extent of the amounts realized through Court. Both parties are, however, agreed that the effect of the decree of the lower Court is to allow the expenses relating to the rent suits and to disallow those relating to the other litigations, the plaintiffs' claim for the amount recovered from the railway company being also disallowed, and it was on this footing that the question under this item has been argued before us. As already observed, the plaintiffs contend that all these expenses must be deemed to be covered by the ten per cent. allowance for expenses of management, and they also claim the amount recovered by the defendant from the railway company, while the defendant maintains that the entire law charges should be allowed as a legitimate deduction in addition to the management expenses. We consider that neither view can be accepted as entirely correct. Suits and other proceedings for recovery of rent are a normal feature of zamindari administration and it will not be unreasonable to regard the expenses relating to them as expenses of management of the estate. And a deduction on a percentage basis having been allowed for such expenses, it seems to us that the defendant cannot claim a further deduction on account of rent suits under

13. ('35) 22 A. I. R. 1935 P. C. 49 : 154 I. C. 1 : 62 Cal. 499 : 62 I. A. 53 (P. C.), Secretary of State v. Saroj Kumar Acharjya Chowdhury.

the head "law charges." The expenses relating to the litigation connected with the railway company and the Chelikani family would, however, seem to stand on a different footing. They are litigations occasioned by some special circumstances and the expenses relating to them cannot be regarded as expenses ordinarily incidental to the management of a zamindari. It is not disputed that these litigations were instituted on justifiable grounds and proved beneficial to the estate. We consider therefore that the defendant is entitled to credit for the expenses shown in the accounts to have been incurred in respect of these litigations so far as the claim is not barred by limitation. He will have of course to account for the amount recovered from the railway company less Rs. 1127 paid to the tenants as aforesaid.

The defendant next claims a sum of Rs. 2516-8-7 as expenses relating to the survey and record of rights carried out by him in respect of the estate. It is objected on behalf of the plaintiffs that this deduction not having been provided for in the preliminary decree which, in addition to the percentage allowance for expenses of management, specifically provides for certain other items of deduction, it is not open to the defendant to claim this sum in the appeal against the final decree as he has not challenged the preliminary decree in regard to this matter in his appeal against that decree. We see no force in this technical objection as all these appeals have been heard together and the points raised can be dealt with as arising in one or other of them as may seem appropriate. Apart from this, it is urged that this sum must also be regarded as included in the ten per cent, allowance for expenses of management and could not be claimed separately. We cannot agree. Survey and preparation of Record of Rights cannot be regarded as acts ordinarily done in the course of the management of a zamindari. They are special operations carried out once and for all and result in great benefit to the estate. The expenses relating to them are in the nature of capital expenditure incurred for the benefit of the estate and there is no apparent reason why the defendant should not be allowed credit for such expenses, so far as the claim is not barred by limitation.

The next item is a claim by the defendant for expenses incurred by him for the construction of certain common calingulas or irrigation weirs which serve both the Pithapur and Gollaprole estates. Under an arrangement with the previous proprietor of the Gollaprole estate providing that the expenses relating to the calingulas should be borne by the proprietors of both estates in certain proportion, the defendant claims a sum of Rs. 5173-2-0. In the lower Court Rs. 7028-6-6 was claimed under this head but the defendant now admits that Rs. 5173-2-0 is the correct sum due. The learned Subordinate Judge has refused to go into this matter on the ground that it was reserved for determination in a separate suit by consent of parties embodied in a memorandum filed in Court. In para. 18 of the preliminary judgment, it is stated that "the dispute regarding the keys and calingulas referred to in the memos will have to be decided in a separate suit as desired by learned counsel on both sides." This statement is not correct as the memorandum refers only to the dispute regarding the keys of the calingulas. That the learned Judge below has fallen into an error is now conceded on behalf of the plaintiffs who agree to this claim being allowed the extent to which it is established. The actual amount due will have to be ascertained in the lower Court.

The last point raised relates to a sum of Rupees 5102-1-4 which the plaintiffs claim as interest actually received by the defendant on investments made out of the rents collected. This claim is put forward only as an alternative to the plaintiffs' general claim for interest on all sums collected by the defendant as landholder, and it is urged that if it is held that the defendant is not chargeable with interest on the profits received by him, he should be held accountable at least for this sum as it was actually received by him. The learned Subordinate Judge has held that the preliminary decree having generally disallowed interest, this claim could not be entertained in the final decree proceedings. As we have held that the plaintiffs are entitled to interest in respect of all the collections made by the defendant, this claim calls for no consideration. In the result, the appeals are allowed in part and the decree will be modified in accordance with the directions contained in this judgment. The parties will pay and receive proportionate costs throughout.

SUBSEQUENT ORDER.—As the materials are not available here for drafting the amended final decrees, the cases will be remitted to the lower Court for this purpose. The lower Court will also apportion the costs between plaintiffs 1 and 2.

C. R. K./G. N. *Order accordingly.*

Limitation Act —
(b) ('42) Chitaley, Art. 109 Note 2a and Art. 120 Note 28 Pt. 1.
('38) Rustomji, Page 958 Note "Wrongfully received" and Page 1038 Note "Suit for accounts".
(c) ('42) Chitaley, S. 3 Note 3 Pt. 2 and S. 9 Note 11.
('38) Rustomji, Page 21 Pt. 7 and Page 163 Pts. 3-5.
C. P. C. —
(e) ('40) Chitaley, O. 20 R. 12 Note 5 Pts. 27 and 47.
('41) Mulla, Pages 725-726 Note "Mesne profits".
(f) ('40) Chitaley, O. 20 R. 12 Note 5 Heading "Deductions".
('41) Mulla, Pages 725-726 Note "Mesne profits".
(g) ('40) Chitaley, O. 41 R. 2 Note 3 Pt. 3.
('41) Mulla, Page 1156 Notes under O. 41 R. 2.

A. I. R. (29) 1942 Madras 494

HORWILL J.

In re K. M. Varadarajulu Chetty Petitioner.

Criminal Revn. No. 873 of 1941 (Criminal Revn. Petn. No. 821 of 1941), Decided on 3rd November 1941, to revise judgment of Chief Presidency Magistrate, Egmore, Madras, D/- 22nd July 1941.

(a) Defence of India Act (1939), S. 2 — Wild speech tending to endanger public safety and hinder defence of India—Act applies.

The Act applies to a wild speech which tends to endanger the public safety and hinder the defence of British India during the time of grave emergency and which is likely to influence adversely to the war effort the whole body of the listeners and fellow workers of the speaker to whom the speech is addressed. [P 495 C 1]

(b) Defence of India Act (1939), S. 2, Rules under, Rr. 38 (1) (a) and 34 (6) (e), (f) and (g)—Objectionable remark in speech when constitutes prejudicial act—Accused can be convicted for same speech only once and not three times merely because speech offends against R. 34 (6) (e), (f) and (g).

An objectionable remark cannot constitute several prejudicial acts merely because it is a prejudicial act in several ways. Nor can an objectionable remark be deemed a prejudicial act unless taken with the rest of the speech, which forms the background against which the remark must be viewed. An accused cannot be convicted three times for the same speech because the speech offends against the provisions of R. 34 (6) (e), (f) and (g). Even if the speech can be said to be a prejudicial act for any one of three reasons, there would only be one offence and the accused can be convicted for that offence once only. [P 495 C 1, 2]

N. D. Varadachari for R. Chakravarthi — for Petitioner.

K. V. Ramaseshan for Crown Prosecutor — for the Crown.

ORDER. — This petition was admitted because the judgment of the learned Chief Presidency Magistrate did not set out the nature of the offence committed. The speech was not analysed, and it was not apparent on the face of the judgment how the Defence of India Act had been contravened by the accused. I have now been able to read through the whole of the speech and in particular those passages which were marked in the lower Court as being particularly objectionable. I have been reminded by the learned advocate for the petitioner of a remark of mine in another case* that it was ordinarily unfair to apply the Defence of India Act to a speech made for the purposes of promoting the welfare of the workers in a trade and industrial dispute; but the speech with which we are concerned here was one to which this Act could be properly applied; for it was a wild speech which tended to endanger the public safety and hinder the defence of British India during this time of grave emergency. The speaker was addressing a large body of workers and his speech was likely to influence adversely to the war effort the whole body of his listeners and his fellow workers.

It is contended by Mr. Varadachari, and I think he is right, that the learned Magistrate was wrong in convicting the appellant three times for the same speech because the speech offended against the provisions of Rule 34 (6) (e), (f) and (g). Actually, I do not think that it offended against R. 34 (6) at all, and as far as sub-cl. (g) was concerned, it probably had no greater effect than the leading articles in the daily press; but even if the speech could be said to be a prejudicial act for any one of three reasons, there would only be one offence. What is punishable is the doing of a prejudicial act within the meaning of R. 38 (1) (a); and the prejudicial act in this case was the making of a speech. If everything in the speech offending against any of the many clauses to R. 34 (6) were considered, then the speaker would be guilty of not merely three offences, but one or more for each and every objectionable remark made throughout the whole speech. An objectionable remark cannot constitute several prejudicial acts merely because it is a prejudicial act in several ways. Nor can an objectionable remark be deemed a prejudicial act unless taken with the rest of the speech, which forms the background against which the remark must be viewed. Two of the convictions and sentences are, therefore, set aside. The sentence of four months rigorous imprisonment is not unduly severe under the circumstances. It certainly does not warrant any interference in revision.

C.R.K./G.N. *Order accordingly.*

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* *Reported in* ('42) 29 A.I.R. 1942 Mad. 427: (1942) 1 M. L. J. 457, In re Guruswami.

* A. I. R. (29) 1942 Madras 495

SOMAYYA J.

Sundarabalakadiresa Thevar and others — *Appellants*

v.

Avudai Ammal and others — *Respondents.*

Appeal No. 193 of 1939, Decided on 2nd October 1941, against appellate order of Sub-Judge, Ramnad at Madura, D/- 31st March 1939.

(a) Civil P. C. (1908), O. 21, R. 11 — Execution petitions are as important as suits themselves — Court must bestow proper amount of care and caution.

The loose practice of not bestowing proper amount of care and caution in dealing with execution applications prevailing in the mufisil Courts must be condemned. Execution applications are as important as the suits themselves and irreparable harm may often be done by the Courts not bestowing that amount of care and caution which they are bound to bring to bear on the disposal of the execution applications. [P 497 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 17 and 11 to 14—Filing of sale papers with execution application is not necessary — Execution application complying with O. 21, Rr. 11 to 14 must be admitted, numbered and retained on file — It may then be dismissed for non-compliance of this or that requisition of Court—Order returning execution application complying with O. 21, Rr. 11 to 14 is illegal — Execution application must be treated as pending or as disposed of along with next application with which it was represented.

The filing of the sale papers along with an execution application itself is not necessary. Where the execution application conforms to the provisions of O. 21, Rr. 11 to 14, the execution application must be taken on file, numbered and kept on file and the sale papers should then be called for as also any other information that the Court may think it necessary in order to enable it to proceed with the execution. The only order which then can be passed on the execution application is one dismissing it for non-compliance with this or that requisition of the Court after giving sufficient time to the decree-holder. Consequently where an execution application complying with the requirements of O. 21, Rr. 11 to 14 instead of being admitted is returned by the Court, the order returning the same is illegal and the execution application must be treated as pending or as disposed of along with the next application with which it was represented : ('39) 26 A. I. R. 1939 Mad. 841 ; ('40) 27 A.I.R. 1940 Mad. 281; ('33) 20 A.I.R. 1933 Mad. 540 and ('18) 5 A.I.R. 1918 Mad. 1090, *Rel. on.* [P 497 C 1; P 498 C 1]

*** (c) Execution—Execution application pending — Death of decree-holder — Court cannot dismiss application — It must be kept on file awaiting any legal representative to continue it.**

Where the decree-holder dies pending an execution application the Court has no jurisdiction to pass any order dismissing the execution application. The application ought to be kept on file awaiting for any legal representative to continue it : ('32) 19 A. I. R. 1932 Mad. 73 (F.B.), *Rel. on.* [P 497 C 2]

(d) Interpretation of statutes—Same word can be construed in different parts of same Act in different senses if sufficient reasons exist.

Though ordinarily the same meaning should be given to the same words occurring in different parts of the same Act, but if sufficient reasons exist, a word can be construed in one part of the Act in a different sense from that it bears in another part : ('37) 24 A.I.R. 1937 Mad. 385 (F.B.), *Rel. on.* [P 500 C 2]

(e) Limitation Act (1908), Art. 182 (5)—Whether "final order" in Art. 182 (5) means last order or order putting end to execution application *(Quœre).*

Whether the expression "final order" in Art. 182 (5) means "the last order in point of time" or "the order putting an end to the execution petition" or "dealing with the merits of the case." [P 499 C 2; P 501 C 1]

K. S. Ramabadhra Iyer — for Appellants.

T. M. Ramaswamy Iyer — for Respondents.

JUDGMENT.—The question for decision in this appeal is whether execution of the decree is barred by limitation. The execution application under consideration is E. P. No. 307 of 1938 filed on 30th July 1938. The decree sought to be executed is a mortgage decree passed on 31st July 1926 in O. S. No. 55 of 1924 on the file of the District Munsif's Court, Sattur. There were several execution applications in between and the question is whether the present execution application is not saved by the previous applications. The first application for execution was filed on 1st July 1927 and it was returned for production of sale papers. This application was not re-presented with the sale papers within the time given but it was presented along with the next execution application filed on 23rd June 1930. This time also the sale papers were not filed with the execution petition but on the undertaking that they will be filed later, the execution application was numbered as E. P. No. 362 of 1930. There were a number of defendants, some were reported to be dead, defendant 12 was reported to have died two years prior, defendant 21 was also dead and some other defendants were not served including defendant 9 who was away at Rangoon. Evidently owing to the trouble in service, the petition was not pressed and it was accordingly dismissed on 22nd July 1930. There was also a decision of the Madras High Court which held the field at that time that where some of the parties die after an execution petition is filed, that petition could not be proceeded with and that a fresh execution petition should be filed, 50 Mad. 1.[1] Though the case related to the death of the decree-holder, the body of the judgment shows that the decision applies to the case of a judgment-debtor as well.

The next application was filed on 6th June 1933 without the sale papers; and on that ground the execution petition was returned on 28th June 1933. This execution petition was not represented within the time fixed but was presented along with the next application filed on 22nd June 1936. This application was taken on file and numbered as E. P. No. 1 of 1937. The petitioner (decree-holder) died about 23rd November 1937 and then it was adjourned on 27th November to 4th December 1937 on the ground that the decree-holder had died. On 4th December, the order was: "Petitioner's pleader states that the petition is not pressed. Dismissed." It must be noticed that the petitioner was already dead; that fact had been brought to the notice of the Court and the petitioner's pleader had no locus standi to make any representation particularly that the petition was not then pressed. The obvious duty of the Court was to wait and see whether any one would come on record to continue the execution petition as the legal representative. By this time, the decision of the Full Bench of the Madras High Court had held in 55 Mad. 352[2] that where a party dies pending an execution application the same might be continued by or against the legal representative and the earlier decision was overruled. E. P. No. 1 of 1937 was dismissed as not pressed on 4th December 1937. The present execution application (E. P. No. 306 of 1938) was thereafter filed by the legal representative of the decree-holder and it has been held by the lower Courts to be barred by limitation on the ground that an order returning an execution petition is not a final order within Art. 182, cl. (5) of Sch. 2, Limitation Act. Column 3 of Art. 182, cl. (5) as amended in 1928 runs thus :

"(Where the application next hereinafter mentioned has been made), the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order."

The lower appellate Court held, following the decision in I.L.R. (1937) Mad. 112[3] that the expression "final order" used in the amended article did not include an order returning an execution petition, that the petitions of 1927 and 1933 were not available for saving limitation and that the later execution petitions are, therefore, barred by limitation. Mr. Ramabhadra Iyer the learned advocate for the appellant urges that the decision in I. L. R. (1937) Mad. 112[3] and those following it do not apply to cases where the execution petitions complied with all the requirements of O. 21, Rr. 11 to 14, Civil P. C. He urges that the sale papers need not be filed with the execution petition, that the orders returning the execution petition on the ground that the sale papers were not filed are illegal and that in such cases the execution petitions improperly returned must be deemed to be still pending or at any rate that they were dismissed when the next execution petitions along with which they were represented were dismissed. He also says that the expression "final order" means the last order in point of time and that the order of return saves limitation even under the amended article. Prior to the amendment, Art. 182, cl. (4) which corresponds to the present cl. (5) ran thus :

"(Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order."

1. ('27) 14 A.I.R. 1927 Mad. 184 : 99 I.C. 627 : 50 Mad. 1 : 51 M. L. J. 745, Palaniappa Chettiar v. Valliammai Achi.

2. ('32) 19 A.I.R. 1932 Mad. 73 : 135 I.C. 561 : 55 Mad. 352 : 62 M. L. J. 1 (F. B.), Venkatachalam Chetti v. Ramaswami Servai.

3. ('36) 23 A.I.R. 1936 Mad. 613 : 163 I.C. 354: 71 M. L. J. 336: I.L.R. (1937) Mad. 112, Kesavalu v. Official Receiver, West Tanjore.

In some cases the execution petition was dismissed after being kept pending for several years. In such cases the starting point being the date of the previous application, great hardship was being caused. In 38 Mad. 695[4] at page 697 Sadasiva Iyer and Spencer JJ. pointed out the hardship caused to the decree-holders in fixing the date of applying as the starting point. The amendment was made in 1927 and the expression "the date of the final order passed on an application" was substituted for the expression "the date of applying in accordance with law." This has given rise to a fresh controversy whether the expression "final order" means "the last order in point of time" or "the order putting an end to the execution petition." There is a conflict of opinion in this Court on this question. Before proceeding to this point, it is better to advert to the facts of this case.

It is common ground that all the execution applications gave all the particulars that are required by O. 21, Rr. 11 to 14, Civil P. C. The defect in the first execution application was that the sale papers were not filed. As pointed out by the decision of this Court in 40 Mad. 949[5] the Code does not make it incumbent upon a decree-holder to furnish the sale papers along with the execution application itself. The duty of the Court is to see whether all the requirements of O. 21, Rr. 11 to 14 are complied with. If they are complied with, then the execution application ought to be taken on file and the sale papers should then be called for as also any other information that the Court may think it necessary in order to enable it to proceed with the execution. The order of the District Munsif returning the first execution application is clearly illegal and was not justified by the facts. The execution application ought to have been given a number, kept on file as was done with later applications and then the application should have been dismissed on the ground that the necessary papers called for were not produced.

The second application was filed on 23rd June 1930 without the sale papers as was the case with the first execution application. But this time either the office or the pleader seems to have lighted upon the decision of this Court in 40 Mad. 949[5] just referred to as there is a note "40 Mad. 949[5]" in pencil on the execution application. This application was taken on file and numbered as E. P. No. 362 of 1930. As I said before, there were a number of defendants; one had gone to Rangoon, two were dead and others were not served as they were away in different villages and after several adjournments, it was not pressed and it was therefore dismissed on 22nd July 1930. The third application was filed on 6th June 1933. There was no defect in this application so far as the particulars required under O. 21, Rr. 11 to 14 go; but as before, the sale papers were not filed. The Court which on the occasion of the second application took it on file gave a number and retained it on the authority in 40 Mad. 949,[5] this time overlooked that decision and did not perform its duty of taking it on file but returned it for sale papers. The only ground upon which it was returned is "sale papers not produced. Returned. Time two weeks." Again, "returned. Time two weeks." The remarks that I made with respect to the first execution petition apply to this; more so as the proper procedure was followed at the time of the second execution petition; why the same procedure was not followed at the time of the third application is not clear. It only shows the loose practice prevailing in the mofussil Courts as regards the execution applications a practice which has often been condemned by this Court. Execution applications are as important as the suits themselves and irreparable harm may often be done by the Courts not bestowing that amount of care and caution which they are bound to bring to bear on the disposal of the execution applications.

This case is a very good illustration of the harm that is done by the Courts not doing their duty in the case of execution applications. If the first and the third execution applications had been taken on file, numbered and retained on file as they ought to have been, the only order that could have been passed was one dismissing them for non-compliance with this or that requisition of the Court. If that had been done, there would have been no room for argument. Instead of that, they were returned and returned without any justification and, in spite of the fact that time and again this Court has pointed out that in the case of non-production of sale papers, the execution application ought not to be returned but kept on file. The fourth application which was made on 22nd June 1936 was, as I said, ultimately taken on file as E. P. No. 1 of 1937. Between the date of the presentation on 22nd June and January 1937 when it was given a number, the matter underwent a number of adjournments. The Court asked the pleader how it was not barred. Then the matter was argued and reliance was placed upon certain decisions of this Court and ultimately after hearing the advocate, the Court ordered it to be filed subject to the question of limitation being raised by the respondents. As said already, the decree-holder died in November 1937 and thereafter the pleader whose authority had ceased with the death of his client seems to have mentioned that the petition was not then pressed. This again shows that proper care is not taken in the disposal of execution petitions. The Court had no jurisdiction to pass any order on 4th December dismissing the execution application. The petitioner was dead and the application ought to have been kept on file awaiting for any legal representative to continue it. The next application is the present one.

Taking E. P. No. 1 of 1937 filed on 22nd June 1936, the decree-holder has to show how it is within time. He relies upon the previous application which was filed on 6th June 1933 but which was returned on 28th June for no other reason than that the sale papers were not filed. This is an illegal order which ought never to have been passed. There was no defect in that execution application. It ought to have been taken on file and then dismissed if the sale papers were not filed after a sufficient time was given to the decree-holder. It is surprising that the Court returned the execution applications for want of sale papers in spite of the fact that in the Civil Rules of Practice there is a long note bringing it to the notice of the executing Courts that it is their duty to take the execution applications which are otherwise in order on file and give sufficient time having regard to the distance of the registration offices and other circumstances to enable the decree-holder to produce the encumbrance certificates and other sale papers. Chapter 9, Part 6 applies to sale of attached property. Then Part 7 gives general rules about sale of property under

4. ('14) 1 A. I. R. 1914 Mad. 384 : 23 I.C. 533 : 38 Mad. 695: 26 M.L.J. 433, Abdul Khader v. Krishna Malamal Nair.
5. ('18) 5 A. I. R. 1918 Mad. 1090 : 38 I. C. 136 : 40 Mad. 949 : 32 M. L. J. 621, Natesa Pillai v. Ganapathia Pillai.

order of Court. The decree in this case being a mortgage decree, the sale of property is directed by the decree itself. In such cases, Rule 195 provides that where the immovable property exceeds Rs. 100 in value, an encumbrance certificate should be filed. There is a note to this rule setting out in extenso the High Court's Dis. No. 1246 of 1922 :

"There is nothing in the rules which requires the production of the encumbrance certificate along with the execution application. The sale proclamation is settled some days after the application and it was also open to the party to file it before the date fixed for settling the proclamation. The subordinate Courts are therefore requested to fix the date for settling the sale proclamation with due regard to the time which will be required to produce the encumbrance certificate, the distance of the registration office and other circumstances. . . . . The subordinate Courts are therefore requested to see to the strict observance of the instructions issued above with regard to the fixing of the date of the sale proclamation."

The difficulties that confront a decree-holder by the Courts not following these instructions are best illustrated in this case. I do not see why the parties should be penalised for the Court not doing its duty and I must take it that the third execution application must be treated as either pending even now or that with the disposal of the next application, this was also disposed of. Similarly, with respect to the first execution application, the papers ought not to have been returned. The execution application ought to have been taken on file and retained on file and appropriate orders passed later on. I am therefore of opinion that in this case the execution petitions filed on 1st July 1927 and on 6th June 1933 must be taken to have been illegally dismissed and, therefore, treated either as pending or as disposed of along with the next application with which they were represented. In this view, the first application must have been treated as having been disposed of by the order of the Court on 22nd July 1930 when the next application was dismissed and that the third application should be taken to have been dismissed when the next application was dismissed on 4th December 1937. In this view, the present execution application is within time and not barred. In I.L.R. (1940) Mad. 60[6] at pp. 70 and 71, Stodart J. observed this:

"There are in my opinion only three ways of dealing with an application for the execution of a decree, and these are unambiguously defined in O. 21, R. 17, Civil P. C. If the application conforms to the requirements of Rr. 11 to 14, it must be admitted which means that it receives a serial number in the execution petition register and comes on in the usual course in open Court for the orders of the Judge. In such a case there will be a final order which will effectively dispose of the matters raised in the application. Secondly, if the application does not comply with the requirements of Rr. 11 to 14, it may be forthwith rejected. Thirdly, and this is the case now under consideration, if the application does not comply with the provisions of Rr. 11 to 14, the Judge, instead of rejecting it forthwith, may allow the defect to be remedied and if necessary may grant time to enable the applicant to do this."

The present case falls within the first of the three alternatives. In all cases where the requirements of O. 21, Rr. 11 to 14 were fulfilled, the obvious course pointed out by Stodart J. ought to be followed and if it was not followed and an order of return was made, then it must be taken that it is an absolutely illegal order and that when the papers were later on put back into Court, it must be taken that it was still pending without a proper disposal as held by Abdur Rahman J. in (1939) 2 M. L. J. 469.[7] The learned Judge held that where an execution application which complied with the necessary requirements of law is improperly returned, the order of return is illegal and the execution application should be taken to be pending even though it had been returned to the party and was not physically in the records of the Courts. The matter there arose in restitution proceedings and application for restitution are treated by the Madras High Court as applications for execution so that successive restitution applications are governed by the rules which relate to execution applications. The order for restitution which was being executed was one passed in 1924. The first application was on 13th November 1925. It was returned to the party on 18th November 1925. This application was later on represented as an annexure with the next execution application. Dealing with this question, the learned Judge says this on page 473.

"This brings me to the main question whether the application of 13th November 1925, should still be deemed to be pending as no final orders required by Art. 182 (5), Limitation Act, were passed on that application. This would depend upon the effect of the order passed by the Court returning the application to the defendant-appellant in consequence of the interim stay being then in force. This was clearly a wrong order and it is therefore contended that the application should still be deemed to be undisposed of and thus held to be pending. The learned counsel for the appellant has relied on a number of cases which lay down that in order to entitle a petitioner to treat an application as in continuation or one for revival of a previous application it should be found that the order dismissing the first application, was wrong or that the first application was not properly disposed. . . . . The principle on which these cases were decided is beyond controversy; but they have been attempted to be distinguished by the learned counsel for the respondent on the ground that the orders passed on the applications were not only illegal but the applications were physically in Court. He contends that when the applications had been returned to the appellant either improperly in 1925 or when the application returned for compliance with certain requirements in 1928 was not represented by him within a reasonable time it must be considered to be *non est* in the eye of the law and cannot be taken advantage of by the appellant after the lapse of about nine years. The contention is undoubtedly plausible but is there any warrant in law for me to give effect to it when I find that the Court was not justified in returning the application to appellant on the ground that an interim order for stay had been passed by it two days before ? The application should have been retained in Court and any legal order that the executing Court might have considered to be proper and which it was competent to give should have been passed thereon . . . . . In the absence of any legal or proper order I am constrained to come to the conclusion that the application

6. ('39) 26 A. I. R. 1939 Mad. 841 : 189 I. C. 411 : I.L.R. (1940) Mad. 60 : (1939) 2 M. L.J.671, Chidambaram v. Murugesam.

7. ('40) 27 A. I. R. 1940 Mad. 281 : 189 I. C. 185 : (1939) 2 M. L. J. 469, Krishnamachari v. Chengalraya Naidu.

a although not physically in Court must be yet treated to be pending and undisposed of."

This decision applies word for word to the present case. In the case before me, the first and third execution applications should not have been returned. There was no defect which entitled the Court to return the papers. They ought to have been kept on file and numbered as execution applications and then further orders should have been passed dismissing them if the requirements of the Court were not complied with. In the words of this judgment, as it is, no final order was passed on the two execution applications just mentioned. In the case before the learned Judge, nine years elapsed between the date of the return and the application that came up before him which was filed in 1934. Being pressed with this long delay, the learned Judge held that that did not make any difference. Dealing with this b contention the learned Judge says this on p. 475 :

"Moreover, the objection as to laches or delay, based as it is on the equitable doctrine of English Courts cannot be allowed to prevail when the legal rights of a party to proceeding come up before the Court for determination. It might have been different if the appellant were asking for an equitable relief. He is asking for a legal relief in this case and the only question is whether this is barred by the statute of limitation. There is thus no room in such cases for the application of any equitable defence such as suggested by the learned counsel for the respondent. In the circumstances the application made by the appellant in 1925 must be held not to have been disposed of and the application made in 1934 may be regarded either in the nature of a reminder or as one for continuance thereof."

c The view that in such cases, the execution application which was returned and later on re-presented must be taken to be still on file and not disposed of was laid down by Madhavan Nair J., in 64 M. L. J. 401.[8] It is urged by the respondents' learned advocate that the matter is concluded in his favour by certain decisions of this Court. Before making a detailed reference to these cases, it may be mentioned that in all these cases, the execution applications did not fulfil the requirements of O. 21, Rr. 11 to 14. Therefore they were rightly returned, and the Court could not have taken them on file and entered them in the Execution Register. When these applications which were directed to be represented within a particular time were not represented within that time and were re-presented only with the next application filed some years after d it was held that these applications would not save limitation. Under the Limitation Act, as amended in the year 1928, the starting point is not the date of the filing of the last execution petition but the final order on that execution application. The question considered in the decisions relied on for the respondents was whether an order returning an execution application was a final order within the meaning of Art. 182 (5) of Sch. 2, Limitation Act. There again, there is a sharp difference of opinion, one view being that the expression "final order" means the last order as opposed to a previous order and the other view being that the expression "final order" means an order putting an end to the execution application and not one merely returning it. That the expression "final" refers merely to the last in point of time is the view propounded by Pandrang Row J., in 1936 M. W. N. 547.[9] He adhered to that view when the same question came e before him sitting with Venkataramana Rao J., in I. L. R. (1937) Mad. 616.[10]

Execution applications in some cases were kept pending for a long time and then dismissed; the next application for execution would be barred if time is reckoned from the date of the filing of the previous execution application and not from the date of the order on that execution application. To remedy this defect, the Legislature amended the Article by introducing the expression, "the final order." This gave rise to the present trouble, one set of Judges holding that the term "final order" means the last order on the previous execution petition and the other view that it must be an order disposing of the execution petition finally and that it does not include a mere order of return. The chief reason that prevailed with the Judges who f took the second view was that if the expression "final order" is taken to be the last order in point of time, it would enable decree-holders merely to prolong the execution by filing frivolous applications and that therefore when the applications were returned, the order returning the execution petition ought not to be taken to be a final order within the meaning of cl. (5) of Art. 182. If only the decree-holder represents the execution application and asks that the Court should dismiss it in view of the defects noticed by it, the Court is bound to dismiss it and, undoubtedly, even according to these decisions, the next execution application will be within time and the order will be the final order. This was the ground on which Venkataramana Rao J., sitting with Pandrang Row J., distinguished the case before them. In that case, there was a reference to a Full Bench on another point and after the Full g Bench expressed its opinion that a civil revision petition is also an appeal within the meaning of Art. 182 (2), the case came on before Pandrang Row and Venkataramana Rao JJ. There the High Court dismissed the civil revision petition on 3rd November 1927 and the application which came for consideration before the High Court was one presented on 16th November 1932. In between there was an application filed on 24th June 1929. That application did not give certain particulars but it was held that the omission to give those particulars did not make the execution application one not in accordance with law. Treating it as an application in accordance with law the question to be considered was whether it saved time under Art. 182 (5) as amended. In that case, the executing Court had dismissed the application on the ground that certain require- h ments were not complied with. Therefore Venkataramana Rao J. held that where the Court actually rejected the application for the reason that the requirements were not complied with, there was a final order even if we take it that the expression "final order" meant an order terminating the proceeding and not merely the one last in point of time. Pandrang Row J. expressed the view that he adhered to the opinion that he had expressed in the earlier case, 1936 M. W. N. 547.[9] With respect I may point out that if only the execution applications had been re-presented without complying with the requisitions and the Court dismissed it as it would be bound to, the execution could be kept alive by frivolous appli-

8. ('33) 20 A. I. R. 1933 Mad. 540 : 144 I. C. 167 : 64 M. L. J. 401, Mahomed Abu Bakkar v. Ram Krishna.

9. ('36) 1936 M. W. N. 547, Mottayya Padayachi v. Rajagopalan.

10. ('37) 24 A.I.R. 1937 Mad. 385 : 168 I.C. 561 : I. L. R. (1937) Mad. 616 : (1937) 1 M. L. J. 453 (F. B.), Chidambara Nadar v. Rama Nadar.

cations. In fact in C. M. A. No. 435 of 1939[11] (unreported) the execution application was ordered to be returned but the decree-holder never took a return of the papers. At the end of the year, the application was dismissed as the papers had not been taken return of. It was held that that order would be a final order as one terminating the execution proceedings. In (1941) 1 M.L.J. 837[12] a decree had been transferred for execution to the Bombay High Court and while the papers were still in that Court another execution petition was filed in the original Court. That Court passed the following order : "Copy of the decree has not been received from the High Court, Bombay—Returned." Within three years after this order, a fresh execution application was filed and the question was whether the order just set out was a final order within the meaning of Art. 182 (5). King J. who delivered the leading judgment held that it was a final order and said this on p. 839 :

"No doubt in most cases when an application of this kind is returned to the applicant, it is returned for the definite purpose of remedying some defect and of being re-presented within a brief interval of time. In the present case, the Court has not stated that it required any action to be done by the applicant. It has merely used the word 'returned,' after explaining the reason why the application was returned. We think the only interpretation that can reasonably be given to this language is that the Court had decided that it would have nothing further to do with the application, and if that interpretation is correct, the order of 27th February cannot be other than a final order within the meaning of any of the rulings of the Madras High Court which deal with the interpretation of that expression."

This only shows that even on the view that the expression 'final order' means an order terminating the execution application, frivolous applications can be filed if the decree-holder chooses to insist upon the Court dismissing them. He has only to represent the papers without complying with the requirements and the Court would then be bound to dismiss the applications. Why if in such a case the execution is kept alive by an order of dismissal passed when the requirements were not complied with, the same result should not follow when the execution application was taken return of and not re-presented I fail to see. There is no difference in substance. It is only a difference in form. The whole difficulty arises because successive execution applications are allowed by the Legislature prescribing a starting point for each successive application and giving a period of twelve years for the execution of mofussil decrees and prescribing no limit at all for execution of decrees of the Chartered High Courts. The remedy does not therefore consist in treating the expression "final order" as one terminating the execution application and not one passed last in point of time.

Another reason given is that the term "final order" used by the Legislature in cl. (2) of Art. 182 has been held to exclude orders passed for default of prosecution and that therefore the term "final order" in Art. 182 (5) must be similarly construed. Reference is made to the decisions of the Judicial Committee in 36 All. 284;[13] 36 All. 350.[14] Venkatasubba Rao J. in I. L. R. (1937) Mad. 112[3] and Burn J. in I. L. R. (1940) Mad. 60,[6] rely on these decisions of the Judicial Committee. If this is so, the matter of the suit must be judicially dealt with and a mere order of dismissal for non-prosecution is not a "final order." That means that the order must be one on the merits of the case. But an order dismissing an execution petition for non-prosecution is undoubtedly held to be a final order for purposes of Art. 182 (5). This is recognised to be so by Venkatasubba Rao and Cornish JJ. in I.L.R. (1937) Mad. 112[3] where reference is made to the decision in A.I.R. 1933 Rang. 87[15] which held that an order merely "closing the execution" was a final order. Venkataramana Rao J. points out in I.L.R. (1937) Mad. 616[10] that an order dismissing an execution petition would be a final order even though the order did not deal with the merits. On pp. 632 and 633 he says :

"In my opinion an order would be a final order within the meaning of the clause if it terminates the execution proceeding so far as the Court passing it is concerned. The order need not be one on the merits."

Pandrang Row J. says on p. 636 :

"In innumerable cases execution petitions are dismissed or struck off either for default or for failure to take steps, and it has never been contended that there is in such cases no final order which alone will provide a fresh starting point of limitation."

Reference to and reliance placed upon the decisions dealing with the expression "final order" as used in Art. 182 (2) would prove too much and this aspect has apparently escaped the attention of the learned Judges who have taken the contrary view. That the same word may be used by the Legislature in different parts of the same Act in different senses is recognised by the Full Bench in I. L. R. (1937) Mad. 616.[10] This is what they say :

"The only serious objection urged against this view is, that in one and the same Act the same word ought not to be construed in two different senses and that, as the word "appeal" has a narrower meaning in Arts. 150 to 157, it would be wrong to give it an extended sense in Art. 182. But as a canon of construction, though ordinarily the same meaning should be given to the same words occurring in different parts of the same Act, it is recognised that if sufficient reasons exist, a word can be construed in one part of an Act in a different sense from that it bears in another part."

In the case before the Judicial Committee, the appeal was dismissed for want of prosecution and it was held that that order would not be a final order within the meaning of Art. 182 (2). If we apply the same reasoning to an execution application, it will lead to this result that where an execution application which is dismissed—say for non-payment of batta which is non-prosecution—the order will not be a final order but undoubtedly orders of dismissal for non-prosecution are final orders. If we construe the expression 'final order' as one dealing with the merits of the case, the decision of Pandrang Row

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11. C.M.A. No. 435 of 1939, Venkateswara Rao v. Subba Rao.

12. ('41) 28 A.I.R. 1941 Mad. 731 : 197 I. C. 261 : (1941) 1 M. L. J. 837, Kandasami Chettiar v. Gokuldoss Madanji & Co.

13. ('14) 1 A. I. R. 1914 P.C. 65 : 23 I. C. 644 : 41 I. A. 104 : 36 All. 284 (P. C.), Batuk Nath v. Mt. Munni Dei.

14. ('14) 1 A. I. R. 1914 P.C. 66 : 23 I.C. 649 : 36 All. 350 : 27 M. L. J. 17, Abdul Majid v. Jawahirlal.

15. ('33) 20 A. I. R. 1933 Rang. 87 : 142 I. C. 435, Kadiresan v. Maung Yan Ya.

and Venkataramana Rao JJ. in I.L.R. (1937) Mad. 616,[10] the decision of Pandrang Row and King JJ. in (1941) 1 M.L.J. 837[12] and the decision in C.M.A. No. 435 of 1939[11] would all be wrongly decided.

All these considerations will have to be borne in mind and the whole question considered when the question directly arises for decision. In the present case as the execution application fulfilled all the requirements of law as laid down under O. 21, Rr. 11 to 14, the order returning the execution application was wholly illegal and this case is therefore distinguishable from the decisions in I.L.R. (1937) Mad. 112[3] and I. L. R. (1940) Mad. 60.[6] I hold therefore that the execution application is not barred. It does not matter whether I direct the first application of 1927 to be taken on file as undisposed of and further orders passed on it or whether further execution is proceeded with on the application of 1938. The appeal is allowed with costs throughout and execution petition remanded to the first Court to proceed with further execution. No leave.

C.R.K./G.N. *Appeal allowed.*

C. P. C. —
(a) ('40) Chitaley, O. 21 R. 11, N. 2.
(c) ('40) Chitaley, S. 146, N. 4 Pt. 7, O. 21 R. 16, N. 19 and O. 22 R. 12, N. 1.
('41) Mulla, Page 468 Pt. (m), Page 774 Pt. (w) and Page 950 Note "Execution proceedings."
(d) ('40) Chitaley, Preamble, N. 7 Pt. 36a.
(b) ('40) Chitaley, O. 21 R. 11, N. 2 and O. 21 R. 17 Notes 2 and 5.
('41) Mulla, Page 776 Note "Sub-r. (1)."
Limitation Act—
('42) Chitaley, Art. 182, N. 86a.
('38) Rustomji, Page 1759 Sub-heading "In accordance with law."

A. I. R. (29) 1942 Madras 501 (1)

HORWILL J.

In re subbiah Thevan and others — Petitioners.

Criminal Revn. Case No. 985 of 1941 (Criminal Revn. Petn. No. 930 of 1941), Decided on 26th November 1941, to revise judgment of Court of Sessions, Madura, in C. A. No. 149 of 1941.

Criminal P. C. (1898), S. 106—Magistrate not giving reasons for passing order under S. 106 —Order is not illegal.

Where Magistrate has expressed an opinion that because of the facts noted in the judgment he was of opinion that an order under S. 106 is necessary, the order is not bad merely because the Magistrate has failed to give reasons for passing an order under S. 106 : ('26) 13 A. I. R. 1926 All. 144 and ('27) 14 A. I. R. 1927 Pat. 37, *Expl., and Disting.*; ('23) 10 A. I. R. 1923 Mad. 618 and 1934 M. W. N. (Cr.) 98, *Rel. on.* [P 501 C 1, 2]

Cr. P. C.—
('41) Chitaley, S. 106 N. 18.
('41) Mitra, Pages 191-192 N. 225.

C. A. Mohamed Ibrahim — for Petitioners.

Public Prosecutor — for the Crown.

ORDER. — This petition was admitted on the question whether the order passed under S. 106, Criminal P. C., was proper in the absence of reasons given by the trial Magistrate for passing such an order and the absence of any reference to the order in the judgment of the Sessions Judge. The trial Magistrate has expressed an opinion that because of the facts noted in the judgment he was of opinion that an order under S. 106, Criminal P. C., was necessary. It has been argued on the authority in A. I. R. 1926 All. 144[1] and A. I. R. 1927 Pat. 37,[2] decisions of single Judges, that something more is necessary. I do not think that even those cases lay down any general rule that a trial Magistrate must give reasons for his opinion. However that may be, the decisions of this Court are clear on this point. Spencer J. in 44 M. L. J. 485[3] says:

"I do not think it is necessary that the lower Court should record a finding that a breach of the peace was involved in order to invest itself with power to make an order under S. 106 (1), Criminal P. C.

If the offence of which the accused were convicted was one which did not of itself necessarily involve a breach of the peace, such as criminal trespass, mischief, or unlawful assembly, it would be proper that the Magistrate or Judge should in his order make it clear that a breach of the peace was committed.

But the section does not require such a finding to be recorded, and when the offence of which the accused is convicted is one which implies the use of violence it would be superfluous to say more. The Judge has recorded his opinion that it is necessary in this case to require the convicted persons to execute a bond for keeping the peace, and that is all that the section in terms demands."

Jackson J. in 1934 M. W. N. Cr. 98[4] states this principle in very much the same words and refers to 30 M. L. T. 348[5] and 29 Mad. 190,[6] which express a somewhat different view, and says that the former merely follows the latter and that the latter was dealing with an offence of which a breach of the peace was not a necessary ingredient. There was, therefore, no illegality in the order of the Sub-Magistrate. The Sessions Judge makes no reference at all to the order under S. 106, Criminal P. C., and the reason for this omission is presumably that the vakil for the petitioners did not think the point worth pressing. The petition is dismissed.

C.R.K./R.K. *Petition dismissed.*

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1. ('26) 13 A. I. R. 1926 All. 144: 89 I. C. 1025: 26 Cr. L. J. 1457: 23 A. L. J. 1053, Mohamed Rahim v. Emperor.
2. ('27) 14 A. I. R. 1927 Pat. 37: 97 I. C. 424: 27 Cr. L. J. 1112, Jai Singh v. Emperor.
3. ('23) 10 A. I. R. 1923 Mad. 618: 72 I. C. 615: 44 M. L. J. 485: 24 Cr. L. J. 455, Ramaswami Thevan, In re.
4. ('34) 1934 M. W. N. (Cr.) 98, Kunhikannan v. Emperor.
5. ('23) 10 A. I. R. 1923 Mad. 133: 76 I. C. 966: 25 Cr. L. J. 294: 30 M. L. T. 348, In re Thirumalai Reddi.
6. ('06) 29 Mad. 190: 3 Cr. L. J. 461, Muthiah Chetty v. Emperor.

A. I. R. (29) 1942 Madras 501 (2)

KING J.

Pottiswami, alleged partner of Pottiswami and Brothers — Petitioner

v.

Sait Sulaiman (Mitta) — Respondent.

Civil Revn. Petn. No. 1240 of 1940, Decided on 4th February 1942, to revise order of Sub-Judge, Bezwada, D/- 10th April 1940.

a **Civil P. C. (1908), S. 42 and O. 21, Rr. 50 (2) and 10 — Original Court and not transferee Court can decide alleged partner's liability under Rule 50 (2).**

The Court to which a decree has been transferred for execution has no jurisdiction to decide the question of a person's liability under O. 21, R. 50 (2). The decree-holder must apply to the Court which passed the decree : ('32) 19 A. I. R. 1932 Pat. 323, *Foll.*; ('21) 8 A. I. R. 1921 All. 199; ('24) 11 A. I. R. 1924 All. 700 and ('31) 18 A. I. R. 1931 Lah. 736, *Dissent.* [P 502 C 1, 2]

C. P. C. —

('40) Chitaley, S. 42 N. 3 and O. 21 R. 50 N. 5 Pts. 11 and 12.

('41) Mulla, Page 170 Note "Powers of Court executing transferred decree" and Page 822 Note b "Court which passed the decree."

P. Satyanarayana Rao — for Petitioner.

V. V. Ramadurai — for Respondent.

ORDER. — The petitioner here is alleged by the respondent to be a partner in the firm of Pottiswami and Brothers against whom the respondent has a decree granted by the Court of Small Causes at Khurai. The decree has been transferred for execution to the Subordinate Judge's Court of Bezwada, which Court has held that it has jurisdiction to decide the question of petitioner's liability under O. 21, R. 50 (2). Petitioner questions the correctness of that decision. If R. 50 (2) alone be referred to, the decision appears to be obviously wrong. The sub-rule says that the decree-holder must apply to the Court which passed the decree. This must always be distinguishable in the nature of things c from the Court to which the decree has been sent for execution and is so distinguished in fact in both S. 42 and in O. 21, R. 10.

The scope of O. 21 appears to be that where R. 10 applies the word "Court" alone is used. Where as in R. 16, R. 26 or R. 50 it is intended that the application should be restricted to one Court that one Court is specifically referred to. The learned Subordinate Judge relied however upon 43 All. 394.[1] In that decision, which has been accepted without any independent discussion in 46 All. 560[2] and 13 Lah. 327,[3] stress is laid upon the overriding provisions of S. 42, which, it is said, was intended to remove all questions arising out of the decree from the cognizance of the Court which passed it and had transferred it. This decision has however been dissented from in 11 Pat. 580.[4] There the learned d Judges point out that O. 21, R. 50 (2) contemplates what is in effect the trial of a suit in which the person against whom execution is sought may contest not only his own liability as a partner of the judgment-debtor firm, but the plaintiff's claim upon its merits.

There being no authority in Madras I am free to choose either of these conflicting views. With great respect it seems to me that the Patna view is preferable. It not only gives the words "Court which passed the decree" their plain and literal meaning e but it explains why a particular kind of adjudication is limited to the Court which passed the decree from a consideration not of some other part of the Code only, but of the words of the sub-rule itself. I accordingly allow this petition, and direct that the respondent's application to the Subordinate Judge of Bezwada under O. 21, R. 50 (2) be dismissed with costs throughout. His remedy must be to apply to the Court at Khurai.

C.R.K./R.K. *Petition allowed.*

1. ('21) 8 A. I. R. 1921 All. 199 : 61 I. C. 401 : 43 All. 394 : 19 A. L. J. 187, Sital Prasad v. Messrs. Clement Robson & Co.
2. ('24) 11 A.I.R. 1924 All. 700 : 83 I. C. 848 : 46 All. 560 : 22 A. L. J. 439, Sanwal Das v. Collector of Etah.
3. ('31) 18 A.I.R. 1931 Lah. 736 : 134 I. C. 1026 : 13 Lah. 327 : 33 P. L. R. 598, Bombay Co. Ltd., Karachi v. Kahan Singh.
4. ('32) 19 A.I.R. 1932 Pat. 323 : 141 I. C. 61 : 11 Pat. 580 : 13 P. L. T. 751, Kaluram v. Firm Sheonand Rai Joshi Ram.

A. I. R. (29) 1942 Madras 502

HORWILL J.

Amara Narasimhalu Chetty — *Petitioner* f

v.

Thamidalapati China Ramayya Naidu and others — *Respondents.*

Civil Revn. Petn. No. 2429 of 1939, Decided on 22nd September 1941, to revise order of District Court, Nellore, D/- 22nd June 1939.

(a) Civil P. C. (1908), O. 7, R. 11 — Value of property found for court-fees — Court is not precluded to find subsequently whether it has jurisdiction.

The finding as to the value of the property for purposes of court-fee does not preclude the Court from afterwards coming to the conclusion that it has no jurisdiction to try the suit. The true value of the land determines jurisdiction and is also the g basis for caculating court-fee, subject to the qualification of S. 12 (1), Court-fees Act, that when once the amount of court-fee has been determined it is final : ('19) 6 A. I. R. 1919 Mad. 93 ; 17 C. W. N. 503 ; 4 Mad. 204 and 14 Mad. 169, *Rel. on* ; ('37) 24 A. I. R. 1937 Mad. 81 (F.B.), *Ref.* [P 503 C 2]

C. P. C. —

('40) Chitaley, O. 7, R. 11, N. 4.

('41) Mulla, Page 612, Note "Clause (b) : Where the relief claimed is under-valued."

(b) Civil P. C. (1908), S. 115 — Finding that property is valued at certain amount cannot be disturbed in revision.

Where both the Courts below are satisfied that the value of the property exceeded a certain amount, the High Court would not go behind that finding in revision. [P 503 C 2] h

C. P. C. —

('40) Chitaley, S. 115, N. 2 pt. 4.

('41) Mulla, Page 408, Note "Limits of revisional jurisdiction."

K. Umamaheswaran — for Petitioner.

M. S. Ramachandra Rao and D. R. Krishna Rao — for Respondents.

JUDGMENT. — The petitioner purchased a plot of land in court auction for a sum of Rs. 239. He was unable to obtain possession and brought the suit out of which this petition arises for possession of the property. He valued the suit at the amount which he had paid in court auction. The Court thought that insufficient and arbitrarily fixed the valuation at Rs. 1000 ; and the District Munsif asked the plaintiff whether he would accept that figure or whether he would prefer to have a commission issued to determine its value. The plaintiff accepted the valuation of Rs. 1000 and paid the additional court-fee. The defendants contended in

their written statement that the value of the property was considerably over Rs. 3000 and that the Court had no jurisdiction to try the suit. The learned Munsif, although he did not determine the actual value of the property, came to the conclusion on the data available to him that it was clear that whether the value of the property was as high as the defendants stated or not, the value certainly considerably exceeded his pecuniary jurisdiction. He therefore returned the plaint for presentation to the proper Court. The matter was taken on appeal to the District Judge who came to the conclusion that although the District Munsif might have done well to have issued a commission to determine the value of the property, he was nevertheless right. He therefore dismissed the appeal.

The real question in this petition is whether, when once the District Munsif had determined the amount of court-fee payable, the District Munsif, in view of S. 12 (1), Court-fees Act, and S. 14, Madras Civil Courts Act, had authority to reconsider the value of the property even for purposes of jurisdiction. It would indeed be strange if the Court, by making an error in fixing the value of the court-fee payable, could obtain jurisdiction which it did not really possess. Mr. Umamaheswaram for the petitioner is unable to find any authority for that position. On the other hand, there is a direct authority of this Court in 10 M. L. W. 178[1] by Kumaraswami Sastri J. that the determination of the court-fee does not preclude the reconsideration of the value of the property for questions of jurisdiction. He followed 17 C. W. N. 503[2] which was decided by a Bench of the Calcutta High Court and it is conceded by Mr. Umamaheswaram that this decision is against him. The learned Judges there followed 4 Mad. 204[3] and 14 Mad. 169.[4] In 4 Mad. 204,[3] it was held that the finality referred to in S. 12 (1) was only with regard to arithmetical calculations of the court-fee payable and not to questions of classification. The question was thought to be of importance there because, if the opinion of the Munsif as to the nature of the suit was final, an appeal would not lie. If the Munsif had rightly understood the nature of the suit, an appeal would have lain. The learned Judges therefore held that on this question of jurisdiction it was competent for them to go behind the finding of the Munsif ; and the reason they gave was that a determination under S. 12 (1) was not final with regard to the classification of suits. In 14 Mad. 169[4] a suit was dismissed because the additional court-fee fixed by the Court was not paid, and the question there was whether an appeal lay against the order dismissing the suit. The learned Judges followed 4 Mad. 204[3] and held that S. 12 did not apply to a wrong determination of the classification of a suit. Much the same question came before a Full Bench in I. L. R. (1937) Mad. 275[5] and the learned Judges were inclined to disagree with the reasoning in 4 Mad. 204[3] and concluded that S. 12 (1) applied to questions of classification as well as to mere questions of calculation. They did not discuss the question whether S. 12 (1) would be final as to jurisdiction as well as to court-fee ; but certain remarks of Venkatasubba Rao J. at p. 282 suggest that he did not think so. He says :

"The present trend of decisions seems to be that where a plaint is rejected under cl. (b) of O. 7, R. 11, the order rejecting the plaint is not appealable when the order is based on a question of valuation pure and simple ; but if the order involves a a decision as to the category to which a suit belongs, the order is appealable. As we have said, this view is the result of the endeavour to reconcile the Code with the Court-fees Act. But is it really necessary to take such a view?"

The learned Judge then goes on to give reasons why it is not necessary to do so. If Mr. Umamaheswaram's reasoning were sound, then a determination of the court-fee would be final for all purposes, and even though a suit were dismissed for non-payment of additional court-fee wrongly demanded, no appeal could lie despite the provisions of O. 7, R. 11 from the decree. The learned Judges in that case held that an appeal would lie, despite the fact that a decision had been given which was final for purposes of court-fee under S. 12 (1). I therefore agree with the learned District Judge that the finding as to the value of the property for purposes of court-fee did not preclude the Court from afterwards coming to the conclusion that it had no jurisdiction to try the suit. The true value of the land determines jurisdiction and is also the basis for calculating court-fee, subject to the qualification of S. 12 (1), Court-fees Act, that when once the amount of court-fee has been determined it is final.

A minor point raised by Mr. Umamaheswaram is that the District Munsif did not have before him satisfactory material on which he could come to the conclusion that he had no jurisdiction. Both the Courts below were satisfied that the value of the property exceeded Rs. 3000. I am not prepared to go behind that finding in revision. Finally, it is said that as the respondents submitted to the jurisdiction of the Court by taking part in certain proceedings ordered on the footing that the Munsif had jurisdiction, they were precluded from questioning the jurisdiction of the Munsif later. Whether there was any personal estoppel or not, when the Court found that it was not competent to try the case, it clearly could not proceed and was bound to return the plaint to the plaintiff for re-presentation in a Court of competent jurisdiction. The petition is dismissed with costs.

C.R.K./R.K. *Petition dismissed.*

1. ('19) 6 A. I. R. 1919 Mad. 93 : 52 I. C. 1001 : 10 M. L. W. 178, Narasimhacharyulu v. Zamindar of Bobbili.
2. ('13) 17 C. W. N. 503: 16 I. C. 575 : 16 C. L. J. 371, Peary Shah v. Surajmal Marwari.
3. ('82) 4 Mad. 204, Annamalai Chetti v. Lieut. Col. J. G. Cloete.
4. ('91) 14 Mad. 169, Kanaran v. Komappan.
5. ('37) 24 A. I. R. 1937 Mad. 81 : 166 I. C. 615 : I. L. R. (1937) Mad. 275 : (1937) 1 M. L. J. 1 (F. B.), Madana Mohana v. Krupasindhu.

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* A. I. R. (29) 1942 Madras 503

LEACH C. J. AND BYERS J.

Palani Mudaliar and another — *Appellants*

v.

M. Natarajan alias Amalorpavanathan and another — *Respondents.*

Appeal No. 35 of 1941, Decided on 24th February 1942, from order and judgment of Krishnaswami Ayyangar J., D/- 21st July 1941.

*** Advancement—Doctrine of—Applicability—It does not apply to Indian Christians.**

The English doctrine of advancement cannot be applied to Indians on grounds of justice, equity and

good conscience. The doctrine is entirely unknown to the personal laws of the vast majority of the inhabitants of this country. Religious belief is not a factor in the application of the doctrine and therefore there is no reason for making an exception in the case of Indian Christians : 6 M. I. A. 53 (P.C.), *Rel. on.* [P 504 C 2 ; P 505 C 1]

M. Ramchandra Rao and K. N. Pandalai — for Appellants.

N. Srinivasa Ayyangar — for Respondents.

LEACH C. J. — The main question to be decided in this appeal is whether the English doctrine of advancement applies to Indian Christians. The rule does not apply to Hindus or Mahomedans. See 6 M. I. A. 53;[1] 48 Mad. 805;[2] 37 All. 557[3] and 13 M. I. A. 232.[4] In 14 Rang. 242,[5] a Full Bench of the Rangoon High Court held that it did not apply to Burmese Buddhists. In 48 Cal. 260,[6] the Privy Council held that the presumption of an advancement does apply to persons who are born in India of English parents and have resided in India all their lives, except for occasional visits to England. Admittedly there is no decision of the Privy Council or of Indian Courts which has extended the application of the principle.

Before discussing further the question whether the doctrine of advancement applies to Indian Christians it will be convenient to set out the relevant facts. The appeal arises out of an application filed by respondent 1 in insolvency proceedings in this Court. The insolvent, Ponnamruthammal, is the wife of respondent 1 who applied for a declaration of his title to a half share in a house and its site known as No. 53 Avadhanam Pappier Street, Choolai, Madras. This property was purchased on 29th August 1938 in the name of the insolvent and one Harry Daniel, who had married the daughter of respondent 1 and the insolvent. The price paid was Rs. 6500. Respondent 1 had been employed as a guard by the South Indian Railway Company Limited. He retired in the month of January 1938, when he was paid the sum of Rs. 7000 which was standing to his credit in the provident fund of the company, and later a sum of Rs. 2175 which represented a gratuity for good service. Respondent 1's case is that out of the moneys which he received from the Railway company he provided altogether Rs. 2500, and this has been held to be the case by the learned Judge sitting in Insolvency (Krishnaswami Ayyangar J.). When the transaction was entered into respondent 1 paid Rs. 1500 and the father of Harry Daniel Rs. 2000. The balance Rs. 3000 was advanced by the vendors on the security of a mortgage of the property entered into by the insolvent and her son-in-law. The mortgage was discharged the same year. Out of the Rs. 3000 due to the vendors Rs. 1000 was advanced by respondent 1 and Rs. 2000 was raised on a mortgage in favour of the Madras City Co-operative Bank Limited. This deed of mortgage is dated 5th November 1938 and was executed by respondent 1 his wife, their son, their two daughters, and their son-in-law. The property was divided into two residences, one in which respondent 1 and his wife lived and the other in which their daughter and their son-in-law lived. On 28th November 1940, the insolvent executed a deed of settlement of her interest in the property in favour of her husband, her son and the daughter who had married Harry Daniel. The consideration was stated to be her natural love and affection for the beneficiaries. The deed contains these recitals :

"Whereas the settlor and one Harry Daniel jointly purchased the houses and ground 53 Avadhanam Pappier Road, and 4-A Dharmaraja Koil Street, Choolai, Madras, more particularly described in the schedule hereto by a deed of sale dated 20th day of August 1938 and whereas the settlor is in possession and occupation of one half of the said properties and whereas the settlor has been in indifferent health for some time and desires to settle her half share in the said properties in favour of her husband Amalorpavanathan and her children Louis Victor Magalamari Ammal the beneficiaries, out of her natural love and affection and with a view to provide for them."

The insolvent was adjudicated on 8th April 1941 and the order of adjudication was based on this deed of settlement. On 25th April 1941 respondent 1 filed an application in the insolvency proceedings in which he asked for a declaration that he was the owner of half of the property and that his wife was merely a benamidar for him to this extent. He also asked for an order permitting him to remain in possession of the portion of the house occupied by him and his wife. This is the application which has given rise to the appeal. The learned Judge held that the wife was a benamidar for her husband, but his judgment makes it clear that he did not arrive at this conclusion without hesitation. The evidence, to use the learned Judge's language, is meagre, but it is certainly sufficient to establish the fact that respondent 1 did provide Rs. 2500 of the money required for the purchase of the property. In fact, this has not been disputed before us. It is also accepted that if the wife is to be deemed to be a benamidar the husband is entitled to a half share in the property. The appellants are creditors of the insolvent and they oppose the husband's application. In the first place they say that the Rs. 2500 must be regardgd as a loan by respondent 1 to his wife. In the alternative they say that it must be regarded as an advancement to the wife for her own benefit; in other words that he intended to make a gift of the property to her. The first contention calls for little comment. There is no evidence from which it can be concluded that the husband intended to make a loan to his wife. In paying this money he was either intending to benefit his wife or he was using her as a benamidar. I return now to the question whether the English doctrine of advancement applies. Both the husband and the wife are Indians of the full blood and profess the Roman Catholic faith. Being Indians they cannot claim to come within the English rule, unless the Court is prepared to hold that it should be applied on grounds of justice, equity and good conscience. I can see no reason for its application on any of these grounds. The doctrine is entirely unknown to the personal

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1. (1854-57) 6 M. I. A. 53 : 4 W. R. 46: 1 Sar. 493: 2 Suther. 13 (P. C.), Gopeekrist Gossain v. Gungaprasad Gosain.
2. ('25) 12 A.I.R. 1925 P. C. 181 : 88 I. C. 327 : 48 Mad. 605 : 52 I. A. 286 (P. C.), Lakshmiah Chetty v. Kothandarama Pillai.
3. ('15) 2 A.I.R. 1915 P. C. 96 : 30 I. C. 299 : 37 All. 557 : 42 I. A. 202 (P. C.), Mt. Bilas Kunwar v. Desraj Ranjit Singh.
4. ('69-70) 13 M. I. A. 232 : 13 W. R. 1 : 4 Beng. L.R. 1 : 2 Suther. 279 : 2 Sar. 522 (P.C.), Moulvie Syed Uzher Ali v. Mt. Babee Ultaf Fatima.
5. ('36) 23 A.I.R. 1936 Rang. 256 : 163 I.C. 211 : 14 Rang. 242 (F.B.), Maung Tun Pe v. B. K. Halder.
6. ('21) 8 A.I.R. 1921 P. C. 56 : 57 I. C. 834 : 48 Cal. 260 : 10 L. B. R. 335 : 47 I. A. 275 (P. C.), F. J. R. Kerwick v. K. M. Kerwick.

laws of the vast majority of the inhabitants of this country, and Indian Courts have persistently refused to apply it to the Hindus and the Mahomedans. In delivering the judgment of the Privy Council in 6 M. I. A. 53[1] at p. 75, Knight Bruce L. J. said :

" It is clear that in the case of a stranger the presumption is in favour of its being a benamee transaction, that is a trust ; but it is clear also that in this country, where the person in whose name the purchase is made is one for whom the party making the purchase was under an obligation to provide, the case is different ; and it is said that that ought to be deemed the law of India also, not because it is the law of England, but because it is founded on reason and the fitness of things, if I may use the expression, or natural justice, that on such grounds it ought to be considered the law of India. Now, their Lordships are not satisfied that this view of the rule is accurate, and that it is not one merely *proprii juris.*"

Later in this judgment Knight Bruce L. J. observed :

" Various reasons may be urged against the abstract propriety of the English rule. It is merely one of positive law, and not required by any rule of natural justice to be incorporated in any system of laws, recognising a purchase by one man in the name of another, to be for the benefit of the real purchaser. Their Lordships, therefore, are not prepared to act against the general rule, even in the absence of peculiar circumstances ; but in India there is what would make it particularly objectionable, namely the impropriety or immorality of making an unequal division of property among children. This might be more striking where there were more sons than one ; but if the objection exists, it does not become less where there is only one son, for the father may have others, and in such a case the same objectionable consequences would follow as where several sons were in being."

It seems to me that these observations which are embodied in a judgment of the Judicial Committee are fatal to the plea that the English doctrine of advancement can be applied legitimately to Indians. Religious belief is not a factor in the application of the doctrine and therefore there is no reason for making an exception in the case of Indian Christians. Consequently, I hold that the presumption which is associated with the doctrine does not arise here. Section 82, Trusts Act, 1882, provides that where property is transferred to one person for a consideration, paid or provided by another person, and it appears that the other person did not intend to pay or provide the consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. Therefore as respondent 1 provided the money for the purchase of a half of the property, a half must be regarded as being his unless the evidence justifies the conclusion that he intended to make a gift to his wife. The appellants say that the evidence does justify this conclusion. They point to the fact that when the insolvent and her son-in-law obtained a loan for the Madras City Co-operative Bank Limited he allowed them to represent to the bank that they were the owners of the property and to raise money on this basis. Then they point to the fact that he allowed his wife to settle the property on him and their son and married daughter, instead of obtaining from her a declaration that she was merely his benamidar.

Are these facts sufficient to establish an intention on the part of respondent 1 to make a gift in favour of his wife ? Krishnaswami Ayyangar J. did not think they were sufficient and his decision cannot be disturbed unless it is shown to be wrong. The burden is upon the appellants and I am not prepared to say that the burden has been discharged. It was, of course, improper for respondent 1 not to disclose the full facts to the Madras City Co-operative Bank Limited, but he did join in the mortgage which was created in its favour and it is very likely that he thought that this was enough. His wife was an ostensible owner and he was not. Neither do I find the fact that respondent 1 allowed his wife to execute a deed of settlement instead of a declaration of his ownership, surprising, having regard to the mentality which is so often shown by litigants in a similar position. His wife owed money to the appellants who had obtained a decree against her, and it is very probable that he considered that the best method of safeguarding himself was a deed of settlement. The conduct of respondent 1 is no doubt blameworthy, but this is not the deciding factor. The question which the Court has to decide is whether the evidence justifies the conclusion that respondent 1 intended to make a gift to his wife and for the reasons given I agree with the learned Judge that it is not sufficient for the purpose. The appeal will be dismissed with costs in favour of respondent 1.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 505

LEACH C. J. AND BYERS J.

Sri Rajah Rao Niladri Rao Garu — *Appellant*

v.

R. Venkatarama Iyer and others — *Respondents.*

Appeal No. 49 of 1941, Decided on 11th February 1942, against order of Gentle J., D/- 10th September 1941.

Civil P. C. (1908), O. 21, R. 97 — Applicability—R. 97 applies only where property is sold by Court in execution proceedings and requirements of R. 95 are fulfilled.

Rule 97 of O. 21 only applies when property has been sold by the Court in execution proceedings and the requirements of R. 95 have been fulfilled. Hence where a conveyance has been executed outside Court and there is no certificate and no order for delivery of possession, the remedy of the decree-holder vendee on obstruction to possession is by way of a suit and not by an application under R. 97: (1873) L. R. 5 P. C. 516, *Disting.*; ('33) 20 A.I.R. 1933 Cal. 246, *Rel. on* ; ('24) 11 A. I. R. 1924 All. 495 (F.B.), *Dissent.* [P 507 C 1, 2]

C. P. C. —

('40) Chitaley, O. 21 R. 97, N. 1 Pt. 2.

('41) Mulla, Page 910 Pts. (g) and (h).

Y. Govindarajulu — for Appellant.

N. Panchapagesa Iyer, V. R. Nataraja Iyer and L. S. Veeraraghava Iyer — for Respondents.

LEACH C. J. — It is not necessary to enter upon a discussion of the merits of this appeal because a preliminary objection taken by respondent 1 must prevail. On 30th July 1930, respondent 3 obtained a final decree for sale in a mortgage suit instituted on the original side of this Court against respondent 2 and others. The preliminary decree was for the payment of Rs. 4,64,059-6-9 with interest. The security comprised a number of immov-

able properties, some in Madras and some in Salem. As the result of an arrangement between respondent 3 (the decree-holder) and respondent 2 (the judgment-debtor) all the properties except two lots were released on payment by respondent 2 to respondent 3 of their values. On 20th June 1934 the unrealized security included 22 acres of land in Mambalam, a suburb of Madras. The decree-holder had applied for the sale of these lands and a proclamation had been settled, but by consent of the parties the sale was on that date postponed for a period of three months. It was a condition of the postponement that if the value of the lands was not paid to the decree-holder within three months they should be sold by him or on his behalf "by private treaty or otherwise," without the necessity of a fresh proclamation of sale. It is the appellant's case that 120 grounds of the Mambalam property were covered by Paimash No. 611. Eighteen grounds equal acre. Respondent 2 did not pay to the decree-holder the value of the lands within the required period, but the decree-holder eventually found in the appellant a purchaser for 33 grounds at an acceptable price. It is the appellant's case that at this stage respondent 2 conceived the idea of getting the benefit of this area for himself by pretending that the lands did not fall within the paimash No. 611 but within paimash Nos. 606 to 609. All the lands comprised within paimash Nos. 606 to 609 had been released from the mortgage. Apparently there are no records in existence from which accurate information can be obtained with regard to the boundaries of the lots included in these paimash numbers.

On 24th April 1939 Gentle J. ordered respondent 2 to execute a conveyance to the appellant in respect of the 33 grounds of land said to be within paimash No. 611. A conveyance was drawn up and approved by the Court. The boundaries of the 33 grounds were taken from an original sale deed executed in favour of respondent 2 in 1920. In obedience to the order of the Court respondent 2 on 19th March 1941 executed the conveyance, but made the following unauthorised addition at the end of the document: "As the lands are not properly identified and as there are no correct survey numbers, I am not selling any lands already released by the Rajah Sahib and sold by me to others. These sales have been made according to the Corporation identification. I have excluded these plots." This addition to the document was eventually struck out under an order of the Court. On 24th March 1941 respondent 2 according to the appellant, conveyed to respondent 1 the lands which the appellant had purchased under the conveyance of 19th March 1941. According to respondent 1, the two lots of properties are quite distinct, the lands bought by him being within paimash Nos. 606 to 609. When the appellant went to take possession of the property which he understood he had purchased he discovered that respondent 1 was already there and he alleges that respondent 1 obstructed him. In these circumstances, he filed an application under O. 21, Rr. 95 and 97, Civil P. C., asking for an order of the Court directing the removal of the obstruction. This application was also heard by Gentle J. who came to the conclusion that the evidence did not establish that the lands purchased by the appellant were the same as those purchased by respondent 1. He considered that there might have been a mistake. The learned Judge further held that there was no evidence of obstruction. On these findings he dismissed the application. The appeal is from his order of dismissal. Respondent 1 says that the appeal does not lie because the application did not lie. He contends that O. 21, R. 97 only applies to sales held by the Court in execution of decrees and maintains that the sale to the appellant was a private one.

The provisions of the Code with regard to the sale of immovable property in execution of a decree are contained in Rr. 82 to 103 of O. 21. Rule 83 which gives power to the Court to postpone a sale to enable a judgment-debtor to raise the amount of the decree does not apply to a decree for sale granted in a mortgage suit. Rule 94 states that where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. The rule further provides that the certificates shall bear the date on which the sale became absolute. Therefore, in a sale held in execution the Code requires the Court to grant a certificate of sale containing specified particulars. Rule 95 says that where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under R. 94, the Court shall, on the application of the purchaser, order delivery to be made by putting the purchaser or any person whom he may appoint to receive delivery in possession of the property. Rule 97 reads as follows :

"(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same."

In this case there was no sale certificate and no order for delivery of possession and the question which the Court is called upon to decide is whether in these circumstances an application under R. 97 would lie at the instance of the appellant. The conveyance to the appellant was made in pursuance of an arrangement which was entered into between him and respondents 2 and 3 outside the Court. It is said by Mr. Venkatarama Sastriar on behalf of the appellant, that parties may choose to adopt their own procedure for the realisation of the decretal amount and that this does not preclude the operation of Rule 97. In this connexion he relies on a passage from the judgment of the Privy Council in (1873) L. R. 5 P. C. 516[1] at p. 522. In delivering that judgment Sir Montague E. Smith said :

"It is true that there was a deviation from the *cursus curiæ*, but the Court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of appeal cannot properly review the decision such departures have never been held to deprive either of the parties of the right of appeal."

1. (1873) L.R. 5 P.C. 516 : 30 L.T. 729 : 22 W.R. 900, Pisani v. Attorney-General for Gibralter.

Mr. Venkatarama Sastriar has also drawn our attention to the fact that the principle stated in (1873) L. R. 5 P. C. 516[1] was affirmed by their Lordships in 2 I.A. 219.[2] The facts in (1873) L. R. 5 P. C. 516[1] are in no way analogous to the facts here. The Court is here concerned with the effect of certain provisions of an Indian statute. The statement of Sir Montague E. Smith in (1873) L. R. 5 P. C. 516[1] on which Mr. Venkatarama Sastriar so much relies cannot legitimately be taken out of its setting and used for the purpose of interpreting R. 97 of O. 21, Civil P.C. In my judgment the rule only applies when property has been sold by the Court in execution proceedings and the requirements of R. 95 have been fulfilled. The provisions of R. 17 of O. 19 of the Rules of the Original Side of this Court lend strong support for this opinion. The rule states that every application under O. 21, R. 95 of the Code for possession of immovable property sold in execution of a decree shall be accompanied by a certificate of the Registrar that a sale certificate under O. 21, R. 94 of the Code has been granted to and in the name of the person who at the time of the sale was declared to be the purchaser. The objection now taken by respondent 1 was taken by him when the application for the removal of the obstruction was before Gentle J. The learned Judge overruled the objection and in doing so accepted the opinion expressed by Sulaiman J. in 46 All. 693.[3] It was there stated that the provisions of R. 97 come into operation only when either the delivery of possession has been ordered by the Court, or, at any rate, an attempt to obtain possession has been made by the decree-holder out of Court. The decision of the Allahabad High Court was criticised by Rankin C. J. in 60 Cal. 8[4] and the learned Chief Justice refused to follow it. In the course of his judgment Rankin C. J. said that the correct way of working Rr. 95, 96 and 97 was this :

"First of all, to find out whether the applicant claims to be within R. 95 or R. 96. If he does not, dismiss his application then and there and leave him to bring a separate suit. If on any reasonable right he claims to be under R. 95 or R. 96, let him have a general warrant mentioning nothing about any particular person who is likely to give trouble; wait and see what particular person does give trouble when the officer of the Court comes to put the applicant into possession; and according to the claim of the person who thus gives trouble, an application may successfully be made under R. 97."

The effect of the decision in 60 Cal. 8[4] is that the obstruction must be to an officer of the Court before an application can be made under R. 97. I see no reason to doubt the correctness of this interpretation of the rules, but even if obstruction to the purchaser himself is sufficient to found an application, it does not, as I have already indicated, lie until the requirements of R. 95 have been met. Rules 95 and 97 must be read in conjunction. The conditions requisite for the application of R. 97 were not fulfilled here and therefore the application did not lie. The appellant's remedy, assuming that there was unlawful obstruction, was by way of suit, not by way of an application under R. 97. For these reasons I would dismiss the appeal with costs, Rs. 150.

BYERS J.—I respectfully agree.

C.R.K./K.S. *Appeal dismissed.*

2. ('74) 24 W. R. 193 : 15 Beng. L.R. 383 : 2 I. A. 219 : 3 Sar. 519 : 3 Suther 190 (P. C.), Sadasiva Pillai v. Ramalinga Pillai.

3. ('24) 11 A.I.R. 1924 All. 495 : 83 I.C. 923 : 46 All. 693 : 22 A.L.J. 626 (F.B.), Sobharam v. Tursi Ram.

4. ('33) 20 A.I.R. 1933 Cal. 246 : 143 I.C. 381 : 60 Cal. 8 : 36 C. W. N. 965, Kiranshahi Dasee v. Official Assignee of Calcutta.

A. I. R. (29) 1942 Madras 507

WADSWORTH AND PATANJALI SASTRI JJ.

A. Rangaswami Ayyar — Appellant

v.

Jainabu Bibi Ammal and others — Respondents.

Appeals Nos. 107 of 1938 and 169 of 1940, Decided on 21st August 1941, against decree and order of Sub-Judge, Dindigul, D/- 7th October 1937 and 27th October 1939, respectively.

(a) Mortgage—Lease by usufructuary mortgagee back to mortgagor expiring in 1934—Mortgagor continuing in possession on understanding that formal lease similar to previous one would be executed—Suit by mortgagee to recover mortgage amount and rent — Claim to mortgage amount admitted but for rent disputed — Mortgagee held entitled to rent at rate of previous lease from 1934 to date of suit—Costs of mortgagee — Failure to ask for decree on confession under O. 12, Rule 6, Civil P. C. — Effect — Decree for rent held not decree for interest — Interest on arrears of rent and costs held could be scaled down under S. 9, Madras Agriculturists Relief Act.

The usufructuary mortgagee leased back the mortgaged property to the mortgagor. After the termination of the second lease in 1934 no fresh lease was executed and the mortgagor continued in possession and enjoyment of the property under an understanding that a formal lease would be executed similar to the previous leases. Their occupation after 1934 was on the basis that they were to go on paying the rent as they had paid previously. In the suit in 1937 for mortgage amount and rent by the mortgagee the claim in respect of the former was admitted but that for the rent was disputed :

Held that the mortgagee was entitled to rent from 1934 up to the date of suit at the same rate which prevailed during the currency of the previous written leases and not merely damages for use and occupation. [P 508 C 2]

Held further that the mortgagee was entitled to costs on the uncontested scale so far as the admitted amount of the plaint claim was concerned and costs on the contested scale only to the extent to which the claim was actually contested. The amount of the costs could not be swelled merely because the plaintiff abstained from asking for the decree on confession to which he was entitled under O. 12, R. 6, Civil P. C. [P 508 C 2; P 509 C 1]

Held also that the judgment-debtors having been found to be agriculturists were entitled to relief under the Madras Agriculturists Relief Act only to the extent to which interest had been decreed. The decree for rent or damages was not a decree for interest; but the interest on arrears of rent and the interest on costs could be scaled down under S. 9 of that Act. [P 509 C 1]

C. P. C. —

('40) Chitaley, S. 35, N. 26 Pt. 7.

('41) Mulla, Pages 148-149, Note "Costs to be in the discretion of the Court."

a T. P. Act —
('36) Mulla, Page 661, Note "Terms of holding over."
('37) Mitra, Pages 638-639, N. 616.

(b) Madras Agriculturists Relief Act (4 of 1938), S. 10 (2) (i) — Mortgagee need not be in physical possession for purposes of S. 10 (2) (i) —Usufructuary mortgage—Lease back to mortgagor — Mortgagee must be deemed to be in possession.

A usufructuary mortgage and a lease back to the mortgagor cannot be regarded as a simple mortgage bearing interest. Though the mortgage and lease back form part of the same transaction effect must be given to each according to its terms and the Court cannot, by reading the two together, spell out a transaction totally different in character and b incidents. A person who leases his land to another remains in possession of the land leased and the same is true whether he be a mortgagee with possession or owes his interest in the land to an absolute title. It is not necessary for the purpose of S. 10 (2) (i) that the mortgagee should be in physical possession of the property. A mortgagee with possession who has leased the land back to the mortgagor must be treated as in possession of the property mortgaged, so as to get the benefit of the exception in S. 10 (2) (i) : ('40) 27 A.I.R. 1940 Mad. 946, *Rel. on.* [P 509 C 1]

M. S. Venkatarama Iyer — for Appellant.

C. A. Seshagiri Sastri — for Respondents.

JUDGMENT. — These two appeals both arise out of a suit on a usufructuary mortgage. Application No. 107 of 1938 is the plaintiff's appeal against c the disallowance of a part of his claim for rent on the hypotheca which was leased back to the mortgagor. C.M.A. No. 169 of 1940 is preferred against the order scaling down the decree under Ss. 8 and 19 of Act 4 of 1938. The suit is based on a mortgage dated 29th September 1930 executed by defendant 1 and her husband, Shaik Farid Mohamed Vavu Khan Rowther for a sum of Rs. 25000, of which admittedly only Rs. 19000 was paid. There was a lease to the mortgagors on 1st October 1930 under Ex. C for two years. This was renewed in 1933 for one year by Ex. D and by Ex. E for a further year which terminated on 29th November 1934. According to the terms of Ex. E, the rent of Rs. 1995 was payable on 29th September 1934. There was no fresh lease deed, after Ex. E was executed; but it has been found—and the correctness d of the finding is not disputed—that the defendants continued in possession and enjoyment of the land upto the time of the suit. On 14th December 1934 the plaintiffs sent a notice demanding the mortgage amount and arrears of rent. On 2nd September 1935 there is a letter from the husband of defendant 1 which indicates that the relations between the parties were friendly. On 25th September 1935, we have Ex. F sent by Shaik Farid Mohamed Vavu Khan Rowther, the husband of defendant 1, to the plaintiff in which he says "as soon as he is well he will come in person to pay the entire amount due and execute the deed." Exhibit G-2 is a further notice dated 31st October 1935. Exhibit F-2 dated 11th July 1936 is a letter in which the defendant's husband asks for time to pay the money and in Ex. J dated 30th November 1936 we have a letter from one K. H. Usain Rowther who appears to be an agent or representative of the defendants which contains the statement that they, (apparently the defendants) thought that the plaintiff should agree to their taking the properties for five years after e fixing the amount "in respect of the arrears of rent due upto this date." The learned subordinate Judge has found that there was no oral lease for the period following November 1934 such as was alleged in the plaint and has given a decree only for damages for use and occupation for the period upto November 1936 and has given no decree for rent or for damages for the broken period ending with the filing of the suit in March 1937. It is no doubt true that there is no very clear evidence of any definite oral lease for this period; but it is certainly established by the documents in the case, particularly the Exs. F and J, that the defendants must have been in possession under some arrangement whereby they agreed to pay rent and to execute a formal lease deed when convenient. It would appear that the execution of the lease deed was prevented by the illness of defendant 1's husband. Their continued occupation during f this period was evidently on the basis that they were to go on paying the rent as they had paid previously.

The defence was a plea that on the termination of the lease in November 1934, the defendants asked the plaintiff to take possession of the land and that he omitted to do so and that subsequently the land was leased out in order to save loss after it had been lying waste for some time. Presumably it is a leasing by the defendants to which this rather ambiguous pleading refers. There is no real evidence of any invitation to the plaintiff to take possession of the land. The documents filed in the case make it quite clear that the land was being enjoyed by the defendants under an understanding that a formal lease would be executed similar to the previous leases. On this state of evidence we are of opinion that the g lower Court was wrong in awarding only damages for use and occupation and that the decree should properly have given rent at the same rate which prevailed during the currency of the written leases. Some argument has been advanced before us with reference to the liability for rent for the broken period of five months and 24 days, between the termination of the last written lease on 29th November 1934 and the date on which the defendants were dispossessed by the receiver. There seems to have been no discussion of this question in the Courts below. The plaintiff expressly claimed rent not merely for the completed years but also for the broken period. There is nothing to show that the defendants did not enjoy the crops on the land during this period and in the absence of any evidence or apparently any serious contention in the h lower Court, that the defendants were not liable for the proportionate rent for this period we think that it should be given. A further contention relates to the decree for costs. In the written statement the defendants admitted their liability for the principal amount of Rs. 19000, and consented to a decree for that sum. They disputed the claim for rent only. The lower Court has given costs on the uncontested scale so far as the admitted amount of the plaint claim is concerned and has allowed costs on the contested scale only to the extent to which the claim was actually contested. The fees' rules do not expressly make provision for any such contingency; but we consider that the lower Court's order is both wise and legal. It was open to the plaintiff under O. 12, R. 6, Civil P. C., to have asked immediately for a decree for the sum of Rs. 19,000 on the admission in the written statement. Had he asked for such a decree there can be no doubt that the proper order for costs would be that on that sum costs would be calculated on the uncontested scale. We

do not see why the amount of costs should be swelled merely because the plaintiff abstained from asking for the decree on confession to which he was entitled.

The civil miscellaneous appeal raises a point under Act 4 of 1938 which, if not explicitly, is covered by the implications of a decision of this Bench. The contention was that the judgment-debtors were entitled to relief under the Act in respect of this mortgage debt on the theory that the rent payable under the lease really represented interest and that the mortgagee was not in possession of the property mortgaged, so as to bring in force the exception under S. 10 (2) (i) of the Act. The theory that a usufructuary mortgage and a lease back can be regarded as a simple mortgage bearing interest has been disapproved by us in (1940) 2 M.L.J. 760[1] where we pointed out that though the mortgage and lease back form part of the same transaction effect must be given to each according to its terms and the Court cannot, by reading the two together, spell out a transaction totally different in character and incidents. In the case just quoted, it was not explicitly argued that a mortgagee with possession who had leased the land back to the mortgagor was no longer in possession of the property mortgaged, so as to get the benefit of the exception in S. 10 (2) (i) of Act 4 of 1938. But we do not consider that this argument is tenable. A person who leases his land to another remains in possession of the land leased and the same is true whether he be a mortgagee or owes his interest in the land to an absolute title. We do not consider that it is necessary for the purpose of S. 10 (2) (i) that the mortgagee should be in physical possession of the property.

The judgment-debtors having been found to be agriculturists are entitled to relief under the Act only to the extent to which interest has been decreed. The decree for rent or damages is not a decree for interest; but the interest on arrears of rent and the interest on costs will have to be scaled down under S. 9 of the Act. The result therefore will be that the decree of the lower Court will be amended by giving to the plaintiff rent from 29th November 1934 upto the date of the suit at the rate of Rs. 1995 per annum. The interest on the arrears of rent and on the decree for costs will be at five per cent. upto 22nd March 1938, thereafter at 6¼ per cent. upto the date fixed for payment which is three months from today and subsequent interest on the aggregate amount at six per cent. The plaintiff will be entitled to costs as decreed by the lower Court, on the uncontested scale so far as the principal sum is due and full costs at the contested scale on the balance of the decree. The respondents will pay the appellant proportionate costs in the regular appeal and full costs in the civil miscellaneous appeal.

C.R.K./G.N. *Order accordingly.*

1. ('40) 27 A.I.R. 1940 Mad. 946 : (1940) 2 M.L.J. 760, Abdul Khadir v. Subramania Pattar.

A. I. R. (29) 1942 Madras 509

KING AND HAPPELL JJ.

R. D. K. Venkatalingama Nayanim Bahadur Varu — Appellant

v.

Raja Inuganti Rajagopala Venkata Narasimha Nayanim Garu—Respdt.

Appeal No. 411 of 1940, Decided on 18th December 1941, against order of Sub-Judge, Chittoor, D/- 2nd February 1940.

(a) Civil P. C. (1908), O. 21, R. 90 Proviso—Time granted to furnish security—Draft security tendered — Court subsequently without passing orders as to adequacy of security issuing notice to opposite side—On objection security tested and found insufficient—Court held not deprived of power to decide inadequacy of security and held entitled to dismiss application without considering application on merits.

A applied under O. 21, R. 90 to have the sale set aside. The Judge ordered that he should furnish security under the proviso to R. 90 and granted him time for one week for this purpose. A draft security bond was tendered to the Court by *A*. Subsequently, without passing any orders in regard to the adequacy of the security tendered or to the necessity for furnishing any registered security bond, the Court issued notice to the opposite side. When he appeared he took the objection that the property offered as security was not sufficient and the Court ordered the security to be tested. The result of the test was that the property offered as security was found to be wholly inadequate and the Court thereupon dismissed the application of *A* without considering it on its merits, on the ground that he had failed to furnish security :

Held that in issuing notice, the Court did not intend to deprive itself of the power of deciding whether the security to be eventually furnished by *A* was adequate or not, and when it was found that the security was not adequate, the Court was entitled under R. 90 to dismiss the application without any further consideration of its merits. [P 510 C 2]

(b) Civil P. C. (1908), O. 21, R. 90—Question of accepting offer for further security held discretionary with execution Court and should not be interfered with.

On finding the security furnished as inadequate, whether the Court should accept the offer to furnish further security is a matter entirely for the discretion of the executing Court and the High Court should not interfere with the exercise of the discretion especially when the security originally offered was grossly inadequate. [P 510 C 2]

(c) Civil P. C. (1908), S. 47 and O. 21, R. 90—Sale void—Application to set aside is under S. 47.

If the sale is in fact void the judgment-debtor is entitled to have it set aside quite irrespective of the fact whether he furnishes security or not. An application to set aside the sale falls under S. 47. [P 511 C 1]

C. P. C. —

('40) Chitaley, S. 47, Notes 51 and 71.

('41) Mulla, Page 896, Note "Applications to set aside sale on other grounds."

A. Bhujanga Rao and D. R. Krishna Rao — for Appellant.

P. V. Rajamannar and K. Subba Rao — for Respondent.

KING J.—The subject-matter of this appeal is a sale in execution of a decree in O. S. No. 86 of 1916 held on 30th September 1939. On 27th October, the appellant applied under O. 21, R. 90, to have the sale set aside. The learned Judge ordered that he should furnish security under the proviso to R. 90 and granted him time for one week for this purpose. On the same day (31st October) the appellant filed another application asking for more time for furnishing security, and eventually time was extended to 11th November on which day a draft

a security bond was tendered to the Court by the appellant. On 15th November, without passing any orders in regard to the adequacy of the security tendered or to the necessity for furnishing any registered security bond, the Court issued notice to the opposite side. When the respondent appeared he took the objection that the property offered as security was not sufficient and the Court ordered the security to be tested. The result of the test was that the property offered as security was found to be wholly inadequate and the Court thereupon dismissed the application of the appellant without considering it on its merits, on the ground that he had failed to furnish security. The appellant appeals against that order.

The first point taken in appeal is that by issuing notice on 15th November, the Court had admitted the application and had therefore precluded itself b from dismissing it except after consideration on the merits. This argument appears somewhat startling to us. But it is sought to be supported by the enunciation of a legal principle that whenever a Court issues notice, whatever the circumstances may be, the Court must be deemed to have admitted the petition, and therefore no further steps can be taken in regard to the dismissal of a petition under R. 90 because security has not been furnished. We have been referred to two rulings in this connexion; one the judgment of Mockett J. reported in (1940) 1 M. L. J. 350[1] and another judgment by a Bench of this Court of which one of us was a member, reported in 53 M. L. W. 719.[2] In the former case, it has been held that ordinarily the decision of the Court to issue notice is tantamount to the admission of an application; and, in the second case, the c same point of view has been taken and the learned Judges go even further and say that even though the Court below did not intend really to admit a petition, if in law the procedure adopted by it has necessarily the effect of having brought about the admission of the petition, then it must be deemed that the petition has been admitted independently of the intention of the Court. We cannot find in either of these judgments any comprehensive principle that in all circumstances the mere issue of a notice by the Court must be considered to be the equivalent of an admission of an application. In the two cases which have been brought to our attention, the circumstances were that a petition was first filed and notice was issued, and it was only after the notice had been served and the respondent had appeared that the Court began to consider the question raised before it by the respondents of the d necessity for calling upon the petitioner to furnish security. In the present case, when the petition was first filed by the petitioner, the Court called upon him before issuing notice, to furnish security. The facts therefore present this very essential point of difference. In both, (1940) 1 M.L.J. 350;[1] 53 M.L.W. 719,[2] there was no possible room for any argument that the Court could have meant anything else by issuing the notice than to admit the application.

In the present case, the learned Judge in the order now appealed against has carefully analysed the facts and circumstances and has come to the conclusion that when the Court issued the notice on the 15th its obvious intention was that that notice should be provisional. The Court assumed that the e petitioner, having filed a draft bond on 11th November, would proceed in due course to file a registered bond, and assumed also that in all probability that registered bond would be found to deal with property sufficient for the purpose of furnishing security. It therefore issued notice to save time, and provisionally, so that when the necessary formalities were completed by the petitioner, the Court could proceed to hear the application on its merits. The only alternative which we think is open to the appellant in this appeal is to convince us that on 15th November the decision of the Court to issue notice meant that the Court had changed its mind, and that after calling for security on 31st October and after waiting until the draft bond had in fact been presented, it decided that after all no security was necessary. We are quite unable to agree with this view of the attitude of mind of the lower Court f in the absence of any kind of record which would give any reason for this change of intention. We think the learned Subordinate Judge who passed the order now appealed against (who incidentally was not the same Judge who passed the orders in November) has come to the only reasonable conclusion, and has rightly divined the real intention of his predecessor, which was to issue notice provisionally. After all, in spite of the incidental remark made in the judgment in 53 M. L. W. 719,[2] the essential element in the admission of an application is the act of the Court admitting it. As was there held, if some act has been done which in law can amount to nothing else than the admission of an application, then the application must be deemed to be admitted, even if the Court did the act without really applying its mind to its consequences. But g whereas in this case, we are able upon the facts to ascribe to the Court a quite different intention when it issued the notice, then it would be absurd to hold that there is any principle of law by which the Court should be deemed to have done what it consciously did not intend to do. It is clear therefore to us that in issuing notice, the Court did not intend to deprive itself of the power of deciding whether the security to be eventually furnished by the petitioner was adequate or not, and when it was found that the security was not adequate, the Court was entitled under R. 90 as now amended to dismiss the application whithout any further consideration of its merits.

The second point argued in appeal was that even though the Court had found that the security actually furnished was insufficient, it ought to have accepted the offer of the appellant to furnish fur- h ther security within a brief interval. The Court was not inclined to accept this offer and considered that it was probably not made bona fide. This is a matter entirely for the discretion of the executing Court and we can see no reason why we should interfere with its exercise of its discretion in this particular case, especially as the result of the testing order showed that the security originally offered was grossly inadequate. So far therefore as this petition can be held to have fallen under O. 21, R. 90, we hold that it was rightly dismissed by the learned Subordinate Judge. There is, however, one further point, and that is that the petition is not confined to O. 21, R. 90, but falls also under S. 47. There is a contention by the appellant that the sale was not only invalid under R. 90, but was from its very inception, void, because the previous sanction of the District Judge of Chittoor had not been obtained for the holding of the sale. This proposition was challenged in the counter affidavit; but the

1. ('40) 27 A. I. R. 1940 Mad. 624 : 191 I. C. 29 : (1940) 1 M. L. J. 350, Narasimha Pattamahadevi v. Annan Naidu.
2. ('41) 28 A.I.R. 1941 Mad. 652 : (1941) 2 M.L.J. 109 : 53 M. L. W. 719, Chidambaram Pandaram v. Lakshminarayana Chettiar.

learned Subordinate Judge has given no adjudication upon it. If the sale were, in fact, void, the appellant is entitled to have it set aside quite irrespective of the fact whether he furnishes security or not. We accordingly set aside the order of the learned Subordinate Judge and remand the petition to be disposed of by him in the light of this judgment and in regard only to the contention just mentioned, which falls under S. 47. Costs in the Court below will abide the result. Costs of this appeal will be paid by the appellant.

C.R.K./R.K. *Case remanded.*

A. I. R. (29) 1942 Madras 511

BURN J.

Pattan Ahmed Khan — Petitioner

v.

Pyda Venkatachelamayya and another — Respondents.

Civil Revn. Petn. No. 1895 of 1941, Decided on 5th January 1942, to revise order of Dist. Court, Nellore, D/- 4th March 1941.

(a) Civil P. C. (1908), O. 47, R. 7 and R. 4 (2) Proviso (b) — Words "strict proof" in R. 4 (2) Proviso (b) — Meaning — "Proof" and "evidence"—Distinction—Appellate Court in deciding whether R. 4 has been complied with or not can see whether evidence adduced before lower Court did or did not amount to "proof".

The phrase "strict proof" in O. 47, R. 4 (2) Proviso (b) does not merely mean formal proof, or evidence admissible in accordance with the strict provisions of law. There is a difference between "proof" and "evidence". "Proof" is the effect produced upon the mind of the Judge by the evidence or evidence sufficient to satisfy the Judge to whom it is presented. A fact is said to be proved when the Court after considering all the matters before it comes to the conclusion that it exists or that a reasonable man ought to act upon the assumption that it does exist. In view of the words "strict proof" used in R. 4 (2) Proviso (b) there is no reason why the appellate Court under R. 7 in deciding whether the conditions of R. 4 have been complied with or not, should be precluded from seeing whether the evidence adduced before the lower Court amounted or did not amount to "proof". The appellate Court has jurisdiction to discuss the merits of the appellant's allegation that he had discovered new matter or evidence which was not within his knowledge or could not be adduced by him at the time of the trial of the suit: ('16) 3 A.I.R. 1916 Cal. 521; ('18) 5 A. I. R. 1918 Cal. 618; ('20) 7 A. I. R. 1920 Cal. 467; ('18) 5 A. I. R. 1918 Bom. 228; ('33) 20 A.I.R. 1933 Mad. 217 and ('39) 26 A. I. R. 1939 Mad. 289, *Not approved.* [P 511 C 2; P 512 C 1]

C. P. C. —

('40) Chitaley, O. 47, R. 4, N. 6, Pts. 3 and 4.
('41) Mulla, O. 47, R. 7, Page 1241, Pt. (n).

(b) Civil P. C. (1908), O. 47, R. 7—R. 7 does contemplate discussion of sufficiency of cause by appellate as well as trial Court.

Rule 7 does contemplate the discussion of the sufficiency of the cause by the appellate Court as well as by the trial Court. It provides that an order granting an application may be objected to on the ground that the application was after the expiry of the period of limitation prescribed and without sufficient cause. If that objection may be based upon the allegation that there was no sufficient cause, the sufficiency of the cause is a matter for the appellate Court as well as for the trial Court. [P 512 C 2]

C. P. C. —

('40) Chitaley, O. 47, R. 7, N. 8, Pt. 3.
('41) Mulla, O. 47, R. 7, Page 1241, Note "where application for review is time-barred."

P. V. Rajamannar and K. Subba Rao — for Petitioner.

K. Kuppuswami — for Respondents.

ORDER. — This is an application to revise the decision of the learned District Judge of Nellore in C.M.A. No. 53 of 1940. The learned District Judge was disposing of an appeal from an order passed by the learned District Munsif of Kavali granting an application for review. The applicant before the District Munsif was defendant 1 in O. S. No. 211 of 1931. The suit was decreed on 23rd December 1935 and steps were taken in execution and in 1938 shortly before the hypotheca was to be sold defendant 1 applied for review of judgment. He alleged that he had discovered a receipt dated 9th November 1928 for Rs. 450. He said that he had been unable to discover this in time to produce it at the trial and he has therefore prayed for review of judgment in order that this additional evidence might be admitted and taken into consideration. The learned District Munsif had to deal with three applications. One was an application for leave to file a petition for review in forma pauperis, another was to excuse delay in filing the application for review and the third was for the review itself. The learned District Munsif granted all these applications. He excused the delay on the ground that the petitioner had not been able to have access to the additional evidence earlier than the date which he himself had given. The learned District Judge on appeal thought that the District Munsif had excused the delay on very flimsy grounds and also that the order allowing review on the ground of discovery of new and additional evidence was not justifiable.

Learned counsel for the petitioner has drawn my attention to the case in 42 Cal. 830[1] in which it has been held that on appeal under O. 47, R. 7, Civil P. C., the appellate Court is powerless to interfere with a decision on a point of fact falling under R. 4. Order 47, R. 7 says that an order granting an application for review may be objected to on the ground that the application was (a) in controvention of the provisions of R. 2, (b) in contravention of the provisions of R. 4 or (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause. Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit. In 42 Cal. 830[1] in dealing with the phrase "strict proof" in O. 47, R. 4 (2) proviso (b) it was held that this merely meant formal proof, or evidence admissible in accordance with the strict provisions of law. This case was followed by the Calcutta High Court in two later cases reported in 45 Cal. 60[2] and 47 Cal. 568[3] and also by the Bombay High Court in 42 Bom.

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1. ('16) 3 A. I. R. 1916 Cal. 521 : 29 I. C. 282 : 42 Cal. 830 : 19 C.W.N. 804, Ahed Khondkar v. Mohendra Lal.
2. ('18) 5 A. I. R. 1918 Cal. 618 : 42 I. C. 484 : 45 Cal. 60 : 26 C.L.J. 187 : 21 C.W.N. 1076, Nundolal Mullick v. Punchanan Mukherjee.
3. ('20) 7 A. I. R. 1920 Cal. 467 : 56 I. C. 734 : 47 Cal. 568 : 31 C. L. J. 134, Chiranji Lal Ramlal v. Tulsiram Jankidas.

295.[4] With due respect to these learned Judges who have pronounced these judgments, it appears to me that they have not given sufficient weight to the "word "proof" in R. 4 (2) proviso (b). There is a difference between "proof" and "evidence." "Proof" is the effect produced upon the mind of the Judge by the evidence or evidence suffcient to satisfy the Judge to whom it is presented. A fact is said to be proved when the Court after considering all the matters before it comes to the conclusion that it exists or that a reasonable man ought to act upon the assumption that it does exist.

In 42 Cal. 830,[1] it seems to be assumed that the words "strict proof" meant no more than evidence formally admissible, but I regret to say with all respect that I cannot accept this view. I see no reason why the Legislature should have used the words "strict proof" if the Legislature merely meant "evidence strictly admissible." I see no reason why the Legislature should have wished to warn the Court not to base its decision upon anything other than evidence strictly admissible. It goes without saying and it does not need to be laid down in any provision of the Civil Procedure Code, that the Court cannot act except upon evidence which is strictly admissible. With all respect therefore, it seems to me that if the interpretation put upon these words by the learned Judges of the Calcutta High Court were correct they would be quite otiose. The Legislature having used the words "strict proof," I can see no reason why the appellate Court in deciding whether the conditions of R. 4 have been complied with or not, should be precluded from seeing whether the evidence adduced before the lower Court amounted or did not amount to "proof." I find that two single Judges of this Court have followed the decisions in 42 Cal. 830.[1] Those decisions are reported in A.I.R. 1933 Mad. 217[5] and A.I.R. 1939 Mad. 289.[6] The Learned Judges however have not discussed the matter ; they have simply followed the decision in 42 Cal. 830.[1] For the reasons already given, I regret I am not able to do the same. There is no decision of a Bench of this Court on this matter so far as I am aware.

I am therefore unable to say that the learned District Judge exceeded his jurisdiction when he discussed the merits of the petitioner's allegation that he had discovered new matter or evidence which was not within his knowledge or could not be adduced by him at the time of the trial of the suit. It appears to me that the learned District Judge had jurisdiction to decide that question as well as other questions. Learned counsel for the respondents have pointed out that the learned District Judge's decision is also based upon the fact that the application was presented after the expiration of the period of limitation and without sufficient cause. Learned counsel for the petitioner contends that in this matter also the appellate Court is not competent to go into the merits of the allegation of "sufficient cause." He contends that it is sufficient if the applicant in the trial Court alleges sufficient cause and produces evidence of sufficient cause. Whether that evidence is really satisfactory or not is a question only for the trial Court according to learned counsel for the petitioner. I think, however, that R. 7 does contemplate the discussion of the sufficiency of the cause by the appellate Court as well as by the trial Court. It says that an order granting an application may be objected to on the ground that the application was after the expiry of the period of limitation prescribed and without sufficient cause. If that objection may be based upon the allegation that there was no sufficient cause, it seems clear that the sufficiency of the cause is a matter for the appellate Court as well as for the trial Court. For these reasons this application fails and is dismissed with costs.

C.R.K./G.N. *Application dismissed.*

4. ('18) 5 A.I.R. 1918 Bom. 228 : 46 I. C. 14 : 42 Bom. 295 : 20 Bom. L. R. 434, Bai Nemathu v. Bai Nematullabu.
5. ('33) 20 A.I.R. 1933 Mad. 217 : 145 I. C. 766, Seeramma v. Seshamma.
6. ('39) 26 A.I.R. 1939 Mad. 289, Muthuswami Naicker v. Chidambaram Chettiar.

A. I. R. (29) 1942 Madras 512

LEACH C. J. AND BELL J.

R. Chidambara Mudaliar and another — Appellants

v.

K. V. Ranganatham and another — Respondents.

Appeal No. 54 of 1941, Decided on 22nd January 1942, against order of Chandrasekhara Ayyar J., D/- 28th October 1941.

Presidency Towns Insolvency Act (1909), S. 9 (e)—Attachment before judgment—Decree-holder subsequently applying for sale of property attached—No order of Court is necessary.

Where there is an attachment before judgment from the time the decree-holder applies for execution, he elects to avail himself of the attachment before judgment and from that moment the attachment before judgment becomes an attachment available for the purposes of execution. There is no necessity for an order of the Court : ('36) 23 A.I.R. 1936 Mad. 91 and ('24) 11 A. I. R. 1924 Mad. 494 (F. B.), *Applied.* [P 513 C 1]

C. P. C. —
('40) Chitaley, O. 38, R. 11 Note 2 Pt. 2a.
('41) Mulla, Page 1125 Pt. (p).

K. Narasimha Iyer — for Appellants.

C. Venugopalachari — for Respondents.

LEACH C. J. — The appellants have been adjudicated insolvents by an order of this Court dated 28th October 1941. They challenge the validity of that order on two grounds. In the first place they say that no act of insolvency was committed, and in the second place that the evidence does not prove that there was a debt due to the petitioning creditor on the date of his application. On 29th January 1941 a creditor, who had filed a suit against the appellants, obtained an order for the attachment before judgment of certain immovable property belonging to them. The suit was successful, and, on 27th July 1941 a decree was passed against the appellants for Rs. 10,500. On 11th September 1941, the decree-holder applied for the sale of the property which was already under attachment. The petition for adjudication of the appellants was filed on 17th October 1941 and the act of insolvency alleged was that the debtors' property had been under attachment for more than 21 days. Section 9 (e), Presidency Towns Insolvency Act, states that a debtor commits an act of insolvency "if any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money." The appellants contend that cl. (e) of S. 9 does not apply in this case. They say

that as the attachment was effected before judgment, it cannot be deemed to be an attachment in execution of the decree.

Order 38, R. 11, Civil P. C., provides that where property is under attachment before judgment and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of the decree to apply for a re-attachment of the property. Therefore, where property has been attached by an order of attachment before judgment and the plaintiff obtains a decree for payment of money, all that he has got to do is to apply for an order of the Court directing the sale of the property attached. When such an application is made, the attachment automatically becomes an attachment in execution of the decree. In my judgment, no other construction is open. If, however, authority is wanted, it is to be found in 47 Mad. 483[1] and in 59 Mad. 303.[2] In 47 Mad. 483[1] the question was whether the words "property attached in execution" to be found in O. 21, R. 57, Civil P. C., include property attached before judgment, when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale. The majority view was that those words did include property attached before judgment. Waller J., observed that once it has been found that for one purpose an application to execute converts an attachment before judgment into an attachment in execution, the conclusion is inevitable that the conversion operates for all purposes. He added that the same question had been argued before him with reference to S. 9, Presidency Towns Insolvency Act, and in this connexion said :

"Under that section, an act of insolvency is committed where any part of a man's property has been attached in execution of a decree for over 21 days. It would, in my opinion, be anomalous to hold that an attachment before judgment takes the judgment-debtor out of the section, even though execution had been proceeding against his property for more than the prescribed period."

In 59 Mad. 303,[2] Varadachariar J. delivering the judgment of the Bench said :

"As a question of principle, if an attachment before judgment can be treated as an attachment for purposes of execution at all, it is difficult to see what necessity there is for an order of Court. A more reasonable view seems to us to be to hold that from the time the decree-holder applies for execution, he elects to avail himself of the attachment before judgment and from that moment the attachment before judgment becomes an attachment available for purposes of execution."

It follows from what I have already said that I am in entire agreement with these observations and that I consider the learned Judge sitting in Insolvency was right in holding that there had been an attachment of the appellants' property for more than 21 days, within the meaning of S. 9 (e), Presidency Towns Insolvency Act. The appellants' second contention can be disposed of in a few words. A creditor who asks for an order of adjudication against his debtor must, of course, prove that the debtor owes him at least Rs. 500 at the time the application is made. In this case the petitioning creditor claimed that there was due to him Rs.3825 on a promissory note, dated 12th May 1940. The petition was supported by an affidavit setting out this fact and stating that the amount due on the promissory note had not been paid. The appellants filed a counter affidavit in which they alleged that no consideration had passed and went on to aver that the petitioning creditor had been paid. In an affidavit in reply, the petitioning creditor denied these allegations. The evidence before the Court consisted of the two affidavits of the petitioning creditor and the affidavit of the appellants which contained these somewhat conflicting pleas. The learned Judge accepted the affidavits of the petitioning creditor as being true and I see no reason to doubt the correctness of his decision. In my opinion, the appeal falls and should be dismissed with costs which should be paid out of the estate of the insolvents.

BELL J. — I agree.

C.R.K./R.K. *Appeal dismissed.*

1. ('24) 11 A.I.R. 1924 Mad. 494 : 79 I.C. 144 : 47 Mad. 483 : 46 M.L.J. 415 (F.B.), Meyyappa Chettiar v. Chidambaram Chettiar.
2. ('36) 23 A.I.R. 1936 Mad. 91 : 161 I.C. 93 : 59 Mad. 303 : 69 M.L.J. 908, Dalayya v. Sundaranarayana.

A. I. R. (29) 1942 Madras 513

HORWILL J.

Public Prosecutor — Appellant

v.

Linga Balija Devamma — Respondent.

Criminal Appeal No. 430 of 1941, Decided on 4th December 1941, against order of acquittal by Sess. Judge, Kurnool Division, D/- 3rd March 1941.

Criminal P. C. (1898), S. 195 — Complaint to village Magistrate is tantamount to information to police — Police finding complaint false, filing charge-sheet under Sec. 211, Penal Code, setting out all facts constituting offence—Complaint by police held valid complaint under S. 195.

When a complaint is given by a person to a village Magistrate it is given to him for the express purpose of informing the police; and so a complaint to the village Magistrate is tantamount to the sending of information to the police through the village Magistrate. A charge-sheet, therefore, by the Sub-Inspector of Police amounts to a valid complaint under S. 195, if he has found the case to be false. If the complaint sets out all the facts which constitute the offence, it does not matter whether the complainant thinks that the offence committed is punishable under S. 211 or under S. 182, Penal Code : ('24) 11 A.I.R. 1924 Mad. 387 and ('25) 12 A.I.R. 1925 Mad. 400, *Expl., and Disting.*; 28 Mad. 565 and 32 Mad 258 (F. B.), *Rel. on.* [P 514 C 1,2]

Cr. P. C. —

('41) Chitaley, S. 195, Note 3a Pt. 1.

('41) Mitra, Pages 628 to 630 Note 614.

Appellant in person.

K. Kuppuswamy — for Respondent.

JUDGMENT. — The accused gave a complaint to the village Magistrate alleging that somebody had entered her house and stolen jewels worth Rs. 429. In due course, the village Magistrate sent the usual reports to the police and to the Sub-Magistrate; and on the receipt of the report of the village Magistrate, the police took cognizance of the matter and reported the case as false. The police subsequently filed a charge-sheet purporting to be under S. 211, Penal Code, but the Sub-Divisional Magistrate found that the offence committed was

a one punishable under S. 182, Penal Code. He considered on the evidence that the case had been amply proved and convicted and sentenced the accused. In appeal, the learned Sessions Judge, without considering the case on its merits, came to the conclusion on a preliminary objection raised by the accused, that the charge-sheet by the police did not amount to a valid complaint such as is required under S. 195, Criminal P. C. A number of cases were quoted before the learned Judge; and he particularly relied on 47 Mad. 229[1] in which it was laid down that a village Munsif cannot be treated as a subordinate of a Sub-Magistrate and that therefore where a complaint by a village Magistrate is necessary, a complaint by a Sub-Magistrate does not satisfy the requirements of S. 195, Criminal P. C. The learned Sessions Judge argues from that case that since a village Magistrate is not a Subordinate b of a Sub-Magistrate, he is likewise not a Subordinate of a Sub-Inspector of Police, and that as the complaint was made to the village Magistrate, a complaint by the Sub-Inspector of Police would not suffice. He accordingly set aside the conviction and sentence and acquitted the accused. The Crown has appealed against this acquittal. It is true that the village Magistrate is not a Subordinate of the Sub-Inspector of Police and that if a complaint by the village Magistrate was necessary, then the accused was rightly acquitted. Section 195, Criminal P. C., requires as a condition precedent to the taking cognizance of an offence punishable under Sec. 182, Penal Code, that there should be a complaint by the public servant concerned. Section 182 says :

"Whoever gives to any public servant any information intending thereby to cause such public servant to do anything which such public servant c ought not to do shall be punished . . . ."

When a complaint is given by a person to a village Magistrate, it is not expected or intended that the village Magistrate will himself take any action to assist the person who gives the complaint, except by sending a report to the police. When therefore a complaint is given to the village Magistrate, it is given to him for the express purpose of informing the police; and so a complaint to the village Magistrate is tantamount to the sending of information to the police through the village Magistrate. A distinction can therefore be drawn between a complaint by a Sub-Magistrate and one by a Sub-Inspector ; for although under Sec. 3 of Chap. 3, Part I of the Village Officers and Ryots Manual, a village Magistrate is bound to prepare a report in triplicate, sending one copy to the Sub-Inspector, one copy to d the Sub-Magistrate, and retaining one copy himself, the Sub-Magistrate does not ordinarily take any action on the report of the village Magistrate, whereas the Sub-Inspector is bound to do so under S. 154, Criminal P. C. A complaint by the village Magistrate may not therefore amount to the sending of information to the Sub-Magistrate upon which the Sub-Magistrate is intended to act; because the party makes a complaint, not for the purpose of giving information to the Sub-Magistrate, who will not take any action, but for the purpose of informing the police, who must take action and who the complainant knows will take action. 47 Mad. 229[1] upon which the learned Sessions Judge relied, merely says that a village Magistrate is not a Subordinate of a Sub-Magistrate and goes no further. The learned advocate for the accused here relies on 21 M. L. W. 661,[2] presumably as an authority for the proposition that where there is a complaint under S. 211, e Penal Code, there cannot be a conviction under Sec. 182, Penal Code. The facts in that case are not very clear; but there is no reason to think that the learned Judges laid down any such general principle of law. What is material is that there should be a complaint setting out all the facts which constitute the offence; and it does not matter whether the complainant thinks that the offence committed is punishable under S. 211 or under S. 182. This Court laid down as long ago as 28 Mad. 565[3] that information given to a village Magistrate for the purpose of being passed on to the Station House Officer and which it was his bounden duty to pass on, must be considered to be information given to the Station House Officer so as to justify his taking action. In 32 Mad. 258[4] which approves of the decision in 28 Mad. 565[3] the majority of the f learned Judges held that information given to a village Magistrate amounts to a complaint to the higher authorities to whom he is bound to pass on the information. It is therefore clear that the learned Sessions Judge was wrong in acquitting the accused on the preliminary ground. The order of acquittal is therefore set aside and the appeal remanded to the Sessions Judge for disposal on the merits.

C.R.K./R.K. *Appeal allowed.*

1. ('24) 11 A.I.R. 1924 Mad. 387 : 76 I.C. 647 : 25 Cr.L.J. 215: 47 Mad. 229 : 45 M.L.J. 553, Pallikkudathan v. Buddu Goundan.

2. ('25) 12 A.I.R. 1925 Mad. 400 : 87 I.C. 418 : 26 Cr.L.J. 962 : 21 M. L. W. 661, Muthu Goundan, In re.

3. ('05) 28 Mad. 565 : 3 Cr.L.J. 108, Emperor v. Jomalagadda Venkatarayudu.

4. ('09) 32 Mad. 258: 1 I.C. 187 : 9 Cr.L.J. 170 : 5 M.L.T. 269 (F.B.), The Sessions Judge, Tinnevelly Division v. Sivan Chetti.

A. I. R. (29) 1942 Madras 514

SOMAYYA J.

Oorpokkil alias Athikkot Parvathi Amma's daughter, Visalakshi Amma

v.

Oorpokkil alias Athikkot Kuppu Amma's son, Madhava Menon.

Second Appeal No. 1100 of 1939, Decided on 16th January 1942, against decree of Sub-Judge, South Malabar at Palghat, in A. S. No. 22 of 1938.

Limitation Act (1908), Art. 120 — Parties h **divided in status — One of them continuing in actual possession of property — Demand for division of that property—Person in possession not objecting — He is liable to account to other sharers for their shares of income of property— Suit for share of income—Article 120 applies — Plaintiff is entitled to share in income not merely for six years prior to suit but from date of division in status.**

When once the parties are found to have become divided in status and one of them continues in actual possession, and further, when there is a demand for division of that property a reply is sent by the person in possession saying that he has no objection to the property being divided, he is clearly accountable to the other sharers for their shares in the income of that property. Article 120 applies to a suit for a share in such income and the period of six years starts from the time when the right of the plaintiff is denied or from the time when there is ouster. In

a the absence of ouster or assertion of hostile title to the knowledge of plaintiff, the plaintiff's right to share in the income is not confined to a period of six years before the date of suit but he is entitled to a share in the income from the date of division in status : ('22) 9 A. I. R. 1922 Mad. 150 (F. B.) and ('33) 20 A. I. R. 1933 Mad. 200, *Rel. on*; ('36) 23 A.I.R. 1936 Mad. 654 and ('35) 22 A.I.R. 1935 Mad. 731, *Disting.* [P 515 C 2; P 516 C 1, 2; P 517 C 1]

Limitation Act —

('42) Chitaley, Art. 120, N. 15 Pt. 5.

('38) Rustomji, Page 1042 Pt. 5.

N. A. Krishna Ayyar and N. K. Anantha-padmanabham — for Appellants.

P. Govinda Menon, P. Chandrasekhara Menon and S. R. Subramaniam —for Respondents.

JUDGMENT.—The plaintiffs whose right to a b share in the income of the suit properties prior to the date of suit has been disallowed are the appellants and they challenge the finding of the lower appellate Court that they are entitled to an account only from the date of suit. The parties all formed members of a tarwad which owned the suit properties in British India and a number of other properties in the Native State of Cochin. The contesting respondent so far as this part of the appeal is concerned is defendant 1. He was the karnavan of the tarwad so long as it was undivided. The Cochin properties were made the subject of a partition suit in the District Court of Trichur, O. S. No. 63 of 1096 (1920) and Ex. 2 dated 15th November 1922 is a certified copy of the judgment in that suit. Exhibit 1 dated 12th August 1925 is a certified copy of the judgment in appeal in that suit. The present c suit is for partition of the properties in British India. The plaintiffs claimed a 10/24ths share on the footing that the plaintiffs' branch contained ten members on the date of the suit as against twenty-four on the whole. The defendants pleaded that the plaintiffs were not entitled to 10/24ths share on the ground that there was a division in status brought about in the year 1920 and that at that time the plaintiffs' branch would have been entitled to 1/17th. This plea was accepted by the plaintiffs and thereafter they confined their claim to 1/17th share with a claim for an account of their share of the income from the time when according to the defendants there was a division in status of the entire tarwad. This division in status was according to the defendants brought about by certain notices of the year 1920 evidenced by Exs. 5, 6, 7 and 8. By Ex. 5 dated 18th October 1920 partition was claimed on d behalf of defendant 2 of both the Cochin and British Indian properties. Reply notices sent on behalf of the other branches are Exhibits 6, 7 and 8. These notices, sent one on behalf of each branch, have effected a division in status. This position has been accepted by the lower Court. On this footing the District Munsif gave the plaintiffs a decree for partition and delivery at the rate of 1/17th share in the British Indian properties and also gave a decree for their share of the income from these properties from the date of the division which he fixed as 1096 kollam corresponding to 1920.

On appeal, the Subordinate Judge while upholding the right of the plaintiffs to 1/17th share in the properties, on the footing that there was a division in status in 1920, disallowed their claim to share in the income which had accrued prior to the date of suit. The reasons given are that before the suit of 1920 there was a prior razi decree in O. S. No. 8 of 1094 on the file of the District Court of Trichur, a copy of the judgment in which is Ex. 3. The plaintiff in that suit was the present defendant 1. Under that decree, on the footing that a sum of Rs. 3000 belonging to him was utilized for the benefit of the entire tarwad, he was given the right to enjoy during his lifetime, the profits of the lands in British India which are now sought to be partitioned; and this the Subordinate Judge holds is binding on the parties. If that is so, the plaintiffs' suit even for partition and recovery of 1/17th share should also have been dismissed and the plaintiffs cannot be given a decree for their share of the income even from the date of suit. Defendant 1 is still alive and, if the razi decree is binding, he is entitled to the entire income during his lifetime and the plaintiffs cannot get their share of the income even after the date of suit. The appellate Judge does not notice what really follows from the finding in the earlier part of the judgment. As a matter of fact, the rights of the parties as provided for in Ex. 3 were materially varied by f later events. First, there were notices — Exs. 5, 6, 7 and 8 — to which I have already referred. Then there was the partition decree in the prior suit which was for partition of the Cochin properties.

Under Ex. 3 the right given to the present defendant 1 was apparently on the footing that he would be the karnavan of the entire tarwad properties, both British Indian and Cochin, and it contemplated the continuance of the tarwad, but once that tarwad was put an end to by Ex. 2, judgment in O. S. No. 63 of 1096, the rights under Ex. 3 must necessarily be taken to have been given up and the provisions contained in the decree in that suit must take their place. As pointed out by Mr. Krishna Iyer for the appellants, provision has been made in the decree in that suit in respect of Rs. 3000 of which the entire tarwad had the benefit. The provision is that interest at 7½ per cent. should be paid by the other g branches to defendant 1 during his lifetime. This is clearly referred to in the judgment of the trial Court and also of the appellate Court. Thus the right created in favour of defendant 1 under Ex. 3 has been varied by the judgment in the suit of 1096 and this is not noticed by the Subordinate Judge. He seems to think that there is no reference to the Rs. 3000 given by defendant 1 in O. S. No. 63 of 1096. This is clearly wrong. There is a reference to the Rs. 3000 which was really made up of two sums of Rs. 2000 and Rs. 1000. The judgment of the lower appellate Court disallowing the right to a share in the income even though the parties have been found to have become divided in status in the year 1096, (in this respect accepting the case of the defendants themselves) appears to me clearly wrong. When once the parties are found to have become h divided in status and one of them continues in actual possession, and further, when there is a demand for division of that property a reply is sent by the person in possession saying that he has no objection to the property being divided, he is clearly accountable to the other sharers for their shares in the income of that property. The ground upon which the lower appellate Court rejected the claim of the plaintiffs to share in the income prior to the date of the suit cannot be supported.

The learned advocate for the respondents then urges that, even if the plaintiffs are entitled to share in the income prior to the date of suit, it is only for a period of six years that the plaintiffs can get their share and not for the full period from 1096 (1920) upto the date of suit. I am clearly of the opinion that this contention is unfounded. The article of the Limitation Act applicable to this claim is Art. 120 which provides a period of six years and the starting point is when the right to

sue accrues. That this article is applicable has been held by a Full Bench of five Judges of this Court in 45 Mad. 648.[1] The learned Judges pointed out that the period of six years starts form the time when the right of the plaintiff is denied or from the time when there is ouster. In all the decisions brought to my notice by either side it is Art. 120 that has been held to apply in such cases. The respondents' advocate refers to two decisions 1936 M.W.N. 410[2] and 68 M.L.J. 487.[3] In the former case the father made an alienation of the entire properties and the sons sued for their share of the properties on the footing that the alienation was not binding on them. A decree was passed upholding their claim but in that suit they did not ask for their share of the income from the properties. More than seven years after the date of the preliminary decree in this suit a suit for mesne profits or for their share of the income accruing due for all the seven years was filed. The learned Judge held that Art. 120 applied to such cases and that the plaintiffs can get the income only for six years prior to the date of suit. This is obviously on the footing that to the knowledge of the plaintiffs, the defendant who was called upon to account, had even prior to the date of the preliminary decree asserted a hostile title as against the sons. In fact, in the suit by the sons for setting aside the alienation, the alienee pleaded that he was entitled to the whole of the property and that the alienation was binding on the sons. The Court upheld the right of the sons and passed a preliminary decree. From that date at any rate it cannot be said that there was no ouster or assertion of a hostile right to the knowledge of the plaintiffs. Therefore the learned Judge rightly held that applying Art. 120 it is only for six years before suit that the plaintiffs can get their share of the income. That is on the footing that the right to sue for their share of the income accrued at least from the date of the previous decree.

The latter case is still clearer and also proceeds on similar lines. There, a step-brother of the plaintiffs effected a mortgage in favour of the defendants and a suit was filed upon the mortgage. In execution of the mortgage decree, the mortgagee himself became the purchaser and got into possession. The plaintiffs filed a suit after an unsuccessful attempt to resist the mortgagee taking possession in execution proceedings. Then they filed a suit for a declaration that their rights were not affected by the mortgage of the step-brother and by the proceedings in the mortgage suit. Unfortunately they did not ask for future profits in that suit. The suit was only for possession and was decreed and ultimately the decision was upheld by the High Court in 1923. They got into possession in pursuance of the decree of the lower appellate Court in May 1922. They had been dispossessed in proceedings in the mortgage suit in 1918. So from 1918 when they were dispossessed to 1922 when they got back possession they were entitled to mesne profits. The suit was filed in 1927. The decision was that though the right accrued in 1918 when the mortgagee purchaser took possession, he would be liable only for six years before the date of suit, that is, from 1921-22 and not from 1919-20. There was a clear ouster and denial of the plaintiff's right in the possession proceedings which took place in execution of the mortgage decree. It was a clear case of ouster and an assertion of hostile title to the knowledge of the plaintiffs more than six years before the date of suit. Therefore according to the decision of the Full Bench in 45 Mad. 648[1] time began to run from the time when the right to sue accrued—1918-1919. That being so, it was held that the plaintiffs were not entitled to the profits of the first two years but that they were entitled to the profits of the later two years; and on that ground their right to share in the income for the first two years was disallowed. There is no discussion of the ground upon which that right was disallowed, but on the facts it was a case where the plaintiffs' right had been denied by the defendant to their knowledge in 1918 and that started limitation running under column 3 of Art. 120, Limitation Act. In fact the learned Judges say :

"The judgment of a Full Bench of this Court in 45 Mad. 648[1] also lays down that as between co-sharers the proper article applicable is Art. 120 and that limitation will begin to run from the time that there is an assertion of exclusive title or what may amount to ouster."

The two decisions relied upon by Mr. Govinda Menon are therefore of no help to him. There is a full discussion of this question in the judgment of Madhavan Nair J. in A.I.R. 1933 Mad. 200[4] where the learned Judge has discussed the earlier cases and has in my opinion laid down the proposition correctly. Reference was made to the decision of the Full Bench in 45 Mad. 648[1] and it was held that the plaintiff was entitled to an account of her share of the income for more than six years before the date of suit. After referring to 45 Mad. 648[1] the learned Judge says :

"This case was followed in A.I.R. 1928 Mad. 1236[5] in which case the plaintiff was given a decree for an account for the period mentioned in the plaint which appears from the papers was for 13 years, i. e., 1910 to 1923. So according to the trend of the decisions of this Court, having regard to the findings that the demand for the income and its refusal in this case was only in the year 1921, the plaintiff's right to demand from defendant 4 an account of the income from October 1911 to the date of the suit though the period is for more than six years cannot be held to be barred under Art. 120, Limitation Act."

The learned Judge also dealt with the decision of the Privy Council in 29 C.W.N. 270[6] on which also reliance was placed by Mr. Govinda Menon. As pointed out by Madhavan Nair J. there was an amendment confining the right to the income to six years before the suit was passed by the Judicial Committee; but without anything more we must assume that there was ouster or assertion of hostile title to the knowledge of the plaintiffs more than six years before the date of suit. The Privy Council approved of the decision in 45 Mad. 648[1] in a recent decision in I.L.R. (1941) Bom. 8.[7] It is unnecessary

1. ('22) 9 A.I.R. 1922 Mad. 150 : 71 I.C. 177 : 45 Mad. 648 : 42 M.L.J. 507 (F. B.), Yerukola v. Yerukola.
2. ('36) 23 A.I.R. 1936 Mad. 654 : 162 I. C. 771 : 1936 M. W. N. 410, Sundararaja Ayyangar v. Raghava Reddi.
3. ('35) 22 A.I.R. 1935 Mad. 731:156 I.C. 640 : 68 M.L.J. 487, Siddalinga Gowd v. Bhimana Gowd.
4. ('33) 20 A.I.R. 1933 Mad. 200 : 142 I.C. 708, Syed Levvai v. Syed Ammal.
5. ('28) 15 A.I.R. 1928 Mad. 1236 : 114 I.C. 364, Ayyakutti Thevan v. Sigappi Achi.
6. ('25) 12 A.I.R. 1925 P.C. 93:29 C.W.N.270 (P.C.), Midnapore Zamindari Co. v. Naresh Narayan Roy.
7. ('40) 27 A.I.R. 1940 P. C. 215 : 191 I. C. 113 : I.L.R. (1940) Kar.P.C. 410 : I.L.R. (1941) Bom. 8 : 67 I.A. 406 (P.C.), Mohamedaly Iyebally v. Safia Bai.

to refer to the other decisions on the point. All the decisions on this question referred to by either side apply Art. 120 and there is no decision which lays down that even in the absence of ouster or assertion of hostile title to the knowledge of the plaintiffs, the plaintiffs' right to share in the income is to be confined to a period of six years before the date of suit. In the two cases relied upon by the learned advocate for the respondents it is clear that there was such ouster more than six years before the date of suit. The law on this question has been plainly laid down in the Full Bench decision in 45 Mad. 648.[1] I therefore reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs in this and the lower appellate Court payable by respondent 1. The other respondents will bear their own costs. No leave.

C.R.K./G.N. *Appeal allowed.*

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* A. I. R. (29) 1942 Madras 517

VENKATARAMANA RAO J.

Minor Nataraja Dikshithar, by next friend and mother Pattammal — *Appellant*

v.

Mahaganapathi Dikshithar and another — *Respondents.*

Second Appeal No. 280 of 1939, Decided on 8th January 1942, against decree of Sub-Judge, Cuddalore, D/- 31st March 1939.

* Hindu law—Marriage—Second marriage of minor is not obligatory sanskara — Debt incurred for same is not binding on family.

A second marriage of a minor coparcener is not an obligatory sanskara and hence a debt incurred to meet the expenses incurred for such a marriage cannot be held to have been incurred for a legitimate family purpose : ('30) 17 A. I. R. 1930 Nag. 282; 32 Bom. 81 and 34 Mad. 422, *Ref.*

[P 519 C 1]

Hindu law —

('40) Mulla, Page 274, Pt. (i).

('38) Gour, Page 392, N. 1054.

K. Bhashyam Ayyangar and S. Ramachandra Ayyar — for Appellant.

S. Panchapakesa Sastri — for Respondents.

JUDGMENT. — This second appeal arises out of a suit for possession of a house. The basis of the plaintiff's claim is that on 6th December 1928 the mother of the defendants during their minority executed a usufructuary mortgage deed for a sum of Rs. 1500 in favour of the plaintiff's father and uncle and on the same day executed a registered deed of lease agreeing to occupy the house for a period of three years on a certain rent and that as the defendants committed default in the payment of rent, the plaintiff filed the present suit for recovery of possession. So far as the plaintiff's title is concerned, his case is that at a partition between him and his uncle after the death of his father the suit mortgage was assigned to his share. The main defence of both the defendants is that the mortgage is not binding on them. On behalf of defendant 2 a special plea is raised that even though the mortgage is binding on defendant 1 it is not for a necessary purpose because the main portion of the consideration which formed the subject of the mortgage in favour of the plaintiff's father was to discharge prior mortgages which were alleged to have been executed for debts incurred in respect of the second marriage of defendant 1. The learned District Munsif gave a decree in favour of the plaintiff but the learned Subordinate Judge reversed this decision. When the matter was taken up by me on the last occasion I called for a finding on the question whether the usufructuary mortgage was binding on the defendants. The learned Subordinate Judge has now submitted a finding in the negative, that is, that it is not binding on the defendants.

The question is whether this finding is correct. So far as defendant 1 is concerned, it seems to me that the finding of the learned Subordinate Judge cannot be sustained. The mortgage Ex. C was executed in discharge of two prior mortgages and also for a sum of Rs. 331 paid in cash for sundry debts. The two prior mortgages are Exs. A and B dated 16th June 1927 and 31st July 1927 for Rs. 500 each executed by the defendants' mother in favour of one Kalyani Ammal. The concurrent finding of both the lower Courts is that so far as the consideration for these documents is concerned, it has been proved that the moneys were paid. The only question therefore is as to their binding nature. The learned District Munsif was of the view that the moneys borrowed under Exs. A and B were required for purposes of the marriage of defendant 1 which admittedly took place in July 1927. No doubt in the evidence the plaintiff sought to prove that the sum of Rs. 1000 borrowed under both these mortgages was for the purposes of paying the bride's price but both the lower Courts on the evidence came to the conclusion that it was not for that purpose. The learned District Munsif in coming to his conclusion relied upon an acknowledgment made in the mortgage (Ex. E) executed by defendant 1 and his mother on 17th September 1932. In regard to the said mortgage, defendant 1 sought to prove that he simply signed it at the instance of his mother but the learned District Munsif disbelieved him.

On appeal the learned Subordinate Judge, when he heard the appeal on the first occasion, took the view that by means of Ex. E defendant 1 must be deemed to have ratified the transaction so far as his share is concerned. But in submitting the present finding he observes that at the date of Ex. E defendant 1 had attained majority and it was obviously at a time when he was still under the influence of his mother and the learned Subordinate Judge left the matter there without discussing the evidence in regard thereto. Instead of remanding the case again, I decided to deal with the points. I have been taken through the evidence of defendant 1 and on a perusal thereof I am clearly of the opinion that his version that he executed the mortgage under the influence of his mother could not be believed. He says that he learnt that he was deceived into signing Ex. E, a year before he was giving evidence, but he had not taken steps to have the transaction set aside. He was an adult and was capable of managing his affairs and beyond his interested testimony there is absolutely nothing to show that he was made to execute the document as he suggests. It is clear therefore that the learned District Munsif was right in the view he took that defendant 1 did ratify the transaction. So far as the validity of the transaction is concerned, it must, therefore, be held to be binding on him he having obtained the benefit by reason of his second marriage. The question as to what extent the consideration could be said to be binding on him is another matter and as that will be the subject of investigation in any suit that may be filed upon the mortgage by the plaintiff, I do not propose to express any opinion thereon. The

next question is whether the said mortgage can be said to be binding on defendant 2 because if it is not binding on him the lease on the strength of which the suit was filed could not be said to be binding on him and no relief could be given to the plaintiff in this suit. The contention of Mr. Ramachandran is that moneys borrowed under Exs. A, B and C were for a legitimate family purpose and the fact that the marriage was a second marriage was immaterial. He further contended that the marriage was an obligatory samskara and so long as the family was joint, debts incurred for the marriage of a coparcener, whether it was a first or a second marriage, must be held to be binding upon the other coparceners. He also contended that the second marriage in this case was very necessary because the family is a Dikshitar family whose members are entitled to perform puja and archana in the Chidambaram temple and derive emoluments therefrom and for that purpose only a married man can function in the temple, and therefore in the interests of the family the marriage of defendant 1 was an absolute necessity. In support of the contention that the expenses incurred for a second marriage must be held to be expenses incurred for a legitimate family purpose Mr. Ramachandran relied on 34 Mad. 422,[1] 32 Bom. 81[2] and 32 All. 575.[3] But 34 Mad. 422[1] and 32 Bom. 81[2] are cases of first marriage and they therefore do not throw much light on the question as to how far a second marriage can be said to be an obligatory samskara in the sense that expenses incurred therefor must be held to be an expenditure binding on the whole family. Krishnaswami Ayyar J. who delivered the leading judgment in 34 Mad. 422[1] based his conclusion on the fact that for a Brahmin marriage is a necessary samskara and the life of a householder is absolutely necessary after the period of his studentship if he is not willing to remain celibate and is not prepared to become a sanyasi. This is what he observes at p. 428 : "Except for him who has thus qualified for entry direct into other asramas than that of householder the stage of house holder is practically compulsory. The twice born Hindu is not to be a student as long as he chooses. He may remain a Naishtika Brahmachari devoted to life-long studentship under strict conditions." In the later portion of his judgment he also observes : "Except to the man who pursues the path of non-attachment to all others the order of a householder is necessary stage in the journey of life." This case was followed by Chandavarkar J. in 32 Bom. 81,[2] who also gives the same reason in arriving at his conclusion. At p. 92 he observes as follows :

"It follows from this exposition in the Mitakshara that, if an unmarried coparcener in a joint Hindu family thinks that he is not qualified either to continue a celibate to the end of his life or to become an ascetic, the rite of marriage in his case becomes a necessity ; it is forced on him by the shastras, inasmuch as he cannot remain without belonging to one of the four orders of life, and all orders are prescribed to him except the order of the householder. Marriage therefore in his case becomes an unavoidable purpose."

Both the learned Judges have examined the texts bearing on the question in considerable detail and I think it is unnecessary to refer to them. A study of those texts and reference to the various books referred to by them clearly indicate that according to the correct principles enunciated by these ancient texts a person cannot think of a marriage till he finishes the Brahmacharya course and that according to the shastras is when the man reaches 25 or 30. It is only after a man finishes his period of studentship, takes leave of his Guru and elects to be a householder without being a celibate or ascetic that marriage becomes an unavoidable purpose because he must enter one of four orders of life and having decided to become a householder he must get married. In fact Krishnaswami Ayyar J. at page 425 observes thus :

"I put it to the respondent's vakil whether he contended that having regard to the age of defendant 2 at the time of the marriage it was not a purpose for which the father could legitimately incur expenditure or contract a loan. He disclaimed any intention of resting his case on that ground. Dismissing therefore from consideration any question of propriety based on the ground of age, we are confronted with the broad question whether the father was justified in borrowing money for the marriage of his son while the income of his property was insufficient to meet the expenditure."

Therefore even with reference to a case of first marriage the learned Judge thought that the question of minority would be a material consideration in coming to the conclusion whether in the particular circumstances the marriage could be said to be an obligatory samskara the expenses for which could be held to be binding on the other members of the family. 32 Bom. 81[2] dealt with the case of a marriage of a minor and the learned Judge upheld an alienation for debts incurred for the marriage of such a minor, and gave reasons for doing so. At page 96 the learned Judge observes thus :

"The rules of the Shastras seem indeed to have been framed by the Rishis with the object of discouraging, if not prohibiting the marriage of a male before he is at least 25 years of age. Nilakantha in his Samskara Mayukha states that 25 years should be allotted to each of the four orders of life. But usage has broken in upon the rule. Though the marriage of a minor boy may appear opposed to the intention, if not injunctions, of the Shastras and of the Commentators, and however objectionable it may seem to our modern ideas, usage having sanctioned such marriages, we must give effect to them and administer the law as it is, not as it should be."

Thus the learned Judge relies on usage and not on shastras for his conclusion. In this case defendant 1 was married at the age of seven and he lost his wife. The second marriage was performed when he was 13 or 14. Strictly speaking neither of the marriages could be in accordance with the shastras because defendant 1 was admittedly not of an age prescribed by the shastras. Even for an adult, it has been pointed out by Niyogi J. in A.I.R. 1930 Nag. 282[4] after discussing the relevant texts bearing on the point that there is no obligation on a widower to marry. At p. 284 the learned Judge observes thus :

"Marriage is recommended to a widower; there is no obligation laid on him to marry. In this case the widower has a son and consequently the necessity of begetting a son could not be assigned as a reason. As to the necessity of maintaining sacrifi-

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1. ('11) 34 Mad. 422 : 8 I. C. 195 : 20 M. L. J. 855, Kameswara Sastri v. Veerachariu.
2. ('08) 32 Bom. 81 : 9 Bom. L. R. 1366, Sundara Bai v. Shivnarayana.
3. ('10) 32 All. 575 : 6 I. C. 465 : 7 A. L. J. 667, Bhagirathi v. Jokhu Ram.
4. ('30) 17 A.I.R. 1930 Nag. 282 : 128 I.C. 409 : 27 N.L.R. 359, Onkar v. Kisan Singh.

cial fire, the necessity is illusory and theoretical as no fire is now maintained. That this peculiar feature of the vedic religion has been wiped off long ago is well known. Vedic mode of religious observances was overgrown and superseded by the Smartha and still later by the Puranic forms. Today an agnihotri is rare even in places like Benares .... The first marriage is ordained (vyavasthita) and any subsequent marriage is left to the choice (aichhik) of the agent. The former springs from Shabdi Bhavana (prompting of the vedic words); the latter from Arthi Bhavana (prompting of desire)."

In that case the learned Judge refused to uphold an alienation made in connection with the fourth marriage of the father with a son of nine years old living. No doubt, the facts of the case may be distinguishable but the observations are pertinent to this case in so far as they point out that the first marriage is ordained and that any subsequent marriage must be left to the choice of the agent, i.e., the person who marries. In this case defendant 1 was 13 years old when the second marriage took place and it could not be said that he felt the necessity of a marriage nor could it be said that he was of an age when he was obliged to beget an offspring in order to discharge his debt to his pithris. If even in the case of an adult, a second marriage can be construed not to be an obligation, there can be no justification therefore for the second marriage of a minor. Thus, if the authority of the shastras is invoked, the marriage of a minor boy is not sanctioned. That is why Chandavarkar J. had to rely on usage for the first marriage of the minor boy. But no such usage is relied on in this case for the performance of a second marriage of minor boy. Thus it seems to me that the expenses incurred for the second marriage of defendant 1 who was on the date of the marriage a minor of about 13 years cannot be held to have been incurred for a legitimate family purpose. Even assuming that the second marriage may be held to be necessary, the question is whether having regard to the age and the then circumstances of the family defendant 1's marriage could be held to be for a legitimate family purpose.

One reason that was assigned was that unless defendant 1 was married, he could not derive the emoluments from the Chidambaram temple. The learned Subordinate Judge in para. 15 of his judgment points out clearly that in order to derive emoluments from the temple it is not necessary that a person should again be married and that once a marriage has taken place, that would be enough. From the plaintiff's own evidence the learned Subordinate Judge has pointed out that a substantial income is derived by performing archana in the temple and the widowers have a right to perform archana and that therefore the family could not be held to have suffered if defendant 1 was not married again. Having regard to defendant 1's age and there being no compelling necessity to marry in the interests of the family, it could not be said that the marriage was a prudent and a necessary act and the mother could have waited until the boy attained majority. The result of this marriage has been, as pointed out by the learned Subordinate Judge, that the family house had to be mortgaged and is in peril of being lost. Therefore, so far as defendant 2 is concerned, it cannot be said that the debt incurred for the marriage of defendant 1 was for a family purpose. The finding of the learned Subordinate Judge that the mortgage is not binding on defendant 2 must therefore be sustained. If the mortgage is not binding on defendant 2, the lease also is not binding on him and if the lease is not binding on him, the possession of the plaintiff could only be that of an alienee from one of the coparceners and the plaintiff will not be entitled to eject him nor could he claim joint possession along with defendant 1. The result is that the second appeal fails and is dismissed. I direct each party to bear their own costs throughout. Leave to appeal refused.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 519

WADSWORTH AND PATANJALI SASTRI JJ.

PS. AR. AR. Arunachalam Chettiar by Agent Sivaraman Chettiar —

Petitioner

v.

Govindaswami Goundan —Respondent.

Civil Revn. Petn. No. 2458 of 1939, Decided on 17th February 1942, to revise order of Sub-Judge, Coimbatore, D/- 26th June 1939.

(a) Civil P. C. (1908), S. 151 — Mortgage decree — Pending appeal to High Court defendant 1 who was not contesting appeal applying to scale down decree under Madras Agriculturists Relief Act — High Court modifying decree and making its decree subject to final decision of defendant 1's application so far as mortgage amount was concerned—Under misapprehension of High Court's order, defendant applying for withdrawal of his application for presentation to High Court — Pleaders on both sides labouring under same misapprehension and Court returning petition for presentation to proper Court—Petition not actually withdrawn but lying in trial Court's office—Subsequently defendant 1 obtaining copy of High Court's judgment and on discovering his mistake which was shared by pleaders on both sides and Court applying to trial Court to restore his application which was lying in trial Court's office — Trial Court under circumstances of case held had power to restore application.

Pending the appeal to the High Court from a mortgage decree, defendant 1 who was not contesting the appeal in the High Court applied to scale down the decree. Shortly after the High Court gave judgment in the appeal modifying the trial Court's decree and directing that its modified decree was to be subject to the final orders on the application filed by defendant 1 under the Madras Agriculturists Relief Act so far as amount due under mortgage was concerned. After this judgment was pronounced there was a series of misunderstandings in the lower Court. It was represented to the vakils on both sides that the proceedings in the lower Court must stop as a consequence of the High Court's decree and must be continued in the High Court. The applicant's vakil took time to consider his position and then applied to the lower Court for the return of the application and the application was directed to be returned for presentation in a proper Court. It was not actually taken back and lay in the trial Court for nearly two months. Meanwhile defendant 1 got a copy of the High Court's judgment, which presumably was not available previously, and discovered that the High Court had made its decree specifically subject to the decision of the pending application by the trial Court. He, therefore, filed an application explaining how the

mistake had arisen and asking the trial Court to hear the original application, which was still in its office, on the merits :

Held that since there was a clear error of fact which led defendant 1 to make a representation to the trial Court regarding the effect of the High Court's judgment and this misapprehension was apparently shared by the vakils on either side and by the Court when it passed the order returning the application for presentation in a proper Court, the trial Court had the power in the circumstances of the case to set right the consequences of the common mistake by restoring the petition of defendant 1 and going on with it from the point at which the proceedings were broken off as a result of the erroneous impression regarding the High Court's order. [P 520 C 2]

(b) Civil P. C. (1908), S. 115 — Decree amended — Appeal must be against amended decree—No revision lies.

When there is an amended decree, an appeal must be filed against that decree and no revision can be entertained. [P 521 C 1]

C. P. C.—

('40) Chitaley, S. 115 N. 8 Pt. 2.

('41) Mulla, Page 413 Pt. (u).

A. C. Sampath Ayyangar — for Petitioner.

C. D. Venkataramanan — for Respondent.

ORDER. — C. R. P. No. 2458 arises out of an order restoring an application filed under S. 19 of Act 4 of 1938 and returned for presentation in a proper Court. The facts necessary to understand the matter are as follows. The decree in question was passed on a mortgage in favour of the plaintiff and defendant 11. Defendants 1 to 5 represented the mortgagors. Defendants 6 and 7 are the wives of defendants 1 and 2. The latter had paid off one of the co-mortgagees, defendant 11, but got him to transfer his interest to their wives, defendants 6 and 7. The lower Court's decree contained a clause safeguarding defendants 6 and 7 if they should in proper proceedings claim any equities as against the plaintiff. An appeal was taken against this part of the decree and also a minor correction was sought in another matter. While this appeal was pending, Act 4 of 1938 came into force and an application was filed by defendant 1, who was not contesting the appeal in the High Court, to scale down the decree. Shortly after this application had been filed, the High Court gave judgment in the appeal deleting from the decree the clause which safeguarded the rights of defendants 6 and 7 and finding specifically that defendants 6 and 7 were mere name-lenders for the mortgagors, defendants 1 and 2. At the time when judgment was pronounced, it was represented to the learned Judges that there was an application pending in the lower Court for relief under Act 4 of 1938. The learned Judges therefore provided in their judgment that their decree was to be "subject to the final orders that may be passed on that application so far as the amount due under the said mortgage is concerned." After this judgment was pronounced there was a series of misunderstandings in the lower Court. It appears to have been represented to the vakils appearing on both sides that the proceedings in the lower Court must stop as a consequence of the High Court's decree and must be continued in the High Court. The applicant's vakil took time to consider his position and then applied to the lower Court for the return of the application and the application was directed to be returned for presentation in a proper Court. It was not actually taken back and it lay in the Subordinate Judge's Court for nearly two months. Meanwhile, defendant 1 seems to have got a copy of the High Court's judgment, which presumably was not available previously, and to have discovered that the High Court had made its decree specifically subject to the decision of the pending application by the trial Court. He therefore filed the application E. A. No. 299 of 1939 explaining how the mistake had arisen and asking the lower Court to hear the original application, which was still in the Subordinate Judge's office, on the merits. The learned Subordinate Judge, on going into the matter, came to the conclusion that there was either a mutual mistake on the part of the lawyers on both sides or a mistake on the part of the applicant of which the respondent desired to take advantage and it was necessary to carry out the direction of the High Court's judgment and decide the application which was pending at the time when that judgment was pronounced.

It has been argued before us on various grounds that this decision is one which has to be modified in revision. The main contention is that the revived application must be deemed to have been presented for the first time on the date on which it was revived and that this date being more than sixty days after the passing of a stay order under S. 20 of the Act, the application was barred by limitation. We do not think that this contention can succeed nor does it seem to us that the question of limitation actually arises. If the revived application is to be regarded as a new application presented for the first time, that must be on the ground that the prior application had in substance been rejected. If it was rejected, no question of limitation would arise and of course the decree would necessarily have to be executed as it stands. If, however, the previous application was not rejected, but was merely in a state of suspense until it was revived, then quite clearly the application which was finally heard was the application originally presented within sixty days of the stay order and the proceedings connected with the abortive return will not alter that fact.

The only question, therefore, which we have really to decide is whether the lower Court had power to revive this application in the circumstances of the case. If the Court did so revive it, it certainly cannot be deemed to have entertained a fresh application ; nor would the reservation in the High Court's order have any relation to a fresh application filed after the High Court's judgment. We see no reason why the lower Court's order reviving this application should be set aside in revision. On the finding of the learned Subordinate Judge there was a clear error of fact which led the applicant to make a representation to the Court regarding the effect of the High Court's judgment and this misapprehension was apparently shared by the vakils on either side and by the Court when it passed the order returning the application for presentation in a proper Court. Had the applicant known the true nature of High Court's order there would have been no question of asking for return ; nor could the Subordinate Judge have returned the application for want of jurisdiction. Everybody seems to have been labouring under the same mistake and it seems to us that the Court had the power in the circumstances of this case to set right the consequences of this common mistake by restoring the petition and going on with it from the point at which the proceedings were broken off as a result of this erroneous impression regarding the High Court's order. We therefore do not consider it necessary or desirable

a to interfere with the order of the Subordinate Judge restoring the application that was directed to be returned. The application, when restored, resulted in an amended decree which comes up for consideration in C. R. P. 1880 of 1940. When there is an amended decree, an appeal must be filed against that decree and no revision can be entertained. The same observation applies to C. R. P. No. 1881 of 1940 which is concerned with an order passed amending the same decree at the instance of defendant 2. There will be one week's adjournment for the petitioners to consider whether they wish to pay court-fee on these two revision petitions and get them converted into appeals. C. R. P. No. 2458 of 1939 is dismissed with costs.

C.K.K./G.N. *Order accordingly.*

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b **A. I. R. (29) 1942 Madras 521**

HORWILL J.

In re Duraiswamy Mudali—Appellant.

Criminal Appeal No. 758 of 1941, Decided on 30th January 1942, against judgment of Special Honorary Presidency Magistrate, G. T. Madras, in C. C. No. 1759 of 1941.

(a) Penal Code (1860), Ss. 511 and 379 — Accused caught while attempting to take purse from *P's* pocket—*P* seizing purse from outside his pocket and also *P's* hand—Offence held fell under S. 511 and not S. 379 as purse was not removed from *P's* possession.

The accused was caught while attempting to take the purse of *P* from his pocket. *P* however seized the purse from outside his pocket and also the ac-
c cused's hand :

Held that although the accused did move the purse for the purpose of committing theft he did not commit the offence of theft, because he was unable to move the purse from the possession of *P*. The offence was therefore one punishable under S. 511 and not under S. 379. [P 521 C 2]

Penal Code —

('36) Gour, Page 1266, N. 4400 and Page 1788, N. 6389.

('36) Ratanlal, Pages 923-924, Note "Moves that . . . . such taking" and Page 1290, Note "Theft."

(b) Penal Code (1860), Ss. 75 and 511 — S. 75 does not apply to offence under S. 611 — But previous convictions may be taken into account and higher sentence imposed.

d Section 75 does not apply to an offence punishable under S. 511. But the fact that the accused had a number of (six) previous convictions can be taken into account and a much higher sentence imposed for the offence under S. 511 than would be proper if there had been no previous convictions. [P 521 C 2]

Penal Code —

('36) Gour, Page 255 Pt. 5 and Page 260 Pt. 7.

('36) Ratanlal, Page 136 Pt. 1.

(c) Penal Code (1860), S. 75 — To determine proper sentence Magistrate must know all previous convictions.

Under S. 75 in order to determine the proper sentence, it is necessary for the Magistrate to know all the previous convictions of the accused. [P 521 C 2]

Penal Code —

('36) Gour, Page 258, N. 524 and Page 259 Pt. 1.

('36) Ratanlal, Page 141, Note "Punishment."

(d) Penal Code (1860), S. 75 — Prior convictions neither proved nor mentioned in charge under S. 75 — It would be unfair to take them into account.

Even if there is no doubt that the accused was previously convicted it would be unfair to take the prior convictions into account when they were neither proved nor mentioned in the charge under Section 75. [P 521 C 2]

Penal Code —

('36) Gour, Page 258, N. 524.

('36) Ratanlal, Page 142 Note "Charge."

(e) Criminal P. C. (1898), S. 565—Conviction only under S. 511, Penal Code — S. 565 does not permit of order as to notification of accused's residence.

Section 565 does not permit of an order with regard to the notification of residence of the accused f to the police where the conviction is only under S. 511, Penal Code. [P 521 C 2]

Cr. P. C.—

('41) Chitaley, S. 565, N. 7 Pt. 1.

('41) Mitra, Page 1820, N. 1440.

Crown Prosecutor — for the Crown.

JUDGMENT. — The appellant was convicted under Ss. 379 and 75, Penal Code, of being an old offender and stealing a purse by putting his hand in the pocket of P. W. 1. He was sentenced to two years rigorous imprisonment. There is no reason at all to doubt the prosecution evidence that the accused was caught while attempting to take the purse of P. W. 1. P. W. 1 however seized the purse from outside his pocket and also the accused's hand; so that although the accused did move the purse for the purpose of committing theft, he did not g commit the offence of theft; because he was unable to move the purse from the possession of P. W. 1. The offence was therefore one punishable under S. 511, Penal Code, and not under S. 379, Penal Code, as the Special Honorary Magistrate found.

Section 75, Penal Code, does not apply to an offence punishable under S. 511, Penal Code. The maximum that could therefore be imposed on the accused was 18 months rigorous imprisonment. In the charge under S. 75, Penal Code, only one previous conviction was referred to. In order to determine the proper sentence, it was necessary for the Magistrate to know all the previous convictions of the accused; and the learned Crown Prosecutor has now given me a list showing that he had no less than six previous convictions and that he had not been long free after his release from jail for the last conviction before he committed the present offence. h Although S. 75 cannot be applied, the fact that he had six previous convictions can be taken into account and a much higher sentence imposed than would be proper if there had been no previous convictions. Although I have no doubt that it is true that the accused was previously convicted six times, it would be unfair to take the prior five convictions into account in view of the fact that they were neither proved nor mentioned in the charge under S. 75, Penal Code.

I reduce the sentence from two years' rigorous imprisonment—which was a sentence that could not be imposed under S. 511, Penal Code—to one year's rigorous imprisonment. The order with regard to the notification of residence of the accused to the police will have to be set aside, because S. 565 does not permit of such an order where the conviction is only under S. 511, Penal Code.

C.R.K./G.N. *Order accordingly.*

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a **A. I. R. (29) 1942 Madras 522**

KING J.

Subramania Ayyar — Appellant

v.

Annavi Pillai — Respondent.

Second Appeal No. 325 of 1940, Decided on 18th February 1942, against decree of Sub-Judge, Trichinopoly, in A. S. No. 83 of 1938.

(a) Civil P. C. (1908), S. 64—*N* bringing *D's* property to sale in execution of his decree on 29th August 1934—Other decree-holders including *S* applying for rateable distribution — Sale set aside on 31st October 1934 on application by *D* under O. 21, R. 89, Civil P. C. — On 20th September 1934 *D* selling property to *P* — On 29th September 1934 *S* attaching aforesaid b property pursuant to his application of 29th August 1934—Claim by *P* on basis of his sale deed from *D* dismissed—Suit by *D* in 1935 against *S* and *D* for declaration of his title — *S* held could not make any claim based upon S. 64 explanation or his action on 29th August 1934 — *D* held had good title on 20th September 1934 when he conveyed property to *P*.

N had brought certain property belonging to *D* to sale in execution of his decree on 29th August 1934 and three other decree-holders including *S* had applied for rateable distribution. Meanwhile *D* applied first under R. 90 and then under R. 89 of O. 21, Civil P. C., for setting aside the sale. The application under R. 89 was eventually allowed, the application under O. 21, R. 90 was dismissed and the sale set aside on 31st October 1934. In the meanwhile, on 20th September 1934 *D* sold the property c which was the subject-matter of the sale to *P* and on 29th September 1934 *S* who had filed an execution application for the attachment of that property on 29th August 1934 had the attachment effected. *P* filed a claim petition based upon his sale deed from *D* and after it was dismissed he filed a suit for declaration of his title against *S* and *D* in 1935:

Held that when *P* filed his suit in 1935 *S* could no longer make any claim for rateable distribution of the assets received from the sale of *D's* property on 29th August 1934. *S* could not therefore be said to be making any claim against *P* in the suit based upon the explanation to S. 64 or his action on 29th August 1934. The result of setting aside the sale was to put an end to the attachment of 29th August 1934 which had formed the basis of the sale. Whatever rights the other creditors might have under d S. 73 there was only one creditor who attached the property. The attachment proceeded logically to a sale and when that creditor's sale was set aside and his claim was satisfied that particular attachment had come to an end. Therefore it was impossible in any circumstances for *S* to say that he had a claim enforceable under the earlier attachment which was effected in 1934 before the sale of 29th August : ('18) 5 A. I. R. 1918 Mad. 127 (F.B.) and ('40) 27 A. I. R. 1940 Mad. 385 (F.B.), *Disting.*

[P 522 C 2; P 523 C 1]

Held further that although the sale was set aside on 31st October 1934 the effect of the setting aside of the sale was clearly to declare that from 29th August onwards the title lay with *D*. Therefore *D* had a good title on 20th September when he sold the property to *P*. [P 523 C 1]

C. P. C. —

('40) Chitaley, S. 64, Note 13.

('41) Mulla, Pages 258-259, Note "Explanation to the section . . . . of this section."

(b) Transfer of Property Act (1882), S. 53 — Whether alienation was in fraud of creditors is pure question of fact—Finding is conclusive in second appeal. e

The question whether an alienation should be set aside under S. 53 as being in fraud of the creditors is a pure issue of fact upon which the decision of the first appellate Court is conclusive in second appeal. [P 523 C 1]

C. P. C.—

('40) Chitaley, Ss. 100 and 101 Note 38 and Note 52 Pt. 4.

('41) Mulla, Page 366 Pt. (a).

N. Sivaramakrishna Iyer and T. R. Venkataraman — for Appellant.

K. V. Sesha Iyengar and R. Subramania Iyer — for Respondent.

JUDGMENT.—The appellant here held a decree f against one Doraiswami, defendant 2 in the suit from which this second appeal arises. Another decree-holder against the same Doraiswami was one Nalluswami Nayudu. Nalluswami Nayudu had brought certain property belonging to Doraiswami to sale in execution of his decree on 29th August 1934 and three other decree-holders including the present appellant had applied for rateable distribution. Meanwhile, however, Doraiswami applied first under R. 90 and then under R. 89 of O. 21 for setting aside the sale. Upon filing the application under R. 89 he no longer pressed the application under R. 90 which was dismissed. The application under R. 89 was eventually allowed and the sale set aside on 31st October 1934. In the meanwhile two events happened. On 20th September the judgment-debtor sold the property which was the subject-matter of the sale to the plaintiff and on 29th September the g appellant who had filed an execution application for the attachment of this property on 29th August had the attachment effected. Further proceedings in E. P. No. 888 of 1934 included a claim petition by the plaintiff based upon his sale deed from defendant 2 and after it was dismissed the present suit was filed by the plaintiff on 13th March 1935. The plaintiff's suit has been resisted by the appellant on the ground that the sale deed from defendant 2 to the plaintiff conveys no title which can be enforced against the rights of the appellant under S. 64 of the Code. As the lower appellate Court has decided against the appellant on this point the present second appeal has been filed.

The appellant relies upon what one might call a general impression of the rights conveyed by S. 64 without too close a scrutiny of the actual language h of the section. He argues that because he has made a claim on 29th August 1934 which would obviously come within the explanation to S. 64 he can now in the circumstances which have obtained during the pendency of the plaintiff's suit rely upon that claim which was then made. It seems to me quite obvious that in deciding the relative rights of the plaintiff and the appellant we must consider the situation as it existed after the filing of the plaintiff's suit. There can, in my opinion, be no doubt that when the plaintiff filed his suit in March 1935 the appellant could no longer make any claim for rateable distribution of the assets received from the sale of this property on 29th August 1934. He cannot possibly therefore be said to be making any claim in this suit against the plaintiff based upon the explanation to S. 64 or his action on 29th August 1934. In order to make a claim against the plaintiff he must establish that there is some attachment on the basis of which he has a claim enforceable

against him. Of course, if he could argue successfully that the attachment which formed the basis for the sale on 29th August 1934 had continued to exist in spite of the setting aside of the sale then he might rely upon S. 64 as giving him a claim against the plaintiff. It seems to me however obvious that the result of setting aside the sale is to put an end to that attachment. Whatever rights the other creditors might have under S. 73 there was only one creditor who attached the property. The attachment proceeded logically to a sale and when that creditor's sale was set aside and his claim was satisfied it seems to follow beyond all doubt that that particular attachment had come to an end. I am of the opinion therefore that it is impossible in any circumstances for the appellant here to say that he now has a claim enforceable under the earlier attachment which was effected in 1934 before the sale of 29th August. I have been referred to two Full Bench rulings of this Court in 41 Mad. 265[1] and I.L.R. 1940 Mad. 526.[2] They do not seem to me to afford the slightest support to the argument for the appellant. Nor is it possible to say that the facts in this case are so similar that they are binding upon me in deciding this appeal against him. It seems to me unnecessary therefore to consider these rulings any further.

The next point which has been brought forward in support of the appeal is that inasmuch as the second attachment was effected on 29th September and the sale was not set aside until 31st October the plaintiff cannot acquire any rights until 31st October, and therefore those rights are defeated by the attachment made in favour of the appellant. It is impossible in my opinion to accept this argument. No doubt until the Court passed its orders on 31st October it was impossible to know with whom lay the true title to the land. If the sale had been confirmed the true title to the land from 29th August onwards would have lain with the auction purchaser. But the effect of the setting aside of the sale is clearly to declare that from 29th August onwards the title lay with the judgment-debtor. On 20th September therefore the judgment-debtor had a good title to convey to any alienee, and it must be held that he did convey that good title to the plaintiff. The attachment effected nine days after the sale to the plaintiff cannot therefore possibly affect the plaintiff's rights. The final point made in the appeal was that this alienation should be set aside under S. 53, T. P. Act, as being in fraud of the appellant. That matter is a pure issue of fact upon which the decision of the lower appellate Court is against the claim of the appellant. It cannot now be agitated afresh in the second appeal. In the result this appeal fails on all points and is dismissed with costs. Leave is refused.

C.R.K./G.N. *Appeal dismissed.*

1. ('18) 5 A.I.R. 1918 Mad. 127 : 43 I.C. 539 : 41 Mad. 265: 33 M.L.J. 707 (F.B.), Annamalai Chettiar v. Palamalai.
2. ('40) 27 A.I.R. 1940 Mad. 385 : 188 I.C. 81 : I.L.R. (1940) Mad.526: (1940) 1 M.L.J.482 (F.B.), Nana Rao v. Arunachalam Chettiar.

A. I. R. (29) 1942 Madras 523

WADSWORTH AND PATANJALI SASTRI JJ.

Kudithipudi Venkatramayya — *Appellant*

v.

Mallacheruvu Pundareekakshudu and others—*Respondents.*

Appeal No. 131 of 1940 and Civil Revn. Petns. Nos. 1098 and 1099 of 1940, Decided on 15th October 1941, against decree of Sub-Judge, Tenali, D/- 1st April 1940.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 21—Applicability—Words "has been adjudicated" in S. 21—Meaning of—In order to come under S. 21 applicant must be insolvent at time of his application.

The words "has been" indicate something which happened in the past and continues upto the present. The words "has been adjudicated" in S. 21 cannot be interpreted as having reference to a past completed act with no reference to present conditions. Those words mean "has been adjudicated and continues in the state resulting from his adjudication": ('35) 22 A. I. R. 1935 Mad. 921; ('37) 24 A. I. R. 1937 Mad. 36 and ('41) 28 A. I. R. 1941 Mad. 510, *Rel. on.* [P 524 C 2; P 525 C 1]

Section 21 is not intended to impose a disqualification upon all persons who have at any time in the past been adjudicated insolvents if dividends have been declared out of their assets, nor is it intended to give the benefits of the Act to all persons who at any time in the past have been made insolvents when owning agricultural land if no dividends have been declared out of their assets. The intention of S. 21 is to provide for pending insolvencies and to lay it down that when a dividend had been paid in such an insolvency the Act would not apply, but that if there had been no dividend, the Act would apply and the debts payable in insolvency would be liable to be scaled down if the insolvent was a person who but for his insolvency would have been an agriculturist. The words "has been adjudicated" in S. 21 which imply the continuation of the insolvency cannot be interpreted as referring only to the state of affairs as on the commencement of the Act. In order to come under S. 21, it is necessary that the applicant should be an insolvent at the time of his application. [P 525 C 1]

(b) Provincial Insolvency Act (1920), S. 37—Adjudication annulled—Debtor ceases to be insolvent—Vesting order under S. 37—Effect of — After annulment property vested in Official Receiver under S. 37 on 1st October 1937 and 22nd March 1938 — Debtor is not agriculturist within Madras Agriculturists Relief Act and hence not entitled to benefits thereof — Debtor cannot be said to have saleable interest in property vested in receiver.

The annulment of the adjudication relegates the debtor to the position which he occupied before he was adjudicated, except in so far as the vesting order under S. 37 places the residue of the properties at the disposal of the appointee for the benefit of the creditors. Although to this limited extent the administration of the estate continues to be in insolvency, the debtor ceases to be an insolvent : ('35) 22 A.I.R. 1935 Mad. 931, *Rel. on.* [P 525 C 1]

Consequently, when after the annulment property is vested in Official Receiver under S. 37 and remains so vested on 1st October 1937 and 22nd March 1938, the debtor cannot be said to be an agricultu-

a rist within the meaning of the Madras Agriculturists Relief Act and hence is not entitled to the benefits thereof. The debtor after the annulment cannot be said to have a saleable interest in the property vested in the Official Receiver. The most that he can be said to have in those properties is a possible expectation of a surplus, if any, after satisfying creditors but that cannot be treated as a saleable interest in those properties. [P 525 C 2]

K. Kameswara Rao and T. Rajagopalan — for Appellant.

V. Govindarajachari — for Respondent.

WADSWORTH J. — These three cases have relation to the same transaction and they are to some extent interdependent. We are concerned with a promissory note debt incurred on 4th December 1930 by defendant 1, in the suit out of which A. S.
b No. 131 of 1940 arises in favour of plaintiff 1. This debt was a renewal of two earlier debts incurred by the father of defendant 1. The suit note was assigned by plaintiff 1 to plaintiff 2 for collection and reassigned to plaintiff 1 in November 1939. Meanwhile, defendant 1 had become an insolvent, his insolvency petition being filed on 6th July 1932 and the adjudication being four months later. The insolvency was not prosecuted and on 1st November 1938 the insolvency Court passed an order annulling the adjudication owing to the default of the insolvent and directing that under S. 37, Provincial Insolvency Act, the properties should vest in the Official Receiver. After this order was passed, defendant 1, who is the appellant here, seems to have made some sort of arrangement with certain of his creditors and on 2nd December 1938 he filed a civil miscellaneous petition before the insolvency Court pray-
c ing for a review of the order vesting the property in the Official Receiver. This application was dismissed on 21st March 1939 and C. M. A. No. 40 of 1939 was preferred to the District Judge on 27th March 1939. Defendant 1 also filed in the insolvency Court, C. M. P. No. 426 of 1939 in which he prayed the Court to scale down the promissory note debt due to the present respondent, which was the only debt said to be outstanding after the settlement made between the appellant and his creditors. This application was rejected on the ground that the applicant by reason of the insolvency had no saleable interest in agricultural lands on 1st October 1937 and by reason of the annulment of the insolvency was not entitled to call in aid S. 21 of Act 4 of 1938. Against the order in this civil miscellaneous petition another appeal was filed to the District Court. In the Dis-
d trict Court, the creditor, who had not been paid, on 21st November 1939 with the leave of the insolvency Court filed a suit for the recovery of his debt. The present appellant pleaded that he was entitled to relief under Act 4 of 1938.

The learned Subordinate Judge negatived this plea on the basis of his previous order, no stay having been obtained from the District Court. The suit was accordingly decreed. The District Judge shortly afterwards passed orders on the two civil miscellaneous applications pending before him. On the appeal against the order rejecting the application for relief under Act 4 of 1938, the learned District Judge held that the insolvency continued even after the annulment by reason of the vesting order and that, even assuming that the insolvency did not continue, the ex-insolvent had still a saleable interest in the property vested in the Official Receiver. He therefore directed the trial Court to scale down the debt. On the appeal against the dismissal of the application to review the order vesting the property in the Official Receiver and District Judge observed that all the creditors except the present respondent had adjusted their claims against the insolvent and that as the debtor was prepared to deposit the amount due to the contesting creditor it had to be scaled down under the contemporaneous proceedings. The District Judge accordingly passed an order vacating the vesting of the property on condition of the deposit of the amount as scaled down within one month of its ascertainment by the trial Court. C. R. P. No. 1098 is preferred by the creditor against the order remanding the application under Act 4 of 1938 for the scaling down of the debt. C. R. P. No. 1099 is preferred by the creditor against the review of the order vesting the property in the Official Receiver and the main appeal, A. S. No. 131 of 1940, is preferred by the debtor against the decree passed without allowing him the benefit of scaling down f the debt under Act 4 of 1938. C. R. P. No. 1099 is not now pressed in view of the fact that on the stay application to this Court, C. M. P. No. 2936 of 1940, the debtor has given security to the satisfaction of the creditor for the amount of the debt should he fail to get it scaled down. There is therefore no longer any necessity for the restoration of the vesting order. This civil revision petition is therefore dismissed without any order as to costs. The appeal and C. R. P. No. 1098 go together and the decision of both these cases depends on the interpretation of S. 21 of Act 4 of 1938. Section 21 runs as follows :

"Nothing contained in this Act shall apply to the debts payable by any person who has been adjudicated an insolvent, if, prior to the coming into force of this Act, a dividend has been declared out g of his assets. If a dividend has not been so declared, this Act shall apply to the debts payable by such person if he would have been an agriculturist within the meaning of this Act but for his adjudication in insolvency."

The contention of the appellant is, firstly, that the section applies to the case of any person who has been adjudicated whether or not he remains an adjudicated insolvent during the relevant period, and secondly, that by reason of the vesting order the insolvency continues, so that the section applies even if it refers only to insolvencies which continue upto the date of the application. It seems to us that the provision that the Act shall apply to debts payable by any person "who has been adjudicated an insolvent" cannot properly apply to the case of any person who was at some time in the past adjudicated an insolvent, but has ceased to be in the position of h an adjudged insolvent before the question arises. We are of opinion that this section cannot properly apply to the case of a person who has, at some time in the distant past, been adjudged an insolvent, if he is not an insolvent during the relevant period. There is no point in treating a person as an insolvent for the purpose of his qualification under Act 4 of 1938, if he is not an insolvent for any other purpose. It would be absurd to apply S. 21 to the case of an insolvent who was adjudged many years ago and whose debts had been paid as a result of proceedings in insolvency. To read the words "has been adjudicated" as if they do not contain any reference to a continuing state, would be to deprive many people of the benefits of the Act, although they were no longer disqualified by their insolvency from owning properties, incurring debts and carrying out the normal activities of a person with full rights over his estate. There is ample authority for the interpretation of the words "has been" in a

statute, as indicating something which happened in the past and continues upto the present. Such an interpretation was placed upon the words "has been hereditary" by the Bench which decided 69 M. L. J. 384,[1] and a similar view was taken in I.L.R. (1937) Mad. 189.[2] In App. No. 298 of 1940 and C. R.P. 1355 of 1940[3] this Bench had to deal with the words "has been hereditary" in the definition of an excepted temple under the Madras Hindu Religious Endowments Act and we held that these words clearly indicate a state of affairs which has prevailed in the past and continues upto the present. There seems, therefore, no reason to interpret the words "has been ajudicated" as having reference to a past completed act with no reference to present conditions. The ordinary meaning of the phrase in ordinary English would be "has been adjudicated and continues in the state resulting from his adjudication" and we hold that this is the meaning of the phrase in section 21. We do not consider that S. 21 was intended to impose a disqualification upon all persons who have at any time in the past been adjudicated insolvents if dividends have been declared out of their assets, nor do we believe that it was intended to give the benefits of the Act to all persons who at any time in the past have been made insolvents when owning agricultural land, if no dividends have been declared out of their assets. The intention clearly was to provide for pending insolvencies and to lay it down that when a dividend had been paid in such an insolvency the Act would not apply, but that if there had been no dividend, the Act would apply and the debts payable in insolvency would be liable to be scaled down if the insolvent was a person who but for his insolvency would have been an agriculturist.

It has been suggested that even assuming the words "has been adjudicated" to imply the continuation of the insolvency, they only have regard to the state of affairs as on the commencement of the Act. But this interpretation is not acceptable to us. No doubt, it is necessary in order that a person may claim the benefits of the Act that he should be an agriculturist on 1st October 1937 and on the date of the commencement of the Act. The appellant in this case was not an agriculturist on either of these dates, for his estate was vested in the Official Receiver. He cannot get the benefit of the Act unless he can come under S. 21; and it seems to us that in order to come under S. 21, it is necessary that the applicant should be an insolvent at the time of his application. A further contention has been advanced that by reason of the vesting order the insolvency continues even after the adjudication has been annulled. This contention seems to us unsound. The annulment of the adjudication relegates the debtor to the position which he occupied before he was adjudicated, except in so far as the vesting order places the residue of the properties at the disposal of the appointee for the benefit of the creditors. Although to this limited extent the administration of the estate continues to be in insolvency, the debtor ceases to be an insolvent. This has been clearly laid down in 58 Mad. 1014.[4] The position, therefore, is that the appellant on 1st October 1937 and on 22nd March 1938 was not an agriculturist because his property was vested in the Official Receiver and he had no saleable interest therein. We cannot accept the view of the District Judge that after the annulment of the adjudication he had a saleable interest in the properties vested in the Official Receiver. The most that he could have had in those properties was a possible expectation of a surplus, if any, after satisfying the creditors. That is not, in our opinion, to be treated as a saleable interest in those properties. It follows, therefore, that the trial Court was right in refusing to apply the benefits of Act 4 of 1938.

A. S. No. 131 of 1940, has therefore to be dismissed with costs. C. R. P. No. 1098 has to be allowed and the order of the trial Court dismissing the application to scale down the debt is restored and the order of the District Judge vacated. No separate costs in the civil revision petition.

C.R.K./G.N. *Order accordingly.*

1. ('35) 22 A. I. R. 1935 Mad. 921 : 158 I C 733 : 69 M. L. J. 384 : 59 Mad. 245, Krishnamurti v. Madras Hindu Religious Endowments Board.
2. ('37) 24 A. I. R. 1937 Mad. 36 : 166 I. C. 188 : I. L. R. (1937) Mad. 189 : 71 M. L. J. 624, Chelapati Rao Naidu v. Hindu Religious Endowments Board, Madras.
3. *Reported in* ('41) 28 A.I.R. 1941 Mad. 510 : 199 I. C. 822 : I. L. R. (1941) Mad. 559 : (1941) 1 M. L. J. 250, T. V. Bhashyakar v. Madras Hindu Religious Endowments Board.
4. ('35) 22 A.I.R. 1935 Mad. 931 : 157 I. C. 1007 : 58 Mad. 1014 : 69 M. L. J. 856, Official Receiver, Guntur v. Secretary of State.

A. I. R. (29) 1942 Madras 525

WADSWORTH AND PATANJALI SASTRI JJ.

Pachigolla Satyanarayanamurthi and others — Appellants

v.

Karatam Sathiraju and others — Respondents.

Appeals Nos. 118 and 119 of 1939, Decided on 16th December 1941, against decrees of Sub-Judge Amalapuram, in O. S. Nos. 25 and 26 of 1938, respectively.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 7—Sale of part of mortgaged property to non-agriculturist with liability to pay off mortgage — Suit for redemption by mortgagor agriculturist — Whole debt including amount in respect of property in hands of purchaser held should be scaled down.

Part of mortgaged property was purchased by a non-agriculturist and amount was left with him to pay off the mortgage. He did not pay. In a suit for redemption, the mortgagor who was an agriculturist claimed to scale down the debt. It was contended that as the purchaser was not an agriculturist the debt should not be scaled down so far as he was concerned :

Held that the whole debt should be scaled down : ('41) 28 A. I. R. 1941 Mad. 204, *Disting.* ; ('41) 28 A. I. R. 1941 Mad. 557, *Rel. on.* [P 527 C 1]

(b) Transfer of Property Act (1882), S. 55 (5) (b) — Part of purchase money retained by purchaser for payment to mortgagee — Purchaser not having to pay full amount owing to debt being scaled down — He is liable to return to mortgagor money remaining unpaid.

Where part of the purchase money is retained by the purchaser for payment of a mortgage and if the purchaser does not have to pay the full amount thus reserved with him owing to the mortgage debt being scaled down at the instance of the mortgagors, he would be liable to return to the latter the portion of

a the purchase money remaining unpaid : 36 Mad. 348, *Rel. on.* [P 526 C 2]

T. P. Act—

('36) Mulla, Page 307 Pt. (d).

('34) Mitra, Pages 279-280, N. 314.

P. Satyanarayana Rao — for Appellants.

P. Somasundaram, P. Suryanarayana and R. Venkata Rao — for Respondents.

PATANJALI SASTRI J.—These appeals arise out of two suits brought by respondents 1 to 3 (hereinafter referred to as the mortgagors) for redemption of two mortgages executed by them in favour of the appellant. The first mortgage was for a sum of Rs. 10,000 and the second for Rs. 7300, the same property, 71 acres 40 cents of land, being mortgaged in both cases. The mortgagors sold 43 acres 40 cents out of the mortgaged property to respondent 4 (hereb inafter referred to as the purchaser) for a sum of Rs. 34,488 out of which Rs. 11,694 was directed to be paid in full discharge of the second mortgage referred to above and Rs. 19,680 was to be paid in part payment of the first mortgage. The purchaser, however, failed to carry out these directions and both the mortgage debts remained outstanding when the Madras Agriculturists Relief Act came into force. The mortgagors then brought these suits for redemption of the mortgages, claiming the benefit of the Act as agriculturists and depositing in Court the amounts which they alleged to be due under the mortgages when scaled down in accordance with the provisions of that Act. The Court below has passed decrees for redemption as prayed for in both the suits, negativing the appellant's contention that the debts should not be scaled down so far as the purchaser was concerned as the latter was not an agric culturist within the meaning of the Act, and the question for determination in these appeals is whether the decrees in question were rightly made.

It is contended that the Court below was wrong in allowing the mortgagors to redeem the mortgages as a whole by payment only of the mortgage moneys as scaled down under the Act without providing that the properties in the hands of the purchaser should be redeemed only on payment of the entire amounts due under the mortgages. It was said that otherwise the purchaser who is a non-agriculturist would be benefited by the scaling down of the debts, a result not contemplated by the Act. Reliance was placed upon the decision in (1940) 2 M. L. J. 872[1] and in C. R. P. No. 1655 of 1940[2] as supporting this contention. These decisions no doubt establish that in a suit to enforce a mortgage brought against the d mortgagor who is not an agriculturist and the alienee of part of the hypotheca who is an agriculturist a decree can be passed for the full amount due against the party who is a non-agriculturist while scaling down the mortgage debt as against the party who is an agriculturist. But they do not, in our opinion, assist the appellant. There it was a suit for sale and the purchaser who was an agriculturist claimed and was allowed the benefit of the Act, it having been held that his liability qua purchaser to pay the mortgage money was a debt within the meaning of the Act, while as against the mortgagor who was not an agriculturist, a decree for the full amount of the debt was passed. In the present case, however, the mortgagors are agriculturists and they seek to redeem the property under S. 60, T. P. Act, which (so far as it is material here) provides : e

"At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee, (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof, to the mortgagor, and (c) at the cost of the mortgagor, either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished, ... Nothing in this section shall f entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

The mortgage money being liable to be scaled down under the Madras Agriculturists Relief Act, it follows from the provision cited above that, on payment of the scaled down amount, the mortgagors are entitled to call upon the mortgagee to deliver up the mortgage deed duly discharged or in other words to redeem the mortgage as a whole. This conclusion is in accord with the decision in (1941) 1 M. L. J. 547[3] which indeed rules this case. There a decree for redemption of a mortgage was obtained by the g mortgagors and transferees of portions of the hypotheca suing as co-plaintiffs. The mortgagors were and the purchasers were not agriculturists and the question arose whether the decree as a whole could be scaled down even as against the purchasers. It was held that there was nothing in the Act to prevent the decree being scaled down as a whole and it was pointed out that the Court would not, by so scaling down the decree, be benefiting the non-agriculturist purchaser as the latter might have to refund the portion of the purchase money which, as a result of the scaling down, he would not have to pay to the mortgagee. The position here is, in our opinion, very similar. As between the mortgagors who sold a portion of the hypotheca under Ex. 2 and the purchaser, the sale was free from the encumbrances except to the extent of the balance due under the first mortgage after deducting the sum of h Rs. 19,680 which the purchaser was directed to pay towards that mortgage. The position therefore is that the amount of Rs. 34,488 in the hands of the purchaser really represents part of the purchase money retained by him for payment to the appellant mortgagee (see S. 55 (5) (b), T. P. Act), and if the purchaser did not have to pay the full amount thus reserved with him owing to the mortgage debts being scaled down at the instance of the mortgagors, he would be liable to return to the latter the portion of the purchase money remaining unpaid: *see* 36 Mad. 348.[4] This, in effect, is admitted by the purchaser in the written statements which he filed in the suits wherein he supported the allegations in the plaint that part of the purchase money was kept in

1. ('41) 28 A. I. R. 1941 Mad. 204 : 195 I. C. 702 : I. L. R. (1941) Mad. 336 : (1940) 2 M. L. J. 872, Ramier v. Srinivasiah.
2. C. R. P. No. 1655 of 1940, Arumugam Pillai v. Sadasivam Pillai.
3. (41) 28 A.I.R. 1941 Mad. 557 : (1941) 1 M. L. J. 547, Marina Ammaji v. Mirza Bakhar Beg.
4. ('11) 36 Mad. 348 : 12 I. C. 353 : 21 M. L. J. 983, Raghunathachariar v. Sadagopachariar.

deposit with him for the benefit of the mortgagors for payment to the appellant on their behalf. It is therefore not correct to say, as was argued for the appellant, that the Court by allowing the mortgagors to redeem the mortgages as a whole was conferring a benefit upon a non-agriculturist contrary to the intendment of the Madras Agriculturists Relief Act. On the other hand, if the purchaser in such circumstances is made to pay the entire sum reserved with him for payment under the sale deed which was executed before the passing of the said Act, the mortgagors would stand ultimately deprived of the benefit which as agriculturists they are undoubtedly entitled to claim under the Act.

It was then said that the purchaser having agreed with the appellant to pay the amounts which he retained out of the purchase money, decrees should have been passed against him personally for such amounts in these suits without driving the appellant to another suit for the enforcement of such liability. The allegations made in this behalf in the appellant's written statement are by no means clear. What appears to have been pleaded is that even before the sale deed was executed, there was an arrangement between the mortgagors, the purchaser, and the appellant whereby the mortgagors ceased to be liable under the mortgages and the purchaser bound himself to pay the sums retained by him to the appellant, who, for his part, undertook to release the properties purchased on such payment. This plea is quite contrary to the recitals in the sale deed (Ex. 2) which clearly contemplate the continuance of the mortgagors' liability and was indeed not put forward in that form before us by the learned counsel for the appellant who merely suggested a new promise made by the purchaser to the appellant involving personal liability to pay the sums specified in the sale deed. The Court below has not gone into this question as in its view such an agreement even if true would give rise to a separate cause of action against the purchaser on which no decree could be passed in favour of the appellant in these suits for redemption brought against both of them. We are inclined to agree with this view and accordingly leave the question open for determination in other proceedings. In the result, the appeals fail and are dismissed. The appellant will pay the costs of the mortgagors and the purchaser 1 set for each in each of the appeals except the fees for the advocate which will be paid only in A. S. No. 118 of 1939.

C.R.K./K.S. *Appeals dismissed.*

A. I. R. (29) 1942 Madras 527

WADSWORTH AND PATANJALI SASTRI JJ.

K. M. N. S: P. Nachiappa Chettiar and others — Appellants

v.

A. K. A. Ramachandra Reddiar and others — Respondents.

Appeals Nos. 23 and 24 of 1938, 295 of 1939 and Civil Revn. Petn. No. 1857 of 1939, Decided on 3rd February 1942, against preliminary decree of Sub-Judge, Madura, D/- 13th September 1937.

Madras Agriculturists Relief Act (4 of 1938), S. 7 — Mortgagor agriculturists — Properties purchased subject to mortgage by non-agriculturist are liable only to extent of scaled amount.

If a debt is scaled down at the instance of a mortgagor who is an agriculturist and claims the benefits of the Act and the properties are purchased by persons who are non-agriculturists subject to the mortgage, the property can be proceeded against only for the scaled down amount and no more, under the general law relating to mortgages: ('41) 28 A. I. R. 1941 Mad. 584 *Expl.*; ('41) 28 A. I. R. 1941 Mad. 584 and ('41) 28 A. I. R. 1941 Mad. 557, *Rel. on.* [P 527 C 2]

T. M. Krishnaswami Iyer and N. Sivaramakrishna Iyer — for Appellants.

Advocate General, K. Rajah Iyer, V. Seshadri, K. S. Venkatarama Iyer, T. S. Venkataramа Iyer and P. V. Subramaniam — for Respondents.

PATANJALI SASTRI J. — (His Lordship after dealing with Appeals Nos. 23 and 24 of 1938 proceeded). It remains only to deal with Appeal No. 295 of 1939 and C. R. P. No. 1857 of 1939, which, as stated already, have been preferred by defendants 5 to 8. These defendants are admittedly not agriculturists within the meaning of the Madras Act 4 of 1938 and cannot therefore put forward any claim under that Act to have the mortgage debt scaled down. But these defendants contend that if the debt is scaled down at the instance of the mortgagor who is an agriculturist and claims the benefits of the Act, the properties purchased by these defendants subject to the suit mortgage could be proceeded against only for the scaled down amount and no more, under the general law relating to mortgages. This contention is supported by the decision reported in I. L. R. (1941) Mad. 930[1] to which one of us was a party. The same principle was also applied in (1941) 1 M.L.J. 547[2] and App. Nos. 118 and 119 of 1939[3] (not reported) which arose out of suits for redemption. Our attention was drawn to certain observations in I.L.R. (1941) Mad. 336[4] as being in conflict with the view expressed in the decisions referred to above. In that case which was the converse of the present, the mortgagor was a non-agriculturist and a puisne mortgagee who was an agriculturist claimed the benefit of the Act. It was argued on behalf of the mortgagee that, as the scaling down of the decree at the instance of the puisne mortgagee (who according to earlier decisions was a debtor within the meaning of the Act) would result in benefiting the non-agriculturist mortgagor contrary to the intendment of the Act, no relief should be given to the applicant although he was an agriculturist. This contention was negatived and the observations in the judgment even if a little too widely expressed must be understood with reference to the particular situation there dealt with and not as laying down any general proposition applicable to different facts.

In the result Appeals Nos. 23 and 24 of 1938 are dismissed with costs and App. No. 295 of 1939 is allowed with costs here and below. C.R.P. No. 1857 of 1939, which was filed only in the alternative is dismissed without costs. The advocates' fee in A. S. No. 24 will be calculated on the value of the decree as scaled down in the lower Court.

C.R.K./K.S. *Order accordingly.*

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1. ('41) 28 A. I. R. 1941 Mad. 584 : I. L. R. (1941) Mad. 930 : (1941) 1 M.L.J. 561, Arunachalam v. Seetharam.
2. ('41) 28 A.I.R. 1941 Mad. 557 : (1941) 1 M.L.J. 547, Marina Ammaji v. Mirza Bakhar Beg.
3. *Reported in* ('42) 29 A.I.R. 1942 Mad. 525 : (1942) 1 M.L.J. 506, Satyanarayanamurthi v. Sathiraju.
4. ('41) 28 A. I. R. 1941 Mad. 204 : 195 I. C. 702 : I. L. R. (1941) Mad. 336 : (1940) 2 M. L. J. 872, Ramier v. Srinivasiah.

a **A. I. R. (29) 1942 Madras 528**

ABDUR RAHMAN J.

Ayyavar Thevar — Appellant

v.

Secretary of State represented by Collector of Tanjore — Respondent.

Second Appeal No. 655 of 1938, Decided on 23rd July 1941, against decree of District Court, East Tanjore at Negapatam, in A. S. No. 6 of 1937.

(a) Evidence Act (1872), S. 33—Depositions of persons recorded in case to which defendant not party — Persons dead at time when copies tendered in evidence—Depositions do not fall within S. 33 and hence are inadmissible.

(b) Evidence Act (1872), S. 33—Evidence to be admissible must fall within one or other section of Act — If it does not, it must be rejected — Inadmissible evidence cannot be made admissible by consent of parties—Consent when may cure defect—Estoppel.

Where the depositions of certain persons were b recorded in a case to which the defendant was not a party and those persons who had deposed had all been dead at the time their depositions were tendered in evidence, the depositions do not fall within the ambit of S. 33 and hence are inadmissible in evidence. [P 528 C 2; P 529 C 1]

The scheme of the Evidence Act is that the evidence must, to be relevant or admissible, fall within one or other section of the Act. If a particular statement or document cannot be brought within the four corners of any section of the Evidence Act, c it will have to be rejected. Irrelevant and inadmissible evidence cannot be made relevant or admissible with the consent of a party. Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant, but consent or want of objections to the wrong manner in which relevant evidence was brought on record of the suit disentitles parties from objecting to such evidence subsequently. Unless a party can be found to have been estopped from objecting to the admissibility of the evidence it cannot be said that evidence not otherwise admissible or which would have been liable to rejection if objection were taken to it, may be perfectly good evidence if admitted by the consent of parties : ('20) 7 A. I. R. 1920 Mad. 547, (F. B.), *Expl.*; ('15) 2 A. I. R. 1915 Mad. 793, *Appr.*; 24 Bom 591 and 15 W. R. 348, *Disting.*; d ('24) 11 A. I. R. 1924 All. 845, *Not approved.* [P 529 C 1, 2]

(c) Evidence Act (1872), S. 33—Deponents in prior proceedings themselves examined in subsequent suit—Fact that parties agreed to have depositions read in Court as evidence would not amount to admission of irrelevant evidence but only consenting to wrong procedure—Proper procedure indicated.

Where the witnesses who had deposed in prior proceedings are themselves examined in a subsequent suit the question whether their previous statements were read out to them with the permission of the Court and with the consent of the other parties would not, although a wrong procedure to adopt, make the statements inadmissible in evidence. The correct procedure would be to put the same questions to witnesses over again in regard to which they had already made their statements. But if in order to save time, the parties agreed to have the previous depositions of the witnesses in Court read as evidence, it would not be admitting irrelevant evidence but will only be consenting to a wrong procedure or method of the reception of their evidence : ('27) 14 A. I. R. 1927 Mad. 1107, *Ref.* [P 529 C 2] e

(d) Evidence Act (1872), S. 33 — Witnesses whose depositions in prior proceedings were tendered in evidence alive — Their statements admitted in evidence—On consent by other side application to summon those witnesses cancelled—Other side held estopped from objecting to statements being referred to in case.

The witnesses whose depositions in a prior proceedings were tendered in evidence were alive and after the statements made by those witnesses were admitted in evidence, the application to summon those witnesses was cancelled on consent being given by the other side: f

Held that having once agreed to the statements being brought on the record and having thus allowed the other party to act to his detriment by cancelling his application to summon those witnesses it was no longer open to the party who had consented to the admission of statements on the ground of estoppel to object to those documents from being referred to in the case: 24 Bom. 591; *Rel. on*; ('24) 11 A. I. R. 1924 All. 845, *Dissent.* [P 529 C 2]

K. Bhashyam Iyengar and T. R. Srinivasan — for Appellant.

Government Pleader — for Respondent.

JUDGMENT.—The learned District Judge has in a careful and fairly elaborate judgment, after discussing the whole of the evidence which was on the record, recorded his finding that the plaintiff g had failed to establish his title to the land sued for. After hearing learned counsel for the appellant I find that the only two points which deserve any notice are : (1) that although there is a reference in Ex. A to 7½ kulis of land in paimash No. 16 the learned District Judge has failed to note that fact and given no reasons for holding that the plaintiff did not have any land, even to that extent, in paimash No. 16, and (2) that the documents, Exs. J, K and L were wrongly rejected by the lower appellate Court. In regard to the first question learned counsel for the appellant is not even today in a position to satisfy me as to the extent of the area contained in paimash No. 16 or that the 7½ kulies mentioned in Ex. A had any reference to one acre 73 cents for which the suit was brought by his client. He wants me to call for a finding in that respect. But if there had been anything in that point, h learned counsel for the appellant would have drawn my attention to the evidence on the record bearing on that point, particularly when I asked him to do so. This was apparently not suggested in the Court below and the absence of a definite ground of appeal either to this Court or to the lower appellate Court leads me to the same conclusion. I am not inclined to call for a finding in the circumstances.

As to the second question whether Exs. J, K and L were admissible in evidence, it was contended by learned counsel for the appellant that having been admitted with the consent of the counsel for the respondent, they should not have been rejected by the learned District Judge. These three documents are copies of the depositions of persons, who had been dead on the date on which these depositions were tendered in evidence. They were recorded in a case to which the present respondent was not a party and could not therefore fall within the ambit

of S. 33, Evidence Act. Learned counsel for the appellant, however, contended that these depositions would be admissible in evidence even if they could not be brought within the four corners of S.33 or of any other section of the Evidence Act. But this is obviously an untenable position. The scheme of the Evidence Act is that the evidence must, to be relevant or admissible, fall within one or other section of the Act. If a particular statement or document cannot be brought within the four corners of any section of the Evidence Act, it will have to be rejected. Reliance was placed by learned counsel for the appellant on a number of cases to which I will refer in a minute; but they have, in my opinion, no application to the facts of the present case. My attention was drawn first of all to a Full Bench decision of this Court in 43 Mad. 609[1] in which one of the learned Judges referred to 38 Mad. 160,[2] which in turn approved of a decision of the Calcutta High Court in 15 W. R. 348.[3] But the question as pointed in the order of reference to the Full Bench was whether the evidence taken in a previous judicial proceeding to which the same persons were parties and in which the same main issues were raised could not have been admitted into evidence in a subsequent litigation even with the consent of parties. It will thus be seen that the main conditions of S. 33 were complied with and the question merely was as to the mode of proof and not as regards the nature and quality of the evidence itself. This case is no authority for the proposition that irrelevant and inadmissible evidence can be made relevant or admissible with the consent of a party. The observations of Coutts-Trotter J., (as he then was) express the position very correctly. He observed as follows :

"It is clear that in this country neither an omission by an advocate to object to the giving of irrelevant and inadmissible evidence, nor the failure of the tribunal to exclude it of its own motion, will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue."

It is possible, however, that if evidence otherwise relevant and admissible is received by a "defective method of letting in evidence" although "in its substance and context relevant and germane to the issues," the consent may cure the defect and it will not be open to a party to object to the method of proof subsequently. It may be that certain observations of Krishnan J. are not very happily worded; but the following question, which he himself formulated and which cannot be lost sight of, would show that he did not intend to lay down that otherwise irrelevant evidence could be made relevant by the consent of parties. The question formulated by him was in the following words :

"As pointed out in 1914 M. W. N. 931,[4] the question involved here is one of mode of proof of relevant facts rather than one of the relevancy of the facts themselves."

It was held in 38 Mad. 160[2] that :

" Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant, but consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a Court of appeal."

This decision cannot possibly help the appellant. Nor do the facts of the case in 15 W. R. 348[3] assist the appellant. It was pointed out by the learned Judges in that case that the depositions which were tendered in evidence were of persons who were alive and who were actually summoned. But they were not examined in view of the fact that the party tendered their previous depositions and the other party agreed to their previous statements being let in evidence. After the witnesses were discharged an attempt was made on behalf of the consenting party to resummon them and that application was rejected by the learned Judges on the following grounds :

"Nothing of this sort was urged before the Court below and we do not think that the witness should be harassed by being repeatedly summoned before the Court when the plaintiff after perusing their testimony was satisfied that it was sufficient for the purposes of his case that that evidence should be used as evidence in his cause."

The decision in 104 I.C. 518[5] is not of much help either as the documents in that case to which objections were taken were first of all produced by the very party who chose to object to their admissibility. But that was not all. The following sentence in Madhavan Nair J.'s judgment is very significant:

"Though these depositions, Exs. I, II, III and IV given in prior proceedings were exhibited it should be noticed that the deponents themselves were examined as witnesses in this case and these documents were put to them while they were under examination."

If the witnesses themselves were examined in that case the question whether their previous statements were read out to them with the permission of the Court and with the consent of the other parties would not, although a wrong procedure to adopt, make the statements inadmissible in evidence. The correct procedure would have been to put the same questions to witnesses over again in regard to which they had already made their statements. But if in order to save time, the parties agreed to have the previous depositions of the witnesses in Court read as evidence, it would not be admitting irrelevant evidence but will only be consenting to a wrong procedure or method of the reception of their evidence.

The decision in 24 Bom. 591[6] does not advance the position any further. The witnesses whose depositions were tendered in evidence were alive and the application to have those witnesses summoned was cancelled after the statements made by those witnesses were admitted in evidence. Had no consent been given by the other side, the witnesses would have been examined in the ordinary course. Having once agreed to the statement being brought on the record and having thus allowed the other party to act to his detriment by cancelling his application to summon those witnesses, it was held to be no longer open, and if I may say so with respect rightly, to the party on the ground of what may be described as an estoppel, to object to those documents from

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1. ('20) 7 A.I.R. 1920 Mad. 547 : 56 I. C. 957 : 43 Mad. 609 : 38 M. L. J. 532 (F.B.), Jainab Bibi v. Haider Ali.
2. ('15) 2 A.I.R. 1915 Mad. 793 : 21 I. C. 319 : 38 Mad. 160 : 25 M. L. J. 360, Prakasarajanim Garu v. Y. P. Venkatarao.
3. ('70) 15 W. R. 348, Sreenath Roy v. Goluck Chunder Sen.
4. ('15) 2 A. I. R. 1915 Mad. 762 : 26 I. C. 384 : 1914 M. W. N. 931, Krishna Reddi v. Sundara Reddi.
5. ('27) 14 A.I.R. 1927 Mad. 1107 : 104 I. C. 518, Lakshmidevamma v. B. Kristiah.
6. (1900) 24 Bom. 591 : 2 Bom. L. R. 386, Lakshman v. Amrit.

being referred to in the case. The decision in 46 All. 815[7] does not, in my opinion, and I say so with very great deference, lay down the law correctly. Unless a party can be found to have been estopped from objecting to the admissibility of the evidence, I do not think it can be said on the basis of the authorities to which I have already referred that evidence not otherwise admissible or which would have been liable to rejection if objection were taken to it, may be perfectly good evidence if admitted by the consent of parties. The observations of Krishnan J. in the Madras case on which reliance was placed in this decision cannot be as observed before torn from their context or taken as an authority on facts other than those that were before the learned Judge in that case. For the above reasons I hold that the documents Exs. J, K and L were rightly rejected by the learned District Judge. In the result the appeal fails and is dismissed with costs. Leave to appeal refused.

C.R.K./G.N. *Appeal dismissed.*

7. ('24) 11 A.I.R. 1924 All. 845 : 80 I. C. 874 : 46 All. 815 : 22 A. L. J. 761, Radhakishan v. Kedar Nath.

A. I. R. (29) 1942 Madras 530 (1)

HORWILL J.

Public Prosecutor — Appellant

v.

Poongavana Goundan — Respondent.

Criminal Appeal No. 686 of 1941, Decided on 26th November 1941, against acquittal by Sub-Divisional First Class Magistrate, Dharmapuri, in C. A. No. 43 of 1941.

Madras Prohibition Act (10 of 1937), S. 4 (1) (a) and (g) — Pots containing illicit arrack and paraphernalia of distillation found in hut owned by accused and his brothers — Accused and his brothers also owning house in village—Brothers convicted — Accused not present when articles recovered — Accused living in hut as much as his brothers — Accused in circumstances held was in possession of articles found.

A pot containing fermented wash, a bottle containing illicit distilled arrack, and a number of vessels used for illicit distillation were found in a hut owned by the accused and his three younger brothers who were tried and convicted; but the accused was tried since because he was then absconding. The accused and his brothers also owned a house in the village. Not only was the accused the eldest member, and therefore the manager, of the undivided family consisting of himself and his three brothers and was the owner of the hut in which the articles were found; but he also lived there. He was not present at the time when the search was made as he was then with his sheep in a pen at some distance off :

Held that as the accused lived in the hut as much as his brothers he was, in the circumstances, in possession of the articles found in the hut, unless there was some reason to think that the articles recovered may have been introduced into the hut during his temporary absence. [P 530 C 2]

Appellant in person.

K. S. Sundaram — for Respondent.

JUDGMENT. — The accused in this case was convicted by the Stationary Sub-Magistrate of Pennagaram, under S. 4 (1) (a) and (g), Madras Prohibition Act, and sentenced to four months' rigorous imprisonment. In appeal, the conviction and sentence were set aside on the ground that the prosecution had not satisfactorily proved that the accused was in possession. The Crown has preferred this appeal against the order of acquittal. A pot containing 4½ gallons of fermented wash, a bottle containing four drams of illicit distilled arrack, and a number of vessels used for illicit distillation were found in a hut owned by the accused and his three younger brothers. The accused and his brothers also owned a house in the village. His brothers were tried and convicted; but the present accused has been tried since because he was then absconding. The Sub-Divisional Magistrate acquitted the accused on the ground that he had a house in the village and was admittedly not present when the articles of distillation were recovered.

It would appear from the evidence of P.W. 2, the village Magistrate of the village, and of D. W. 1, that not only is the accused the eldest member, and therefore the manager of the undivided family consisting of himself and his three brothers and was the owner of the hut in which the articles were found; but that he also lived there. He was not present at the time when the search was made as he was then with his sheep in a pen at some distance off; but the evidence leads one to conclude that he lived in the hut as much as his brothers and was therefore in possession of the articles found in the hut, unless there is some reason to think that the articles recovered may have been introduced into the hut during his temporary absence. If the offence had been committed with regard to some smaller article such as a packet of opium or a jewel that could be easily introduced in a very short space of time without the knowledge of a person living in the house, then undoubtedly the Sub-Divisional Magistrate would have been right. But it is clear that all the paraphernalia of distillation could not have been introduced within a short space of time. It seems most unlikely that the younger brothers were waiting for their eldest brother to go out to attend to the sheep in order to introduce into the hut in his absence material for distillation and then to have the process well advanced by the time that the police came to search the hut. I have no doubt in the circumstances that the accused was in possession of the articles found and which were the subject of the charge. The order of acquittal is therefore set aside and the accused convicted and sentenced, as he was, by the Stationary Sub-Magistrate.

C.R.K./G.N. *Accused convicted.*

A. I. R. (29) 1942 Madras 530 (2)

HORWILL J.

Public Prosecutor — Appellant

v.

Kola Sahib of Wandiwash — Respondent.

Criminal Appeal No. 396 of 1941, Decided on 10th October 1941, against judgment of Sub-Divisional First Class Magistrate, Cheyyar, D/- 14th December 1940.

(a) Madras District Police Act (24 of 1859), S. 53—Accused charged with making false complaint against police officer — S. 53 does not apply.

Section 53 can have no application where the accused is charged with making false complaint

against police officer as the subject of the prosecution cannot be said to be an act done under the provisions of the Act, i. e., the Act does not make provision for the filing of a false complaint against police officers. [P 531 C 1]

(b) Madras District Police Act (24 of 1859), S. 47—S. 47 does not authorise act but punishes acts against police officers.

Section 47 does not authorise an act but punishes certain acts against police officers. [P 531 C 1]

Appellant in person.

A. S. Sivakaminathan — for Respondent.

JUDGMENT.—The appellant was found by the Stationary Sub-Magistrate of Wandiwash to have sent a false report to the Deputy Superintendent of Police, Tiruvannamalai, against the Circle Inspector of Wandiwash Circle and he was convicted under S. 47, Police Act, and sentenced to a fine of Rs. 50. The matter was taken in appeal to the Sub-divisional First Class Magistrate of Cheyyar, who allowed the appeal on the technical ground that the complaint was barred by time under S. 53, Police Act. The learned Sub-divisional Magistrate clearly made a mistake in presuming that any period of limitation had been laid down for the bringing of complaints of the nature with which we are concerned in this case. Section 53 says :

"All actions and prosecutions against any person which may be lawfully brought for anything done or intended to be done either under the provisions of this Act or under the provisions of any other law for the time being in force conferring powers on the police shall be commenced within three months of the act complained of . . . ."

The subject of this prosecution was not an act done under the provisions of the Act, i. e., the Act does not make provision for the filing of a false complaint against police officers. Section 47 does not authorise an act, but punishes certain acts against police officers. The appeal is therefore allowed. As more than one year has elapsed since the accused was first sentenced, I think it is sufficient to meet the ends of justice if he is fined R. 10. As he now admits the offence, it is not necessary to send the appeal back to the Sub-divisional Magistrate for re-hearing.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 531

HORWILL J.

Public Prosecutor — Appellant

v.

Chinnalatchumana Naidu — Respondent.

Criminal Appeal No. 669 of 1941, Decided on 12th December 1941, against acquittal by Sub-Divisional Magistrate, Salem, in C. A. No. 43 of 1941.

(a) Criminal trial—Crown appeal against acquittal — Though appellate Court can go into facts it will not convict if facts were at all uncertain especially when lower Court's finding on evidence is not unreasonable.

Although the appellate Court is entitled to go into the questions of fact in an appeal by the Crown against acquittal it will be reluctant to convict the accused if the questions of fact were at all uncertain, especially when the lower Court came to a finding on the evidence which cannot be said to be altogether unreasonable. [P 531 C 2]

Cr. P. C. —

('41) Chitaley, S. 423, N. 15 Pt. 15.

('41) Mitra, Page 1315, N. 1120.

(b) Madras District Municipalities Act (5 of 1920), S. 182 — Applicability.

Section 182 applies to private streets as well as to public. [P 532 C 1]

(c) Madras District Municipalities Act (5 of 1920), Ss. 182 and 313—Encroachment on lane —Accused charged under S. 313 read with S. 182 and acquitted — Bona fide dispute as to ownership of lane in general and part of it encroached upon in particular — Order of acquittal held should not be interfered with — Municipality held should establish its rights in civil suit before taking further action in respect of lane.

The accused was charged with encroaching upon a lane under S. 313 read with S. 182 and was acquitted. There was a bona fide dispute as to the ownership of the lane in general, and that part of it which was encroached upon and was situated near the accused's house in particular.

Held that the interests of justice required that the order of acquittal should not be interfered with. It would be better that the Municipality should establish clearly its rights in a civil suit before taking any further action in a criminal Court, with respect to the lane. [P 532 C 1]

K. Venkataraghavachari — for Appellant.

T. Thayagaraja Iyer — for Respondent.

JUDGMENT. — The Municipality of Salem brought a case under S. 313 read with S. 182, District Municipalities Act, against a certain person for having encroached on a public street. The Second Class Stationary Sub-Magistrate of Salem considered all the evidence relating to the ownership of this lane and came to the conclusion that it was a public street. He pointed out that even if it were a private street, it would be punishable to disregard an order that the encroachment should be removed; for S. 182 makes no mention of the word 'public' immediately before the word 'street.' In appeal, the Sub-divisional First Class Magistrate came to the conclusion that the street was a private one. He did not consider the second finding of the Stationary Sub-Magistrate that even if it were a private road, the section would apply; but he concluded his judgment by saying:

"Since the question of property rights over the lane is in dispute between the Municipality and the appellant, the latter's conviction by the Stationary Sub-Magistrate under S. 313, District Municipalities Act, does not appear proper."

He accordingly set aside the conviction and acquitted the accused. Although I am entitled to go into the questions of fact in an appeal by the Crown, I should be reluctant to convict the accused if the questions of fact were at all uncertain, especially when the appellate Court came to a finding on the evidence which cannot be said to be altogether unreasonable. The learned Public Prosecutor points out, as the Stationary Sub-Magistrate did, that S. 182 applies to all streets, private as well as public. The corresponding section in the Local Boards Act, S. 159, relates only to public streets, whereas in the District Municipalities Act as well as in the City Municipal Act, encroachments may be ordered to be removed from any street. That this is no accident is evident from the fact that S. 167 of the old Act, which, like the corresponding provisions of the Local Boards Act, punished disobedience of orders to remove encroachments only on public roads, was

amended in the new Act. Section 167 of the old Act, which ran : "No . . . . encroachment in any public street, shall be erected without the written permission of the Municipal Council," may be contrasted with S. 182 of the present Act.

The learned counsel for the accused does not dispute that S. 182, District Municipalities Act, applies to private streets as well as to public; but says that his client has all along contended, not that the whole lane belongs to him, but that the alleged encroachment was erected on his own private property. As the accused has been acquitted and there does seem to be a bona fide dispute as to the ownership of the lane in general, and that part of it situated near the accused's house in particular, I do not think that the interests of justice require that the order of acquittal by the Sub-divisional Magistrate should be interfered with. It is better that the Municipality should establish clearly its rights in a civil suit before taking any further action in a criminal Court, with respect to this lane. The appeal is dismissed.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 532 (1)

HORWILL J.

In re Sheik Mahaboob—Accused.

Criminal Revn. Case No. 491 of 1941, (Case referred No. 28 of 1941), Decided on 30th July 1941, for orders of High Court by Sessions Judge, Guntur Division in his letter dated 8th May 1941.

(a) Criminal P. C. (1898), S. 562—Applicability — Accused already spending two periods in Borstal School—S. 562 does not apply.

Section 562 can be applied only to first offenders; and hence an accused who had already spent two periods in a Borstal School, cannot be treated under Section 562. [P 532 C 2]

Cr. P. C. —

('41) Chitaley, S. 562, N. 13, Pt. 1.

('41) Mitra, Page 1811, N. 1434 (contd.)

(b) Penal Code (1860), S. 379—Only evidence against accused being confession said to have been made by them which led to discovery of stolen article — If article was discovered from statement of one accused statements of other accused held would be inadmissible — No evidence that accused 4 made crucial statement or led police to place where stolen article was found—Accused 4 held should be given benefit of doubt.

The only evidence against the four accused was a confession said to have been made by them and which led to the discovery of the stolen article :

Held that all the accused could not have been questioned together, nor could it be believed that they simultaneously made a confession of their guilt. If the police discovered the whereabouts of the stolen article from the statement of one accused then the statements of the other accused would not be admissible because they did not lead to any discovery. Since there was no evidence that accused 4 made the crucial statement, or that he led the police to the place where the stolen articles were found, he should be given the benefit of the doubt and acquitted. [P 532 C 2]

Penal Code —

('36) Ratanlal, Page 926 Note "Presumption."

('36) Gour, Page 1277, N. 4444.

Public Prosecutor—for the Crown.

ORDER.—The joint Magistrate of Ongole tried four accused for the offence of "theft in a building." They were all youths; and after admonishing them he released them under S. 562, Criminal P. C. Section 562 can be applied only to first offenders; and so accused 4, who had already spent two periods in a Borstal School, could not be treated under this section. The Sessions Judge has therefore referred the case to this Court for orders. The only evidence against the accused persons was a confession which is said to have been made by them and which led to the discovery of the stolen article. All the four accused could not, of course, have been questioned together, nor is it to be believed that they simultaneously made a confession of their guilt. If the police officer and the other panchayatdars had discovered the whereabouts of the stolen article from the statement of one accused, then the statements of the other accused would not be admissible because they did not lead to any discovery. There is no evidence on record which leads one to conclude that it was accused 4 who made the crucial statement, or that it was accused 4 who led the panchayatdars to the place where the stolen articles were found. I think therefore that he should be given the benefit of the doubt and acquitted. The conviction is therefore set aside.

C.R.K./G.N. *Conviction set aside.*

A. I. R. (29) 1942 Madras 532 (2)

HORWILL J.

B. P. Nagi Reddy—Petitioner

v.

Panyam Sanjeeva Reddy—Respondent.

Criminal Revn. Case No. 284 of 1941 (Criminal Revn. Petn. No. 270 of 1941), Decided on 15th August 1941, to revise judgment of Sub-Divisional First Class Magistrate, Kurnool, D/- 13th December 1940.

(a) Penal Code (1860), S. 448 — Intention to intimidate — Accused with number of persons entering a house to set up title to it held committed trespass.

A mere knowledge that the accused will annoy the owner of the house is not sufficient: [P 533 C 1]

But where the accused entered a house with a number of persons to set up his title to the house:

Held that the dominant intention of the accused was to set up civil title to the house to which he had no lawful claim; but the accused had the subsidiary and subordinate intention of intimidating or annoying the person in possession. The latter would presumably not have left the house by mere persuasion, and so the accused took there with him a number of persons. The effect was to intimidate her and therefore he was guilty under S. 448: ('18) 5 A.I.R. 1918 Mad. 136 (F.B.), *Ref.* [P 533 C 1]

Penal Code —

('36) Ratanlal, Page 1084, Pt. 4 and Page 1086, Pt. 2.

('36) Gour, Pages 1511-1512, N. 5372.

(b) Penal Code (1860), S. 448—Sitting on pial of house is trespass.

Sitting on the pial of a house would be a trespass. [P 533 C 1]

Penal Code —

('36) Ratanlal, Page 1091 N. "Building."

('36) Gour, Page 1523, N. 5408.

(c) Criminal P. C. (1898), S. 439 — Sentence of small fine — No interference on ground of error in conviction.

Where the accused has been sentenced to pay a small fine, the error that the offence committed by the accused was one of simple trespass and not house trespass as held by the trial Court is not a sufficient cause for interfering in revision. [P 533 C 1]

Cr. P. C. —
('41) Chitaley, S. 439, N. 23.
('41) Mitra, Page 1429, N. 1205.

P. Basi Reddy—for Petitioner.

Public Prosecutor—for the Crown.

ORDER. — The concurrent findings of fact of two Courts are that the petitioner, knowing that he had no manner of title to a certain house, went to that house and with the assistance of a number of friends who were accused in the first Court but have been subsequently acquitted, turned out P. W. 1 and the tenant of the house (P. W. 3) and locked the house. Accused 1 (petitioner) was originally charged under Ss. 147 and 448 read with S. 149, Penal Code; but on appeal he was convicted under S. 448. The question is whether the petitioner has been properly convicted. The principal question is whether there was any criminal trespass at all in that the intention of the accused was to set up a title to the house and not to intimidate, insult or annoy any person in possession. 41 Mad. 156[1] makes it clear that a mere knowledge that he will annoy the owner of the house is not sufficient. That was a case in which the persons who entered the house did so because they thought it probable that there were some jewels belonging to them inside the house. In the present case, it is probably true that the dominant intention of accused 1 was to set up civil title to the house to which he had no lawful claim; but I think that the accused had the subsidiary and subordinate intention of intimidating or annoying P. W. 3. She would presumably not have left the house by mere persuasion; and so the petitioner took there with him a number of persons. The effect was to intimidate her; and I have no doubt that the accused went there with the intention of intimidating P. W. 1 and P. W. 3 and forcing them to leave the house.

Another objection is that the accused has been charged with trespass constructively; for, the charge suggests that he did not enter the house himself but sent in the other accused. However, there is a finding that he sat on the pial of the house, which would be a trespass and the conviction cannot be set aside on this ground unless the accused has been prejudiced by it. I feel sure that in this case he has not been. Finally, it is said that the offence committed by the accused was one of simple trespass and not house-trespass, in that he did not enter inside the house. Whether there is anything in this point or not, I do not consider the error to be a sufficient cause for interfering in revision with a small fine. The petition is dismissed.

C.R.K./K.S. *Petition dismissed.*

1. ('18) 5 A.I.R. 1918 Mad. 136 : 43 I. C. 578 : 19 Cr.L.J. 162 : 41 Mad. 156 : 33 M.L.J. 729 (F.B.), Vullappa v. Bheema Row.

A. I. R. (29) 1942 Madras 533

WADSWORTH AND PATANJALI SASTRI JJ.

Pothukuchi Venkata Ramanayya and others — *Appellants*

v.

Daggubati Mallikharjanadu — *Respondent.*

Appeal No. 210 of 1940, Decided on 23rd February 1942, against decree of Sub-Judge, Bapatla, D/- 25th March 1940.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) Proviso (c)—Tax need not have been imposed throughout period of 2 years.

It cannot be said that under proviso (c) of S. 3 (ii) property tax on a rental value of not less than Rs. 600 must have been imposed throughout the period of two years specified in the proviso as such an interpretation is against the plain language of the proviso which does not use the word "throughout" but uses the word "within." If at any point of time within the period the disqualification has been incurred it will satisfy the terms of the proviso. [P 533 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) Proviso (c)—"Aggregate" — Meaning explained.

The word "aggregate" clearly refers to the total of the rental values of the various buildings and lands in respect of which the tax has been imposed and not to the total of the valuations for two half years. [P 534 C 1]

(c) Usurious Loans Act (1918, as amended in Madras), S. 3 — "Agriculturist" — Meaning.

The word "agriculturist" in S. 3 of the Act as amended in Madras is used in its ordinary dictionary sense of a person who actually follows the calling of agriculture. [P 534 C 1]

V. Govindarajachari and R. Krishnamurthy— for Appellants.

P. Satyanarayana Rao — for Respondent.

WADSWORTH J. — The defendants appeal against a preliminary decree on a mortgage. The mortgage was dated 6th October 1933 and provided for compound interest at nine per cent. It was contended in the lower Court that the defendants were agriculturists. The lower Court has found that they are excluded by the operation of proviso (c) to S. 3 (ii) of Act 4 of 1938. The facts are that for the half year ending 31st March 1936 they paid property tax on an annual rental value of Rs. 613, for the half year ending 1st October 1936 and for the half year ending 31st March 1937 on a rental value of Rs. 300 and for the half year ending 30th September 1937 on a rental value of Rs. 367. It was contended in the lower Court, firstly, that in order to come within the purview of proviso (c), property tax on a rental value of not less than Rs. 600 must have been imposed throughout the period of two years specified in the proviso. This seems to us to be against the plain language of the proviso which does not use the word "throughout" but uses the word "within". If at any point of time within the period the disqualification has been incurred it will satisfy the terms of the proviso. Secondly, it is contended that the words "the aggregate annual rental value of such buildings and lands" mean the annual value of the buildings and lands arrived at by adding the valuation for each of two half years and dividing by two. Thus, for the whole year ending 1st October 1936, it is suggested that the defen-

dants must be deemed to have been assessed to property tax on buildings and lands of an aggregate annual rental value which is half of Rs. 913. Again the answer is that such an interpretation involves the negation of the actual facts. The defendants were never assessed on an annual rental value of half of Rs. 913. The word "aggregate" clearly refers to the total of the rental values of the various buildings and lands in respect of which the tax has been imposed and not to the total of the valuations for two half years. It seems to us clear that by reason of the assessment for the first of the four half years on the basis of an annual rental value of Rs. 613, defendants are excluded from the benefits of the Act.

A further contention has been based on the language of the Madras amendment to S. 3, Usurious Loans Act, wherein it is provided that in the case of loans to agriculturists if compound interest is charged the Court shall presume that the interest is excessive. It has already been decided that the appellants are not agriculturists in the sense in which the word is used in Act 4 of 1938. But this is not the sense which will apply to the Usurious Loans Act. We take it that the word "agriculturist" is used in its ordinary dictionary sense of a person who actually follows the calling of agriculture. There is no evidence that the defendants follow the calling of agriculture. Defendants 1 and 2 are described in the cause title as "Brahmin landlords". Defendant 3 who is the son of defendant 1 is described as "landlord, cultivation." But whether he is actually engaged in cultivation as a calling we do not know. There is no basis in the evidence for the contention advanced. In the result therefore the appeal is dismissed with costs.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 534 (1)

HORWILL J.

Sri Sri Sri Palaharama Kanti Rajaram Das Bavaji of Balaga—Petitioner

v.

Duvvada Ramanna and others — Respondents.

Criminal Revn. Case No. 662 of 1941 (Criminal Revn. Petn. No. 622 of 1941), Decided on 3rd March 1942, to revise order of Joint Magistrate, Chicacole, D/- 16th April 1941.

Criminal P. C. (1898), S. 145 — Scope — Dispute between tenants and sub-tenants about land — Landlord is not party to dispute — But Magistrate can proceed under S. 145 even though his attention to dispute is drawn by landlord.

In a dispute regarding land between the tenants and sub-tenants, the landlord is not a party to the dispute within the meaning of S. 145, Criminal P.C. For, S. 145 is concerned with persons in actual possession, the word "actual" being used in contra-distinction to constructive possession. That does not however mean that the landlord has no locus standi; he is interested in the land and in his tenants; and there can be no legal objection to a Magistrate's taking notice of a dispute merely because his attention had been drawn to the dispute by an absentee landlord. [P 534 C 2]

Cr. P. C.—

('41) Chitaley, S. 145, N. 19 and N. 25 Pt. 14a.

('41) Mitra, Page 376, N. 399 heading "Landlords, tenants" and page 381, N. 404.

C. K. Venkatanarasimham for K. S. Jayarama Iyer and G. Gopalaswami — for Petitioner.

G. Balaparameswari Rao and Y. Suryanarayana — for Respondents.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER.—The petitioner is dissatisfied with the order passed by the Joint Magistrate of Chicacole refusing to adjudicate on the petitioner's rights and to pass orders restraining the counter petitioners from interfering with the petitioner's possession. The petitioner is the Mahant of the Balaga Mutt. P. W. 2 is his tenant; and the counter petitioners are a number of persons, including several sub-tenants of P. W. 2. During the course of the hearing it seems to have been argued that the Mahant had no locus standi; because he was not the person in actual possession. The Magistrate seems to have accepted that argument; but he also came to the conclusion that there was no danger of a breach of the peace and that the police had exaggerated the matter. He therefore dismissed the application. I agree with the learned Joint Magistrate that the Mahant is not a party to the dispute within the meaning of S. 145, Criminal P. C. It has been held in many cases that S. 145, Criminal P. C., is concerned with persons in actual possession, the word 'actual' being used in contra-distinction to constructive possession. That does not however mean that the Mahant had no locus standi; he was interested in the land and in his tenants; and there can be no legal objection to a Magistrate's taking notice of a dispute merely because his attention had been drawn to the dispute by an absentee landlord.

Although there was an order that the petitioner should print all the papers on which he wished to rely, he has chosen not to print most of the relevant evidence, and so we do not know exactly what the nature of the dispute is. It does however appear that P. W. 2 had sub-leased the land to some other persons; and the fact that they figure as counter-petitioners instead of as petitioners, indicates that there is some dispute between P. W. 2 and his sub-tenants and that there was no real dispute about actual possession. Those counter petitioners who would be entitled to be in actual physical possession as the sub-tenants of P. W. 2 do not seem to have any dispute with the other counter petitioners. So it does seem, prima facie, as if the dispute is not what the petitioner would have the Court believe. However that may be, the Joint Magistrate was entitled to consider the question whether a breach of the peace was likely. He has given reasons for thinking that no breach of the peace was likely to occur. He disposed of that petition as long ago as April of last year, and as far as we know, there has been no breach of the peace since. No case has therefore been made out for interference in revision. The petition is dismissed.

C.R.K./K.S. *Petition dismissed.*

A. I. R. (29) 1942 Madras 534 (2)

WADSWORTH J.

Kunnamangalath Palakunnath Kolai Sankaran Nayar — Petitioner

v.

Palakunnath Kolai Govindan Nayar— Respondent.

Civil Revn. Petn. No. 1031 of 1940, Decided on 12th February 1942, to revise order of Dist. Munsif, Calicut, D/- 20th January 1940.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 15 — Landlord's interest undivided — Part of tenant's interest assigned — Assignee can get rent scaled down only on paying rent of entire holding—Division of land-holder's interest corresponding with division of tenant's interest—Question whether tenant can get rent scaled down by payment only of rent due to person entitled thereto of items assigned to him explained.

When the landholder's interest remains undivided and there is an assignment of part of the tenant's interest, the assignee can get the rent scaled down only on paying the rent of the entire holding. Where, however, there has been a division of the landholder's interest corresponding with the division of the tenant's interest, the question whether the tenant could get the rent scaled down on payment only of the rent due to the person entitled to the rent of those items assigned to him must depend to a great extent on the facts. If there has been an attornment by the tenant to the subdivided landholder, the tenant would be entitled to claim relief as against the person to whom he actually paid his rent on the deposit of the rent for one year. If in fact the rent of the holding was still payable to the original landholder who had to make over part of the rent to the sub-divided group the scaling down could only be ordered on payment of the full rent of the holding. [P 535 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 15—Deposit made subsequent to 30th September 1939 — Circumstances under which deposit may be treated as made on 30th September 1939 stated.

A deposit under S. 15 made subsequent to 30th September 1939 may be treated as having been made on 30th September 1939 if it is proved, that the applicant was prevented from making the deposit on 30th September by some default on the part of the treasury officer or the bank or by some delay on the part of the Court in issuing the chalan so as to prevent the applicant from making the deposit in time: ('24) 11 A.I.R. 1924 Mad. 324, *Rel. on.* [P 535 C 2]

K. Kuttikrishna Menon — for Petitioner.

V. P. K. Nambiar — for Respondent.

ORDER.—This civil revision petition arises out of an application under S. 15 of Act 4 of 1938. There was a previous application under which the petitioner was permitted to make a deposit of the rent for the Malabar year corresponding to Fasli 1347 at the same rate as that now deposited. I am informed that an appeal was filed against that decision and rejected. The petition recites that the purappad of the holding was originally fixed at Rs. 62-7-0, of which Rs. 49-10-0 was payable to the respondent's tavazhi (that is the tavazhi of the present petitioner) and the balance to the Kolai tarwad and that the three items assigned to the petitioner from the original kanomdar have to pay the amount of Rs. 49-10-0 payable to the respondent's tavazhi. In the counter affidavit the contention is raised that the deposit should be of the rent for the entire holding. There was no evidence at all and the judgment of the lower Court is concerned mainly with a contention as to the date of the deposit. I am asked to infer in revision that this deposit is invalid because it is a deposit only of the appellant's share in the rent of the holding.

The position where out of an original holding three items have come into the hands of an assignee and the rent of those three items has come to be payable not to the tarwad which was originally the landholder but to a sub-group of that tarwad, stands on a different footing from the position when the landholder's interest remains undivided and there is an assignment of part of the tenant's interest. In the latter case we have held that the assignee could get the rent scaled down only on paying the rent of the entire holding. Where however there has been a division of the landholder's interest corresponding with the division of the tenant's interest, the question whether the tenant could get the rent scaled down on payment only of the rent due to the person entitled to the rent of those items assigned to him must depend to a great extent on the facts. If there has been an attornment by the tenant to the sub-divided landholder, clearly the tenant would be entitled to claim relief as against the person to whom he actually paid his rent on the deposit of the rent for one year. If in fact the rent of the holding was still payable to the original landholder who had to make over part of the rent to the sub-divided group, presumably the scaling down could only be ordered on payment of the full rent of the holding. The facts, however, have not been clearly established and it does not appear that the contention now urged was supported by the necessary evidence in the lower Court.

There is however another contention with reference to which it appears that the materials before the learned District Munsif were not sufficient to support the order. It appears from the petition that a chalan for the deposit of the amount was asked for and obtained on 30th September 1939 which was the last day on which the deposit could be made with reference to S. 15 of the Act. The amount was actually deposited in the bank only on 2nd October 1939. The lower Court relies on the decision in 47 Mad. 543[1] and treats the deposit as having been made, not on 2nd October but on 30th September. The decision quoted would justify the learned District Munsif's conclusion if it was proved that the applicant was prevented from making the deposit on 30th September by some default on the part of the treasury officer or the bank or by some delay on the part of the Court in issuing the chalan so as to prevent the applicant from making the deposit in time. These are matters which have to be proved by evidence. I do not think it right to set aside the lower Court's order for want of the evidence when the order itself may in fact be correct. The revision petition is allowed and the application is remanded to the lower Court for fresh disposal after taking evidence on the question whether the circumstances in which the deposit was made justify the inference that it would have been made on 30th September, but for the default of the Court or the treasury or the bank. Costs to abide by the result.

C.R.K./G.N. *Petition allowed.*

1. ('24) 11 A.I.R. 1924 Mad. 324 : 79 I.C. 651 : 47 Mad. 543 : 45 M. L. J. 849, Gopalakrishna Pillai v. Kunjithapatham Pillai.

A. I. R. (29) 1942 Madras 535

VENKATARAMANA RAO AND SOMAYYA JJ.

Rangaswami Goundar — Petitioner

v.

Official Receiver, Coimbatore and others — Respondents.

Civil Misc. Petn. No. 5899 of 1941, Decided on 19th December 1941, for leave to appeal to His Majesty in Council against decree of High Court in A. S. No. 195 of 1938.

Civil P. C. (1908), S. 110 — Value of subject-matter in appeal—Value is amount upto date of decree of lower Court — Subsequent interest cannot be added as it is within discretion of Court — What may or may not be awardable is not to be included in claim.

In the case of a plaintiff whose suit is dismissed by the High Court on appeal the value for the purposes of leave to appeal to His Majesty in Council is the amount calculated upto the date of the decree of the lower Court and further interest cannot be added. For the grant of subsequent interest is within the discretion of the Court and therefore the further interest which may or may not be allowed is not part of the claim for the purpose of S. 110. So, if the decree is a mortgage decree interest subsequent to the date fixed for payment cannot be added because the grant of such interest is discretionary and it was grantable under S. 34 prior to 1929 ; in this respect the law is the same even after 1929. Therefore, even if the Judicial Committee in the particular case reverses the decision of the High Court, it might, having regard to the facts of the case, refuse to award interest from the date fixed for payment in the lower Court. Therefore what may or may not be awardable is not to be included in the claim. It is not part of the claim : *Case law discussed.* [P 536 C 2; P 538 C 2]

C. P. C. —

('40) Chitaley, S. 110, N. 5, Pt. 5.

('41) Mulla, Pages 393, 394, N. "Mesne profits and interest."

S. Muthiah Mudaliar — for Petitioner.

D. Ramaswami Ayyangar — for Respondents.

SOMAYYA J.—This is an application for leave to appeal to His Majesty in Council against the decree and judgment of this Court which reversed the decree of the Subordinate Judge of Coimbatore. Being a reversing judgment the applicant will be entitled to the leave asked for if the value of the subject-matter of the suit and of the subject-matter in dispute in appeal to His Majesty in Council are both of the value of Rs. 10,000 or upwards. In the Court below, the suit valuation was Rs. 10,000 and therefore the first requisite is satisfied. The only question is whether the second condition is also satisfied. The lower Court gave a decree for a sum of Rs.4000 for principal, Rs. 5625 for interest and Rs. 1060-3-0 for costs, in all making up Rs. 10,685-3-0 calculated upto 3rd February 1938. Defendant 6 appealed to this Court. He valued the appeal at Rs. 9665 made up of Rs. 9625 decreed for principal and interest upto 3rd February 1938 plus Rs. 40 further interest upto 25th February 1938, the date of the presentation of the appeal. The amount of costs decreed was not included in the valuation of the appeal and no court-fee was paid thereon as it is not necessary to include costs in the value of the appeal. If the appeal succeeds, the direction as to costs made by the trial Court will automatically be set aside. The contention on behalf of the respondent is that the value of the subject-matter involved in the appeal to His Majesty in Council is not Rs. 10,000 and upwards because the valuation of the appeal is only Rs. 9665. His contention is that the interest accruing subsequent to the date of the decree of the lower Court cannot be calculated in arriving at the amount. The appeal was disposed of on 26th February 1941. By that time, apart from costs, the amount due as per the decree of the lower Court amounted to over Rs. 11,000 because the amount decreed carried interest at 6 per cent. per annum from the date fixed for payment, that is 3rd February 1938.

If the suit had been dismissed by the trial Court and had been decreed by the appellate Court, it is undoubted and it is not disputed—that for a defendant's further appeal the value of the claim as it stood on the date of the decree of the High Court would be the sum to be taken into consideration for this purpose. That is the decree which he would appeal against. Is there any reason to apply a different rule in the case of a plaintiff-appellant ? The real loss to the plaintiff which he seeks to restore by appealing to His Majesty in Council is the amount which he was deprived of by the decree in appeal as on the date of its decree. On the date when the High Court passed its decree, he was entitled to over Rs. 11,000 apart from costs. If this is the crucial date even for the plaintiff seeking leave to appeal, then the applicant must succeed. But the respondent contends that the question has been concluded by various decisions of the Judicial Committee, and of this and the other High Courts and it is urged that the effect of those decisions is that in the case of a plaintiff whose suit is dismissed by the High Court on appeal, the value for the purposes of leave to appeal to His Majesty in Council is the amount calculated upto the date of the decree of the lower Court and that further interest cannot be added. Now, the reason underlying the decisions which take this view is that the grant of subsequent interest is within the discretion of the Court and that therefore the further interest which may or may not be allowed is not part of the claim for the purpose of S. 110, Civil P. C. In the case of suits where the plaint valuation is in question, it has been held by the Judicial Committee in 53 Mad. 167[1] at p. 170 that subsequent interest or subsequent mesne profits will not be calculated. Prior to 1874, appeals to the Privy Council were governed by the Order in Council of 10th April 1838. The words then were "amount or value of the subject-matter in dispute in appeals to Her Majesty in Council." The other requisite that the plaint also must involve a like sum was not there. On the wording of the Order in Council of 10th April 1838, there are several decisions the effect of which is summarised by the Judicial Committee in 53 Mad. 167[1] on p. 170 thus :

"Upto 1874, appeals to the Privy Council were governed by the Order in Council of 10th April 1838. The words then were "amount or value of the subject-matter in dispute in appeals to Her Majesty in Council." Upon that there were decisions of the Privy Council that interest on money claims and mesne profits of immovable property subsequent to the date of the suit, but awarded by the decree, might be reckoned, but none subsequent to that date."

In a case where a suit was dismissed by the trial Court but decreed on appeal, it is the amount calculated upto the date of the appellate decree that determines the question. In 8 M. I. A. 166[2] at pages 168 and 169 the Judicial Committee dealt with a case where on the date of the decree of the High Court, the sum decreed against the defendant was over Rs. 10,000. Their Lordships said this on page 168 :

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1. ('30) 17 A.I.R. 1930 P. C. 44: 121 I. C. 513 : 53 Mad. 167 : 57 I. A. 56 (P. C.), Mangamma v. Mahalakshmamma.
2. (1859-61) 8 M. I. A. 166 : 13 Moo. P. C. 472 : 3 W. R. 14 : 1 Sar. 742 : 1 Suther 399 (P. C.), Gooroopersad Khoond v. Juggutchunder.

"Now, where the appeal is from the whole decree, and the decree has given an amount, including interest upto the date of the decree, which exceeds Rs. 10,000, it is clear, that the matter which is in dispute in the appeal must exceed the sum of Rs. 10,000; for the question to be tried upon the appeal must be whether the decree is or is not right, that is to say, whether the decree has or has not properly ordered payment of a sum exceeding Rupees 10,000. Where, therefore, at the date of the judgment the sum which is recoverable under the decree of the Sudder Court is an amount exceeding Rupees 10,000, there, in their Lordships' judgment, the case clearly falls within the terms of the Order in Council."

Then on page 169 they said :

"Their Lordships must not, of course, be understood to intimate that the Sudder Courts ought to give leave to appeal in cases in which the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree."

Here it is laid down that the amount decreed by the appellate Court including interest upto the date of its decree is the amount to be taken for the purpose of granting leave to appeal to His Majesty in Council. Interest subsequent to the date of the High Court decree should not be calculated. Mr. Muthiah Mudaliar argues that if this is the rule laid down for the defendant-appellant, the same rule ought to apply to a case of a plaintiff-appellant. We think there is considerable force in this argument and if the matter rested upon principle, we should be inclined to hold in favour of the applicant. The respondent's argument that the matter is set at rest by the subsequent decisions of the Judicial Committee and of this and other High Courts has now to be examined. The first decision relied upon is that of the Privy Council in 53 Mad. 167.[1] That was a case dealing with the question whether "the amount of value of the subject-matter of the suit in dispute in the Court of first instance must be ten thousand rupees or upwards." It was urged that interest subsequent to the date of suit should be included for calculating the value of the subject-matter of the suit. The plaintiff got a decree in the trial Court but lost on appeal. She was the applicant and it was clear that unless interest between the date of the plaint upto the date of the decree of the trial Court was added, the sum of Rs. 10,000 would not be reached. The Judicial Committee held that this cannot be done, and approved the decision of this Court in 39 Mad. 843.[3] There is nothing in this decision that touches the question with which we are dealing. As stated already, the plaint in this case asked for a decree for Rs. 10,000.

The next decision relied upon is that of this Court in 56 Mad. 886.[4] In that case the plaintiff filed a suit for over Rs. 10,000; but the trial Court gave a decree for a sum less than Rs. 10,000. The defendant appealed and the plaintiff preferred a memorandum of cross-objections. The whole suit was dismissed by the High Court. The plaintiff filed an application for leave to appeal to His Majesty in Council. The value of both the appeal and the memorandum of cross-objections as on the date of the trial Court's decree was less than Rs. 10,000, but if to this was added the interest from the date of the decree of the trial Court upto the date of the decree of the High Court, the value was over Rs. 10,000. The question was whether he was entitled to do so. The learned Judges held that he was not and pointed out the difference between a case of a defendant seeking to file an appeal against the decree of the High Court and that of a plaintiff seeking to do so. The view expressed is that interest subsequent to the date of the plaint is within the discretion of the Court under S. 34, Civil P. C., and that therefore interest subsequent to the date of the plaint cannot be deemed to be part of his claim against the defendant, or, to employ the language of S. 110, Civil P. C., part of "the subject-matter in dispute on appeal to His Majesty in Council." Then they say :

"If the plaintiff's suit is dismissed by the Court on appeal the maximum value to be attached to his appeal to the Privy Council is the value of his suit as stated in the plaint and accepted by the trial Court; and it can make no difference whether that Court allowed in whole or in part or dismissed it altogether."

According to this judgment, if the suit is for Rs. 10,000 and the decree is for Rupees 8000 it is Rs. 8000 which is the value of the subject-matter of the dispute in appeal to His Majesty in Council. They do not even allow the interest from the date of suit upto the date of the first Court's decree to be added because the grant of interest subsequent to the date of the plaint is discretionary. This decision appears to go too far. The respondent does not urge that interest from the date of the plaint to the date of the first Court's decree should be excluded. Suppose the suit is for Rs. 12,000, with interest at six per cent. from the date of plaint and the Court gave a decree two years after the plaint for Rs. 9500 with interest at six per cent. thereon from the date of suit so that the amount decreed on the date of the decree is over Rs. 10,000; would the case satisfy the requirements if that decree is reversed on appeal ?

The next decision relied upon is that of the Patna High Court in 20 Pat. 481.[5] The Judges follow the reasoning of the Judges in 56 Mad. 886[4] and there is nothing further by way of independent reasoning. They dissented from a decision of Dawson-Miller C. J. and Coutts J. in 2 P. L. T. 463[6] and held that where the Court is not bound to grant post-plaint interest under some statute (as in (1879) 4 A. C. 270[7]) subsequent interest cannot be included where the plaintiff seeks to prefer an appeal to His Majesty in Council. The respondent relies on another decision of the Judicial Committee in 8 M. I. A. 262[8] at p. 264. That was an application for leave to appeal from a decree of the Sudder Court dated 23rd October 1857 which reversed that of the Zillah Court. The plaintiff lost on appeal and he sought leave to appeal from the decree of the Sudder Court which corresponds to the High Court. From the facts it appears that the suit claim was as laid in the plaint for recovery of

3. ('16) 3 A.I.R. 1916 Mad. 985 : 31 I. C. 296 : 39 Mad. 843 : 30 M. L. J. 317, Subramania Iyer v. Sellammal.
4. ('33) 20 A.I.R. 1933 Mad. 401 : 143 I. C. 139 : 56 Mad. 886 : 64 M. L. J. 496, Venkatathirisami Naidu v. Kasthuri Ranga Appaswami Naidu.
5. ('41) 28 A.I.R. 1941 Pat. 255: 195 I. C. 196: 20 Pat 481: 22 P.L.T. 363 (F. B.), Brijmohan Singh v. Bhubaneshwar Prasad Sing.
6. ('21) 8 A.I.R. 1921 Pat. 229: 62 I.C. 959: 6 Pat. L. J. 596: 2 P. L. T. 463, Ramyad Singh v. Rambilas Sing.
7. (1879) 4 A.C. 270: 48 L. J. P. C. 25: 40 L. T. 500, Bank of New South Wales v. Ouston.
8. (1859-61) 8 M. I. A. 262: 1 Sar. 772 (P. C.), Doorga Das Chowdhry v. Ramanath Chowdry.

Rs. 9274-6-0 including interest due up to that date. The decree of the trial Court was that the defendant should pay the plaintiff the total sum of Rs. 9274-6-0 and interest on the principal sum during the period when the suit was pending trial, and for costs together with interest on the consolidated sum from that day to the date of realisation. The Sudder Court reversed the decree of the Zillah Court on 29th February 1860. In dealing with the plaintiff's application, the Judicial Committee said this :

"The amount absolutely decreed by the Court is Rs. 9274-6-0 the interest added to that for the time specified at 8 per cent. would, according to the petitioner's calculation, raise the sum due to Rs. 9310; that is under the appealable sum. It has been determined a short time ago by their Lordships, in 8 M. I. A. 164[9] at p. 165 that the Sudder Courts have no authority under the Order in Council of 10th April 1838, to add the interest accruing subsequent to the decree to the capital sum decreed for the purpose of reaching the appealable amount, here, the interest, under any circumstances, would not be sufficient, for, to arrive at the necessary amount, you must add, as you seek to do, the costs. Now, the costs of a suit are no part of the subject-matter in dispute, and cannot be used for the purpose. . . . . Their Lordships are clearly of opinion, that the sum in issue in this suit is not sufficient to bring the case within the Order in Council."

This seems to lay down that it is the amount calculated upto date of the decree of the trial Court that determines the question as regards the plaintiff who lost on appeal. This decision seems to be in point though it is difficult to see how this decision is reached from a consideration of the earlier decision on pages 164 to 168 of the same report. If the earliest decision is to be applied, the sum calculated up to the date of the decree of the High Court should determine the question. But apparently they took Rs. 9274-6-0 the sum mentioned in the plaint plus interest up to the date of the decree of the trial Court; and the sum on that date was only Rs. 9310 (see p. 264). This sum is stated to determine the question. Though this decision is referred to in the later decisions and in the text books as an authority for the proposition that costs should not be included, we are bound to follow this decision.

The next question argued is that in the case of mortgage decrees like the present case, the Court is bound to grant interest and that therefore the decisions just referred to do not apply and that this case is governed by the decision of the Judicial Committee in (1879) 4 A. C. 270.[7] If the grant of interest is obligatory, then it seems to us that the decision just cited would apply. So, this takes us to the next question whether the award of interest is compulsory after the date fixed for payment by the lower Court. The decision of the Judicial Committee in 15 Pat. 210[10] clearly lays down that the grant of interest subsequent to the date fixed for payment in a mortgage suit is not obligatory. Mr. Venkatachariar goes further and argues that the Court is not bound to grant interest at the contract rate even from the date of the plaint and relies upon the observations of the Federal Court in (1940) 1 M.L.J. Supp. 14[11] at p. 18, but we consider it unnecessary to go into that question. It is enough to point out that prior to the enactment of the Code of Civil Procedure in 1908, there was no provision in the old Transfer of Property Act for grant of interest subsequent to the date fixed for payment. When the Civil Procedure Code was enacted in 1908, the provisions regulating procedure in mortgage suits were transferred from the Transfer of Property Act to the Civil Procedure Code. Order 34, R. 4 which provides for a preliminary decree in a suit for sale ran thus :

"In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in cls. (a), (b) and (c) (i) of sub-r. (1) of R. (2), and further directing that the mortgaged property or a sufficient part thereof, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses, and interest and the balance, if any, be paid to the defendant or other persons entitled to receive the same."

Though the grant of subsequent interest was not provided for in R. 2, this rule recognized that subsequent interest may also be granted because it makes a provision for paying to the mortgagee the amount of subsequent interest when the sale proceeds come in. There has been a subsequent amendment in 1929 which made further changes with which we are not now concerned. The Judicial Committee pointed out in 15 Pat. 210[10] that before the amendment in 1929, grant of subsequent interest, i. e., grant of interest subsequent to the date fixed for payment, was made under S. 34, Civil P. C., and that the law is the same even after 1929. This decision is conclusive on the question and we cannot hold that the grant of interest subsequent to the date fixed for payment is obligatory. We hold that the grant of such interest is only under S. 34, Civil P. C., which leaves it to the discretion of the Court to grant it or not. If this is so, the case falls within the principle of 56 Mad. 886[4] and 20 Pat. 481[5] and of the Judicial Committee in 8 M. I. A. 262.[8]

To sum up, the grant of such interest subsequent to the date fixed for payment is discretionary and it was grantable under S. 34, Civil P. C., prior to 1929; in this respect, the law is the same even after 1929. Therefore, even if the Judicial Committee in this case reverses the decision of this Court, it might, having regard to the facts of this case, refuse to award interest from the date fixed for payment in the lower Court. Therefore, what may or may not be awardable is not to be included in the claim. It is not part of the claim as held in 56 Mad. 886.[4] The question might arise whether after the amendment of 1929 even interest after the date of suit does not come within S. 34, Civil P. C., and whether the grant of interest at the contract rate upto the date fixed for payment is obligatory but we do not wish to go into that question. We therefore hold that the applicant is not entitled to the leave asked for and dismiss the petition with costs.

C.R.K./K.S. *Petition dismissed.*

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9. (1859-61) 8 M. I. A. 164: 3 W. R. 14: 13 Moo P. C. 469; 1 Suther 399: 1 Sar. 741 (P.C.), Maharajah Sutteeschunder Roy v. Guneschunder.

10. ('36) 23 A.I.R. 1936 P.C. 63: 160 I.C. 285: 63 I. A. 114: 15 Pat. 210 (P. C.), Kusum Kumari v. Debi Prosad.

11. ('40) 27 A. I. R. 1940 F. C. 20 : 187 I. C. 796 : I. L. R. (1940) Kar. F. C. 33 : (1940) 1 M. L. J. Supp. 14, Jai Govind Singh v. Lachminarain Ram.

A. I. R. (29) 1942 Madras 539

ABDUR RAHMAN AND SOMAYYA JJ.

Maharani Gurucharan Kaur of Nabha and another — Appellants

v.

Province of Madras through Collector of Madura and others — Respondents.

Appeal No. 156 of 1939, Decided on 6th February 1942, against decree of Sub-Judge (Addl.) of Madura, D/- 21st November 1938.

(a) Tort—Wrongful restraint or confinement explained — Plaintiff sitting in car in railway compound awaiting arrival of train—Police not allowing plaintiff to board train and also closing gate of compound and placing two constables there — Plaintiff not making attempt to go in any direction but sitting in car — Case held of wrongful restraint and not of wrongful confinement.

It is incorrect to say that a person must be taken to have been confined merely because he is not allowed to proceed either in his car or conveyance even if no restriction is placed on his person. The offences of wrongful restraint or wrongful confinement are offences affecting human body and cannot be said to have been committed if a person is not restrained or confined himself but the liberty of going in the conveyance in which he wishes to go or taking the article which he wishes to carry and without which he is not willing to proceed is denied to him. [P 545 C 2]

The instructions to the Police Sub-Inspector from the D.S.P. were to go over to station *K* and to prevent certain Maharaja from leaving that station. The fact however was that it was not the Maharaja but his wife the Maharani and his daughter alone who had reserved a first class compartment and were at station *K* to board the Express which was due to arrive. The Maharani was awaiting the arrival of the train in her own car which was placed in the railway compound fenced on three sides by iron fencing and on the fourth side by the railway premises; the iron fencing had a gate through which the cars came into the compound. On arrival of the train, the Sub-Inspector acting under a bona fide though erroneous belief that he was to detain the Maharani, not only prevented the Maharani from boarding the train but also got the gate in the iron fencing closed and posted two constables near it. In the suit by the Maharani and her daughter for damages for wrongful confinement :

Held that no doubt by placing the policemen at the gates and by closing the same (although not locking) the plaintiffs' car was stopped and would not have been allowed to be taken out but it did not mean that the plaintiffs were confined and would have been prevented from proceeding in any direction if they had attempted to do so. No doubt from the subjective point of view the Maharani must have thought that she was confined but that was not enough to hold that she was actually confined or imprisoned and not merely restrained from proceeding by the Express. Had there been proof on the record that there was total restraint of plaintiff 1's movements or liberty during the period that she was in her car by the use or threat of force or by confinement, she could be said to have been imprisoned. Both on facts and as to law the plaintiffs were not and could not be said to have been actually confined either in the railway compound or even within the limits of the station. Had plaintiff 1 or her secretary made a request to the Sub-Inspector or to the constables for the former to go out of the railway compound and had any obstruction been created, it would have been a different matter. The onus of proving confinement lay on the plaintiffs : *Case law referred.* [P 544 C 2; P 545 C 1, 2]

(b) Tort — "Good faith" — Definition of, in General Clauses Act is materially different from that in Penal Code—Penal Code definition cannot be applied in case of tort.

The definition of the words "good faith" in the General Clauses Act is materially different from that given in the Penal Code and it would not be correct in cases of tort to use them in the limited sense in which they are used in the Penal Code. [P 545 C 2]

Penal Code —
('36) Ratanlal, Page 82 Pts. 1, 2.
('36) Gour, Page 209 Paras. 354 & 356.

(c) Government of India Act (1935), S. 270 (1) — Applicability of S. 270 (1) depends primarily on allegations in plaint.

The question of the applicability of S. 270 (1) depends primarily on the nature of the allegations made against the public servants in the plaint : ('39) 26 A.I.R. 1939 F. C. 43, *Rel. on.* [P 546 C 1]

(d) Criminal P. C. (1898), S. 54 (1) (ix) and S. 56 — Word "requisition" in S. 54 (1) (ix) is quite general and covers telephonic message — Order for arrest of person by telephonic message is legal provided S. 54 (1) is complied with — Officer ordering such arrest acts in discharge of his official duty within S. 270 (1), Government of India Act.

There is no warrant for the proposition that a police officer cannot order the arrest of a person by means of a telephonic message. The word "requisition" in S. 54 (1) (ix) is quite general and clearly covers a message communicated by telephone, although it will be necessary for him when he is asking another police officer to do what he could have done himself to disclose under S. 54 (1) not only the identity of the person whom he wishes to be arrested but also the offence or the reason for which the arrest is to be made. This has to be done for the reason stated in the last clause of S. 54 (1). [P 546 C 1, 2]

Cr. P. C. —
('41) Mitra, Page 118, N. 119.

(e) Criminal P. C. (1898), Ss. 54 and 56 — Applicability — S. 56 does not limit S. 54 in all cases.

The provisions of S. 54 are not limited by those of S. 56 in all cases. Section 54 applies to all police officers whether superior or subordinate. Section 56 only applies to such police officers as are in charge of a police station or as are making investigations under Chapter 14. If in their capacities as such officers, they depute their subordinates to arrest without a warrant (otherwise than in their presence) they have to give that order in writing. But if they are not acting in that capacity a compliance of the general provisions contained in S. 54 (1) (ix) would be enough : ('36) 23 A.I.R. 1936 Rang. 119, *Expl. and criticised.* [P 546 C 2; P 547 C 1]

Cr. P. C. —
('41) Chitaley, S. 56, N. 2.
('41) Mitra, Page 115, N. 114; Page 121, N. 129.

(f) Government of India Act (1935), S. 270 (1) — Word "duty" in S. 270 (1) refers to actual duty and not what person thinks to be his duty.

The word "duty" as used in S. 270 (1) refers to the actual duty and not what a person merely thinks to be his duty. [P 547 C 1]

(g) Madras District Police Act (24 of 1859), S. 21—Word "lawfully" in S. 21 refers to issue of "orders or warrants."

Prima facie the word "lawfully" in S. 21 does not qualify the words "orders or warrants" and merely refers to the method of their issue. [P 547 C 2]

(h) Government of India Act (1935), S. 270 (1) — Senior police officer issuing lawful order to subordinate officer to arrest particular person — Subordinate officer misunderstanding order and arresting some one else — Subordinate officer instead of acting in execution of his duty can only be said to be purporting to act in execution of his duty—Either of them is covered by S. 270 (1)—S. 53, Madras District Police Act applies.

Under S. 21, Madras District Police Act, it is the duty of every subordinate police officer to obey the orders of the senior police officer. A lawful order issued by a superior police officer to his subordinate officer does not become unlawful merely because it was misunderstood by the subordinate officer who was to execute the same. Where the subordinate officer by mistake in reading or hearing the order of his superior for the arrest of a particular person arrests or detains some one else the subordinate officer cannot be said to have been acting in execution of his duty in carrying out the orders of his superior officer, and instead of acting in execution of his duty he can only be said to have purported to act in execution of his duty which he is bound to discharge. But either of them is covered by S. 270 (1), Constitution Act, and cannot legally give rise to a cause of action against the subordinate police officer except with the consent of the Governor. Section 53, Madras District Police Act, applies in such a case to the superior as well as subordinate police officer. [P 547 C 1,2]

(i) Madras District Police Act (24 of 1859), S. 21—It is incorrect to say that S. 21 is applicable between police officers inter se and has no application when they are dealing with private individuals.

It is incorrect to say that S. 21 is applicable between police officers inter se and has no application when they are dealing with private individuals. The orders which they as police officers are to give and the warrants which they are to issue will relate largely if not solely to private individuals or to individuals even if they happen to be police officials in their private capacity. The Police Act does not deal with administrative matters of the police as a department but with matters and duties which they in their official capacity are called upon to undertake and discharge. [P 547 C 2]

(j) Government of India Act (1935), S. 270 (2) — Onus to prove want of good faith in case of persons and acts referred to in S. 270 (2) is on plaintiff or complainant.

The onus of proving want of good faith in the case of such persons and such acts as are referred to in S. 270 (2) is upon the plaintiff or the complainant as the case may be. [P 548 C 1]

(k) Limitation Act (1908), Arts. 2, 36, 19 and 120 and S. 24—Mere allegation that person acted or omitted to act in pursuance of enactment is not enough to attract Art. 2 — Act found to have been done in pursuance of enactment — Art. 2 must apply — Suit by plaintiff against police officers for damages for wrongful confinement and wrongful restraint—Plaintiff found to have been wrongfully restrained—Defendants found to have acted under S. 54, Criminal P. C., and S. 21, Madras District Police Act—Art. 2 and not Art. 19 or Art. 36 held applied—Limitation held started when wrongful restraint took place and not when injury (illness) resulted therefrom — S. 24 held inapplicable.

The word "alleged" in Art. 2 cannot be taken to mean that a mere allegation by a party invoking its assistance or pleading that he had acted or omitted to act in pursuance of an enactment would attract its provisions. But when the act is found to have been done or purported to have been done in pursuance of an enactment Art. 2 must be held to apply. It is incorrect to say that the allegation by the defendants that they were acting in pursuance of an enactment must be taken to have been made by them when they were acting so as to attract Art. 2. [P 548 C 2]

The plaintiff brought an action for damages against certain police officers for wrongful confinement and wrongful restraint. It was found that the plaintiff was wrongfully restrained but there was no wrongful confinement and that the defendants had acted under S. 54, Criminal P. C., and S. 21, Madras District Police Act :

Held that the suit was governed by Art. 2 and not by Arts. 36, 19 or 120: [P 548 C 2]

Held further that limitation for the suit started under Art. 2 from the date when wrongful restraint took place and not when injury (illness to plaintiff) resulted therefrom. If the act complained of had not given rise to a cause of action until some special damage had resulted therefrom, S. 24 might have been of help to the plaintiff, but since the wrongful restraint complained of and found to have been committed was a tort and actionable per se, it could have given rise to a cause of action immediately and hence S. 24 was of no help. [P 548 C 2]

Limitation Act —

('42) Chitaley, S. 24, Note 5, Pt. 1 ; Art. 2, Note 1, Pt. 13; Art. 2, Note 5.

('38) Rustomji, Page 485, Note "Statute runs from happening of damage;" Page 534, Pts. 5, 6; Page 543, Pt. 1.

(l) Tort — Internment of Maharaja of Native State by Government is act of State—It cannot be questioned by Municipal Courts.

The internment of a Maharaja of a Native State by an order of the Government is nothing but an act of State and hence the same cannot be questioned by the Municipal Courts of the country. [P 549 C 2]

(m) Tort—Master and servant—Liability of Government for acts of its officers.

No doubt in the case of a private individual or his servants who are shown to have committed a civil injury in the course of their employment and for their master's benefit even if the act would have been against his specific instructions, he, i. e., the master would be liable. But the Government cannot be held liable either when an officer takes an action in pursuance of a statutory duty or when the act

committed by him happens to be in excess of his authority unless in the latter case the act is either done by the Government's express orders or is subsequently ratified and adopted by it. Nor could any action be maintained against the Government for a tort committed by its servants if in passing the order in the performance of which the tort was committed the Government was discharging its governmental functions as a Sovereign. The position would be different if the officer acts not bona fide but out of malice or is carrying out an order passed by the Government not in the exercise of its governmental functions but in carrying on the ordinary business transaction : *Case law relied on.*

[P 549 C 1, 2 ; P 550 C 1, 2]

(n) Master and servant — Order by Government to police held did not enable them to do more than they were bound to do under Criminal Procedure Code or Madras District Police Act.

The direction of the Government of India to the Madras Police in connexion with a detenu in the Madras Presidency was that they wanted a "watch to be maintained by the police at any railway station where the detenu is likely to entrain and steps to be taken to ensure his rearrest in the event of his absconding":

Held that the direction did not enable a police officer to do anything more than he was bound to do under the provisions of the Criminal Procedure Code or under the Madras District Police Act, irrespective of its having been given by the Government of India. The Government expected all officers to discharge the duties imposed upon them by statute and the Government were not asking or expecting anything else or in addition to be done.

[P 550 C 1]

K. Bhashyam — for Appellants.

The Government Pleader — for Respondents.

ABDUR RAHMAN J. — This appeal arises out of a suit for damages brought by two ladies, plaintiff 1, being a wife and plaintiff 2 a minor daughter of the ex-Maharaja of Nabha against the Province of Madras through the Collector of Madura and four police officials one of whom was the then District Superintendent of Police at Madura, the other a Sub-Inspector of the Government Railway Police at the Madura Railway Station and the remaining two, head constable and constable of the Government Railway Police stationed at Kodaikanal Road Railway Station in the Madura District. The facts that have led to the institution of this suit may be first stated. Nabha is an important Sikh State in the Punjab which was being ruled since 1911 by plaintiff 1's husband. He was interned in 1928 at Kodaikanal—a hill station in the Madura District—by an order of the Government of India to which reference is made in a memorandum (Ex. 7-b) issued by the Government of Madras to the District Magistrate, Madura on 22nd February 1928 (the year 1922 typed in the letter being obviously a mistake for 1928). A second memorandum No. 477-3 (political) dated 22nd June 1928 (Ex. 7-c) issued by the Under Secretary to the Government of Madras to the District Magistrate Madura shows that the Government of India, although not desirous of imposing a close supervision over the ex-Maharaja of Nabha, yet wanted a "watch to be maintained by the police at any railway station where the detenu 'was' likely to entrain and steps to be taken to ensure his rearrest in the event of his absconding."

This memorandum also discloses the fact that the Government of India had then forbidden the ex-Maharaja from absenting himself from his residence at night but this condition is stated by him in his evidence to have been relaxed later. The existence or non-existence of such a condition is however irrelevant for the purposes of this case and may be left out of consideration. It would appear from a third memorandum No. 477-6 dated 22nd August 1928 (Ex. 7-d) that the movements of the ex-Maharaja were under the orders of the Government of India to be restricted to Kodaikanal Municipal limits. A copy of this memorandum was also issued to the Inspector-General of Police who communicated the decision of the Government to the District Superintendent of Police at Madura on 24th August 1928 (Ex. 7). Since then the ex-Maharaja has been living in Kodaikanal and had with the object of keeping their company and of, as he says, giving "them a send off," accompanied the plaintiffs in their car on some occasions when they wished to visit Madras, but is not stated to have transgressed the Kodaikanal municipal limits. From a letter written by Mr. Ganesan (P. W. 6) on behalf of plaintiff 1 on 11th January 1937 to the Station Master Kodaikanal Road (Ex. F) asking a first class compartment to be reserved, it appears that she originally intended to leave Kodaikanal Road by the Trivandrum Express on Tuesday 12th January 1937, but as no reply was received by him in time, they decided to leave Kodaikanal Road by the same train on the next day, i. e., on 13th January 1937 (Ex. F-1). She eventually left Kodaikanal on 13th January 1937 at about 5-30 p. m. with her daughter plaintiff 2. About half an hour after their departure, a telegram (Ex. 4) was despatched by the Station House Officer, (a head constable), to the District Superintendent of Police, Madura North, which reads as follows : "Ex-Maharaja departuring to Madras Spencer Hotel with family in car M. D. 2037."

This led the District Superintendent of Police to wire (Ex. 5) to the Sub-Inspector, Kodaikanal to prevent the ex-Maharaja from leaving Kodaikanal. But it was unnecessary to take any action on that telegram as another telegram (Ex. 6) was despatched by the Station House Officer at 7-30 p. m. in the meantime informing the District Superintendent of Police that the ex-Maharaja had "returned on sending family." The District Superintendent of Police had anyhow to take action on the information contained in Ex. 4 before the receipt of Ex. 6. He decided therefore to communicate his orders to the Sub-Inspector at the Madura Railway Station by telephone to go to Kodaikanal Road Station and prevent the ex-Maharaja from leaving that station. This order was not correctly understood by the Sub-Inspector and it was the misunderstanding of this message on his part that led him to detain plaintiff 1 and resulted in the institution of the suit out of which the present appeal arises. Mr. Cameron (defendant 2) was examined in this case as a witness (D. W. 5). He deposes to having communicated the following message on the telephone :

"Ex-Maharaja of Nabha and family were reported to be leaving Kodaikanal, that it is probable that the party would be taking the Trivandrum Express at Kodaikanal Road Station, that the Sub-Inspector should prevent the ex-Maharaja from catching that train."

The Sub-Inspector, however, states in para. 9 of the cross-examination that he could not follow to start with whether the order of detention was in respect of the ex-Maharaja or the Maharani but with a reply to a question put by him on the tele-

phone to the District Superintendent of Police, he was satisfied that the latter wanted the Maharani to be detained. According to Mr. Cameron, on the other hand, no question was put by the Sub-Inspector that might have led him to detect the mistake as to the identity of the person to be detained and the only difficulty that the Sub-Inspector had in understanding his message was with the word Nabha which he (the Sub-Inspector) did not follow and which he was confusing with the word "Nadar." Be that as it may, it was apparently for the District Superintendent of Police who must have been aware of his Sub-Inspector's capacity to follow a message in English and whose attention was drawn to the difficulty exhibited by the latter in understanding the former's message to be circumspect and to take steps to ensure that his orders were properly understood. On receipt of the telephonic message and understanding that plaintiff 1 was to be detained, the Sub-Inspector left Madura by the Trivandrum Express that was about to start when the message was received by him and arrived at Kodaikanal Road Station at about 8.15 P. M., 11 minutes after the usual time for its arrival.

Plaintiff 1 who had arrived at the Kodaikanal Road Station at about 7.45 P. M. was awaiting the arrival of the train in her own car which was placed in the railway compound fenced on three sides by iron fencing and on the fourth side by the railway premises containing three or four rooms occupied by the Station Master, Spencer's refreshment room, a waiting room for the higher class passengers and a verandah. The iron fencing has a gate through which the cars come into the compound. The Sub-Inspector who had seen a first class compartment reserved for plaintiff 1 at an intermediate station between Madura and Kodaikanal Road, ascertained from defendant 4 on his arrival at Kodaikanal Road Station if plaintiff 1 had arrived. On being informed that she had and in view of what he had understood at the time to have been the orders of the District Superintendent of Police, he prevented plaintiff 1's secretary from placing her luggage which he was trying to keep, in the compartment and communicated to plaintiff 1 through her secretary the orders that he, i. e., the Sub-Inspector, had understood to have received from the District Superintendent of Police, Madura. The plaintiff complains that on the arrival of the train not only was she prevented by the Sub-Inspector from boarding the train but that the gate in the iron fencing was also closed under his instructions and the two constables (defendants 4 and 5) were placed near the gate which resulted in wrongful confinement or imprisonment of the plaintiffs. Since Mr. Bashyam, learned counsel for the appellants, referred to the confinement not only for the purpose of enhancing the damages but as an additional ground for making the Sub-Inspector and the two constables liable, we would have to examine this contention in detail later. It is sufficient, however, to say for the time being that the contention advanced by the plaintiffs' learned counsel that defendant 3 would in any case be liable for having exceeded his instructions and confining his clients within the railway compound instead of permitting them or rather plaintiff 1 from boarding the train, was not advanced in the lower Court and is being put forward for the first time in this Court.

Either in view of some altercation between the plaintiffs' secretary and the Sub-Inspector or on account of the former's request in the vain hope of the plaintiffs being permitted to travel by the Trivendrum Express, the train was detained for about eight minutes longer than the scheduled time for its stay but it is unnecessary to go into these minor details, as they do not seem to bear on the questions that have to be determined in this appeal. We know it for a fact that the plaintiffs were not allowed to board the train and that the Sub-Inspector sent a telegram (Ex. O), after it had left to the District Superintendent of Police, Madura North at 8-42 P. M., which reads as follows :

"Detained Maharani of Nabha from going by six (the number by which the Trivandrum Express is known) as per your orders advise as to what to do."

To this the following reply (Ex. III) was despatched by Mr. Cameron at 9-20 P. M. :

"Your orders were to detain Raja and not Maharani. Maharani may proceed anywhere and you should afford any assistance which the Maharani may require."

This was received at Kodaikanal Road Telegraph Office at 9-25 P. M. and delivered to the Sub-Inspector at 9-45 P. M., according to the time of its receipt as given at the corner of the telegram presumably by the Sub-Inspector. Shortly after this the plaintiffs were allowed to go. It seems that the plaintiffs then went to the Spencer's refreshment room (*vide* Ex. XIII), for a short time and in spite of a telegram (Ex. K-1) that was sent by the plaintiff's secretary to the Station Master, Trichinopoly, which reads as follows : "Maharani Nabha arriving by car to catch six, please detain reserve 4 first, 2 seconds, Madras;" they could not catch the train as they arrived at that station only at about 1-30 A. M., while the train must have left it about two hours earlier. They left Trichinopoly eventually by the Dhanushkoti passenger at about 4-30 A. M. on 14th January 1937 reaching Madras at about 2-30 P. M. on the same day.

Paragraphs 7, 17 and 18 of the plaint state the grounds on which the plaintiffs want to make the various defendants liable for damages for the suffering both mental and physical humiliation caused to the plaintiffs and least of all pecuniary loss suffered by them. As reliance was placed by the Government Pleader on the allegations in these paragraphs in support of his objection that the suit was not maintainable against defendants 2 to 5 under S. 270 (1), Government of India Act, it would be useful to reproduce them in extenso. They read as follows :

"7. The said acts of defendants 2 to 5 were purported to be done by them in their official capacity and are quite irregular and there is no lawful justification for the said acts of the said defendants, and have all the appearance of official high-handedness. The said wrongful acts of the said defendants 2 to 5 restraining the liberty of the plaintiffs by show of authority have resulted in complete deprivation of liberty of the plaintiffs and amount to false imprisonment.

17. Since the invasion of the plaintiffs' right to freedom has been committed in the course and as part of the official employment and alleged to be within the scope of his official authority, defendant 1 is also liable in law to the plaintiffs.

18. As defendants 3 to 5 have acted under the direction of defendant 2 and as defendants 2 to 5 have thereby joined in committing the said wrongful acts, they are also liable in the same way to the plaintiffs in damages."

Relying upon the information contained in the telegrams that were sent by the Station House Officer, (Exs. 4 and 6), it was contended on behalf of the defendants that the ex-Maharaja of Nabha had also accompanied the persons who had left his house

along with the plaintiffs on 13th January 1937 but that he had subsequently returned. The fact that the plaintiffs were detained at the Kodaikanal Road Station was not denied but it was alleged on behalf of the defence that the telephonic message given by the District Superintendent of Police, Madura North, to prevent the ex-Maharaja of Nabha from proceeding by the Trivendrum Express was not correctly heard by the Sub-Inspector of Police and being under the bona fide impression that he was asked to prevent plaintiff 1 from going by that train, he communicated the orders to her through her secretary and stopped her from boarding the train. It was denied however that the Sub-Inspector of Police had ordered defendants 4 and 5 to close the gates or to post themselves near it or had wrongfully confined the plaintiffs. The "acts done by defendants 2 and 3 were" pleaded to have been "done by them in their official capacity in the lawful exercise of their duties" and "defendant 3" was said to have "acted bona fide in not allowing the plaintiffs to proceed by the Trivendrum Express train." It was asserted that "the plaintiffs were informed through the secretary that they could go any where except the train." The allegations that plaintiff 1 was not in good health or that there was loss of sleep or loss of appetite or bronchial affection on that score or that there was mental pain and physical discomfort, pecuniary loss and humiliation were denied.

Not being content with the denial of the injury caused to the plaintiffs, insult was added to it by not admitting the alleged position of the plaintiffs in life and their status by which apparently it was meant that they were not the wife and daughter of the ex-Maharaja. We would have understood para. 15 of defendant 1's written statement to mean that the plaintiffs' designation as "Maharani" and "princess" was being disputed had it not been for the cross examination of plaintiff 1 on behalf of the defendants in paras. 28 and 29 which leads us to infer that the status of plaintiffs 1 and 2 as the ex-Maharaja's wife and daughter was not being admitted. This was wholly opposed to the letters (Exs. T, T-1 and T-2) written by the Private Secretary to His Excellency the Viceroy to or on behalf of plaintiff 1 in August 1933 when she was even referred to as Junior Maharani of Nabha although the correct form of address in regard to her given by the Chief Secretary to the Government of Madras in an extract of a confidential demi-official letter written to the District Magistrate of Madura (Ex. 14) is stated to be different. Whether this new formula of address was evolved at that time or earlier, it is unnecessary to ascertain. But it appears to have evoked a serious protest on behalf of plaintiff 1 (*see* Exs. S and 11-a) and may have been to some extent responsible for this litigation, as it is quite possible that if she had been addressed by Mr. Cameron as Maharani in Ex. 8, the letter would not have remained unopened and this litigation would not have in all probability started. After all she was referred to as "Maharani" seven months later (Ex. R) by no less an officer than the Deputy Inspector General of Police when he was directed by the Government of Madras to see her with the object of apologising "on behalf of the police for the very discourteous treatment she received at the hands of the railway police at Kodaikanal Road Station"; but by then the suit had been instituted and the case was stated to have "gone out of her hands" (Ex. 12-a). We cannot help expressing our regret however that due advantage was not taken of the Government's gesture of goodwill. This is however only by the way and can have no effect on the determination of the various questions that arise in this appeal.

To revert to the pleas raised on behalf of the defendants. Since defendant 1 had not authorised anything to be done to the plaintiffs and there was no ratification on its behalf of anything done by the other defendants, defendant 1's liability for the action of the other Government servants who had either acted or purported to act under the statutory powers conferred on them was denied. Reference was made in the end to the written apology sent by Mr. Cameron (Ex. 8) to plaintiff 1 as soon as he had become aware of the unintentional mistake committed by defendant 3 and attempts that were subsequently made to have an interview with plaintiff 1 for the same purpose, although they can have no bearing on the liability of the various defendants, if they or any one of them are or is found to be liable — whatever effect they may have to the quantum of damages in case the main issues are decided against them. The validity of the notice served on defendant 1 was disputed and the suit was alleged to have been barred by limitation. It was contended on behalf of defendants 2 to 5 that the plaintiffs were not entitled to maintain the suit without the consent of the Governor of Madras as required by S. 270 (1), Government of India Act, and that the suit was also barred under S. 53, Madras District Police Act (Act 24 of 1859).

In a judgment that is fairly well discussed the learned Subordinate Judge of Madura came to the conclusion that defendant 3 had ordered the closure of the eastern gate of the railway compound in order to prevent plaintiff 1 from proceeding by car with the object of boarding the train at any other station like Dindigul and Trichinopoly and that under his orders defendants 4 and 5 "had totally and effectively restrained the freedom of the plaintiffs so as to cause false imprisonment." In answer to the issue whether defendants 2 and 3 (the District Superintendent of Police and the Sub-Inspector) were acting bona fide in the lawful discharge of their duties, the learned Subordinate Judge was of opinion that they had acted bona fide and although defendant 2 had acted in the lawful discharge of his duties, defendant 3 had not done so and was not protected by law. As to issue 1 which related to the bars under S. 53, Madras District Police Act and S. 270 (1), Government of India Act, the learned Subordinate Judge found that under the latter section the sanction of the Governor of the Madras Province was a condition precedent for the maintainability of the suit ; but S. 53, Madras District Police Act, did not apply to the facts of the present case. As for the liability of the Province of Madras, he held that although S. 179, sub-cl. (1), Government of India Act, was not a bar, the plaintiffs had no cause of action against it as defendants 2 to 5 were not acting as agents of the Government and the principles of implied authority to act on behalf of the latter or of the liability of a master for the wrongful acts done by his servant in the course of the latter's employment were not applicable. As to the question of limitation he held that in so far as the act of defendant 2 was in pursuance of S. 54, Criminal P. C., the suit was barred by limitation against him but not against the other defendants. The issues in regard to the validity of the notice under S. 80, Civil P. C., and relating to misjoinder of defendants were not seriously pressed on behalf of the defendants. As for the quantum of damages the learned Subordinate Judge was of opinion that if the case were to be decreed in favour of the plaintiffs a sum

of Rs. 5000 would have been enough in the circumstances of the case ; but having regard to the conclusion in regard to the legal objections raised on behalf of the defendants, he was of the opinion that the suit was not maintainable. It was therefore dismissed. The plaintiffs appeal.

From the facts that have been stated and the pleadings of the parties that have been briefly summarised, it would be clear that there is no dispute in regard to the essential facts of this case. Whether the ex-Maharaja of Nabha had actually left his house on 13th January 1937 and had returned as mentioned in the telegram Ex. 6 or had not left his house on that day at all, it is unnecessary to decide although we are inclined to accept the ex-Maharajah's testimony and feel that the second telegram (Ex. 6) was sent by the head constable (Station House Officer) after he had discovered that the first one (Ex. 4) was sent under a mistake. It seems that Sebastian (D. W. 9), a police constable in the intelligence department had received "information at 11 A. M. on 13th January 1937 that the ex-Maharajah of Nabha and Rani (plaintiff 1) would go with their family to Spencer Hotel Madras" and this information was communicated by him to Ghulam Dastagir (D. W. 8) head constable 988 on the same day. Either relying on the information that he had received during the day or as a result of the working of a heated imagination, Sebastian seems to have jumped to the conclusion that the ex-Maharajah had left Kodaikanal when he saw his cars pass by and asked D. W. 8 to wire to the District Superintendent of Police Madura and to the other officers mentioned in the latter's statement of the Ex-Maharajah's departure. Even if the ex-Maharajah had left his house by car — a fact which we have already stated we are not prepared to believe — that should not have been sufficient for either Sabastian (D. W. 9) or Ghulam Dastagir (D. W. 8) to wire to the authorities as the ex-Maharajah had been accompanying his wife and daughter even before upto the Municipal limits when they wished to visit Madras and this must have been known to them.

As to the question whether Mr. Cameron (defendant 2) had asked the Sub-Inspector (defendant 3) to detain any person other than the ex-Maharaja, it is true that the message which Mr. Cameron deposes in his evidence as D. W. 5 to have sent was not reduced to writing. It is not therefore possible to say whether the message given by the witness in his deposition and reproduced in an earlier portion of this judgment was exactly what he has now stated it to be. But as the telegram, Ex. 4, referred to the departure of the ex-Maharajah, the telegram, Ex. 5 which Mr. Cameron had given at or about the time when he telephoned his orders to the Sub-Inspector also refers to the "Nabha ex-Raja" to be prevented from leaving Kodaikanal and the telegram, Ex. 3, which he sent in reply to Ex. O reiterates that the orders were "to detain Raja and not Maharani" there cannot be much room for doubt that he must have asked the ex-Maharajah alone to be detained although it is possible to conceive that the word "party", if used by him, as both he and the Sub-Inspector depose to its having been used on the telephone, might have led the Sub-Inspector D. W. 1 (who had read upto fourth form only) to think that the order of detention applied to all those as well who were or were to be with the ex-Maharaja. The Sub-Inspector would not however admit this and states, as we have already noticed elsewhere, that his definite instructions were to detain plaintiff 1. Moreover the District Superintendent of Police knew that it was the ex-Maharajah alone who was debarred under Government orders from leaving the Municipal limits of Kodaikanal. In the absence of any other indication or suggestion as to the motive for plaintiff 1's detention, we cannot but conclude that Mr. Cameron must have ordered the ex-Maharajah alone to be detained. There is no doubt however that the Sub-Inspector (defendant 3) understood that the orders were in regard to plaintiff 1 and it was on that basis that he acted until the telegram, Ex. 3, was received by him.

We will advert to the effect of this finding later but we cannot help deprecating at this stage that a responsible officer like the District Superintendent of Police should have depended solely on the telephonic message and should not have followed it up by a confirmatory telegram or letter particularly when he was dealing with the liberty of an ex-Ruler of an important Indian State. Had Mr. Cameron taken the trouble to send a telegram to Kodaikanal Road Station confirming his orders and sent a letter with a constable in a car, the mistake of detaining the plaintiffs would not have been committed and this unfortunate litigation would have been avoided.

Moreover, the use of the word 'detain' which was in all probability used by Mr. Cameron on the telephone, was also unfortunate. It is used both in the sense of keeping one in confinement as also for keeping him in waiting or hindering him. It cannot be denied that to a policeman, particularly when he does not happen to be very well-educated, the word detain would ordinarily suggest the first meaning rather than the second or the third. The use of this word by Mr. Cameron to the Sub-Inspector and the use of it by the latter when communicating the former's orders to plaintiff 1's secretary could have been and was probably taken to mean that plaintiff 1 was intended to be confined to the place where she happened to be at the time, i. e., in the car in the railway compound. And if the constables (defendants 4 and 5) were posted near the gate — and we are inclined to agree with the finding arrived at by the lower Court in this respect that they were placed there by the Sub-Inspector — the conclusion would be irresistable that plaintiff 1 must have thought that she was confined within the railway fencing where her car was standing and would not be permitted to leave it if she tried so to do. If that was the impression created in her mind, we can very well understand why plaintiff 1 did not ask any person if she could go out of the compound and why she did not leave the car. That must have been her feeling from the subjective point of view ; but that would not be enough for us to hold that she was actually confined or imprisoned and not merely restrained from proceeding by the Trivendrum Express. Had there been proof on the record that there was total restraint of plaintiff 1's movements or liberty during the period that she was in her car by the use or threat of force or by confinement, she could be said to have been imprisoned. Our attention was drawn in this respect by learned counsel for the appellants to the evidence of P. W. 4, P. W. 5 and P. W. 6. There is no doubt that in answer to a request by the secretary (P. W. 6) "to ask the constables to open the gate on the east so that they could go" the Sub-Inspector (D. W. 1) is reported to have said that "he could not allow them to go unless he received instructions from the District Superintendent of Police." But if this is taken along with what the witness (P. W. 4) stated in

para. 11 of his cross-examination which reads as follows :

"Through the upper class waiting room one can come to the platform and go out through the third class waiting room. There was no obstruction from anybody to go like that but no car can go that way," it would appear that there was no total restraint on the plaintiffs' movements ; but what the witness was trying to convey was that by closing the gates, the car could not have been taken out of the station compound and as the plaintiffs could not have left the Kodaikanal Road Railway Station without the car, they must be taken to have been virtually confined. Similarly, P. W. 6, who is no other than the plaintiff's own secretary stated in his examination-in-chief that the Sub-Inspector, D. W. 1 said that :

"His orders were to detain the Maharani . . . . . He did not say she could be detained there and would not be allowed to go anywhere . . . . I did not ask the Sub-Inspector if there was any objection to the Maharani going back to Kodaikanal or to her going by car though not by train."

Having regard to these statements, we cannot attach any importance to the statement of P. W. 5 that plaintiff 1 was not allowed to go and was told that she "should stay there." Learned counsel for the plaintiffs laid considerable stress on the advice sought by the Sub-Inspector in his telegram (Ex. O) after he had succeeded in preventing plaintiff 1 from boarding the train. We are in agreement with Mr. Bhashyam that the explanation given by the Sub-Inspector in his deposition that by those words he wanted to know what Mr. Cameron wanted the witness to do in regard to his own movements, i. e., whether he might return to Madura is wholly unconvincing and that the Sub-Inspector was apparently enquiring as to how he should act as plaintiff 1 had been detained from going by the Trivendrum Express and was then at the Kodaikanal Road Station. But this does not show that plaintiff 1 was there because she was confined to the Kodaikanal Road Station, but because she happened to be left behind after the train had left the station without her. We are however prepared to admit that by placing the policemen at the gates and by closing the same (although not locking) it would be a legitimate inference to draw that the plaintiffs' car was stopped by defendants 3 to 5 and would not have been allowed to be taken out. This does not however mean that the plaintiffs were confined and would have been prevented from proceeding in any direction other than possibly to Dindigul or Trichinopoly if they had attempted to do so.

On the analogy of the decisions in 27 Bom. L. R. 1419[1] and A. I. R. 1927 Mad. 506[2] and of 1938-2 M. L. J. 583,[3] it was contended by Mr. Bhashyam that if plaintiff 1 was not allowed to go in her car in which she had a right to proceed and it was impossible for her to go anywhere without her car, the persons who prevented her from using the car should be held to have confined or imprisoned her wrongfully. It was argued by the learned Government Pleader, on the other hand, that even if the defendants are found to have prevented the car from being taken out of the railway compound by or at plaintiff 1's instance, they could not be said to have confined or imprisoned plaintiff 1. He cited 15 Bom. L. R. 103,[4] 11 Cr. L. J. 192[5] and 60 C. L. J. 472,[6] in support of his contention. It is admitted in this case that plaintiff 1 may be, in so far as she was prevented from boarding the Trivandrum Express, taken to have been wrongfully restrained by the Sub-Inspector. But the contention that a person would be said to have been confined merely because he is not allowed to proceed either in his car or conveyance even if no restriction is placed on his person does not seem to us correct. The offences of wrongful restraint or wrongful confinement are offences affecting human body and cannot be said to have been committed if a person is not restrained or confined himself but the liberty of going in the conveyance in which he wishes to go or taking the article which he wishes to carry and without which he is not willing to proceed is denied to him. If the decisions cited by Mr. Bhashyam lay down any different rule we would be, with great deference, unable to concur with them.

We are not for the above reasons, satisfied both on facts and as to law that the plaintiffs were or can be said to have been actually confined either in the railway compound or even within the limits of Kodaikanal Road Station. Had plaintiff 1 or her secretary made a request to the Sub-Inspector or to the constables for the former to go out of the railway compound and had any obstruction been created, it would have been a different matter. The onus of proving confinement lay on the plaintiffs and in the absence of satisfactory evidence on this point, it is not possible for us to agree with the lower Court —although it has to be admitted, as we have already observed, that the conduct of defendant 3 was undoubtedly dubious and the use of the word detention makes the statement of the defence witnesses on this point doubtful.

In view of our finding that Mr. Cameron had ordered the ex-Maharaja to be detained, the question of his bona fides for ordering plaintiff 1 to be prevented from boarding the Trivendrum Express does not arise for consideration. We are equally clear in our minds that the Sub-Inspector was not actuated by any bad or malicious motives either. He was under an honest impression, although a mistaken one, that he was ordered to prevent plaintiff 1 from going by the Trivendrum Express. At one stage of the case, Mr. Bhashyam advanced the contention that the Sub-Inspector's conduct was at all events extremely negligent and that he should not be held to have acted in good faith if we were not satisfied that he had proceeded in the matter with due care and caution. But when it was pointed out to him that the definition of the words "good faith" in the General Clauses Act is materially different from that given in the Penal Code and that it would not be correct in this case to use them in the limited sense in which they were used in the Penal Code, the contention was not pressed. The action of the Sub-Inspector could not be, even if negligent to some extent, held to be malicious or even mala fide. We must, therefore, hold that in preventing plaintiff 1 from proceeding by the Trivendrum Express he was acting bona fide though erroneously. Having come to these findings of fact, we are now free to discuss

1. ('26) 13 A. I. R. 1926 Bom. 118 : 91 I. C. 811 : 27 Cr. L. J. 139 : 27 Bom. L. R. 1419, Emperor v. Lahanu Manaji.
2. ('27) 14 A.I.R. 1927 Mad. 506 : 100 I. C. 544 : 28 Cr. L. J. 320, In re Peria Ponnusami Goundan.
3. ('38) 1938-2 M.L.J. 583, In re Muhammad Usuf Sahib.
4. ('13) 15 Bom.L.R. 103 : 19 I.C. 177 : 14 Cr.L.J. 177, Emperor v. Ramalala.
5. ('10) 4 I.C. 1157: 11 Cr.L.J. 192: 5 M.L.T. 207, In re Venkataramiah.
6. ('35) 22 A.I.R. 1935 Cal. 252 : 155 I.C. 444 : 36 Cr. L. J. 740 : 39 C. W. N. 143 : 60 C. L. J. 472, Durgapada Chaterjee v. Nilmani Ghosh.

the various questions of law which have been raised on behalf of the various defendants. The first contention advanced by the learned Government Pleader was that inasmuch as the plaintiffs were expressly suing the defendants for acts which were admitted by them to have been done in their official capacity, the suit would not be maintainable without the consent of the Governor under S. 270 (1), Government of India Act. It runs as follows :

"No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connexion with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connexion with the affairs of a province, of the Governor of that province in his discretion."

Inasmuch as the act of wrongful confinement or of wrongful restraint which was committed in January 1937, i. e., some months before "the relevant date" by persons employed in connexion with the affairs of a province, it would fall within the ambit of the section if it was done or purported to be done by them in the execution of their duty as a servant of the Crown in India. As the question of the applicability of S. 270(1) depends primarily on the nature of the allegations made against the public servants in the plaint for which, *see* 1939 F. C. R. 159[7] at pp. 179 and 184, we will have to examine the allegations contained in para. 7 of the plaint which we have reproduced earlier in this judgment. The plaintiffs' complaint is that the "acts of defendants 2 to 5 were purported to be done by them in their official capacity" or in other words, in the execution of their duty as servants of the Crown. Since this suit was not instituted with the consent of the Governor, S. 270 (1) clearly constitutes a bar so far as defendants 2 to 5 are concerned. Mr. Bhashyam however contended that S. 270 (1) would have no application unless the acts were done or purported to be done by these defendants in the execution of their duty. He contended in the first instance that as it was not possible for Mr. Cameron to order any subordinate of his to apprehend or to detain any person by telephone, he could not be stated to have done anything in discharge of his duty. Secondly, it was contended that as, in the absence of any allegation or information that the plaintiffs had committed any offence, it was not possible for the Sub-Inspector of Police to have restrained or confined them, he could not be equally said to have done anything in the execution of his duty. The same argument was advanced with reference to the other two constables who are defendants in the case. Reference was made in this connexion by Mr. Bhashyam to S. 54, Criminal P. C., under which it is possible for a police officer to arrest a person without a warrant.

There is no warrant for the proposition that a police officer cannot order the arrest of a person by means of a telephonic message. The word "requisition" in S. 54 (1) (ix) is quite general and clearly covers a message communicated by telephone, although it will be necessary for him when he is asking another police officer to do what he could have done himself to disclose not only the identity of the person whom he wishes to be arrested but also the offence or the reason for which the arrest is to be made. This has to be done for the reason stated in the last clause of S. 54 (1). This information will enable a person who is called upon to arrest to know that the person required to be arrested by him could have been lawfully arrested without a warrant by the officer who had issued the requisition. The proposed action being thus within the competence of one who may be described, although not quite accurately, as a principal, the person requisitioned would be doing nothing wrong if he complied with his so-called principal's orders and carried them out as his agent. Our attention was drawn to a decision by a single Judge of the Rangoon High Court in 13 Rang. 754,[8] where it was held that the provisions of S. 54, Criminal P. C., were limited by S. 56 of the Code and that although it is possible for a police officer to arrest on his own initiative or when acting independently any person concerned in a cognizable offence without a warrant, yet where a subordinate police officer was not acting independently but was merely deputed by a superior officer to arrest a person concerned in a cognizable offence, the order specifying the person to be arrested and the offence or other cause for which the arrest was to be made must be in writing and the Subordinate police officer must notify to the person to be arrested the substance of the order and if so required by such person, show him the order.

Inasmuch as the police officer in that case was making an investigation under Ch. 14 of a case under S. 380, Penal Code, which is a cognizable offence, the decision was, if we may say so with respect, fully justified. But if the learned Judge wished to lay down generally that the provisions of S. 54 were to be limited by those of S. 56, Criminal P. C., and in all cases it is incumbent upon a superior officer of the police, even when he is above the rank of an officer who is in charge of a police station or when he is not making an investigation under Ch. 14, Criminal P. C., to comply with the formalities mentioned in S. 56 of the Code, we must with deference express our dissent. Section 54 applies to all police officers whether superior or subordinate. Section 56 only applies to such police officers as are in charge of a police station or as are making investigations under Ch. 14. The officer in charge of a police station is defined in S. 4 (p), Criminal P. C. Let us suppose that an Inspector General of Police orders his Deputy Inspector General of Police or a District Superintendent of Police (all of whom are superior police officers and who would not ordinarily be in charge of a police station or making an investigation themselves under Ch. 14) to arrest a person, would it be essential for the Inspector General of Police to comply with the requirements of S. 56, Criminal P. C.? In our opinion, it would not be so necessary. Nor would it be necessary for a subordinate police officer, say an Inspector of Police to do so if he gives an order for a person's arrest to another police officer as long as the person giving the order is not the officer in charge of a police station and is not making an investigation under Ch. 14, Criminal P. C. In other words, S. 56 of the Code only applies to cases of police officers who are either in charge of a police station or who are making investigation under Ch. 14. If in their capacities as such officers, they depute their subordinates to arrest without a warrant (otherwise than in their presence) they have to

7. ('39) 26 A.I.R. 1939 F.C. 43 : 181 I. C. 317 : 40 Cr. L. J. 468 : I.L.R. (1939) Kar. F. C. 132 : 1939 F.C.R. 159, Horiram Singh v. Emperor.

8. ('36) 23 A.I.R. 1936 Rang. 119 : 161 I. C. 459 : 37 Cr. L. J. 462 : 13 Rang. 754, Mohamed Ismail v. Emperor.

give that order in writing. But if they are not acting in that capacity, a compliance of the general provisions contained in S. 54 (1) (ix) would be enough.

Had the ex-Maharaja of Nabha left the Kodaikanal Municipal limits and arrived at Kodaikanal Road Station against the orders of the Government of India, he would have been guilty of an offence defined in S. 225 (B), Penal Code, and liable to arrest by Mr. Cameron without a warrant, the offence being of a cognizable nature. The Sub-Inspector also knew that the ex-Maharaja could not leave the Kodaikanal Municipal limits and he could have also done the same. If Mr. Cameron could have arrested the ex-Maharaja himself under S. 54 (1) (i), it is clear that he could have made a requisition to the Sub-Inspector either in writing or verbally or even by telephone to arrest the ex-Maharaja at Kodaikanal Road Station under sub-clause 9 of the same section. In making a requisition to arrest the ex-Maharaja at Kodaikanal Road, both the person to be arrested and the cause for which the arrest was to be made must be taken to have been specified and it would have appeared to the Sub-Inspector therefrom that the ex-Maharaja could have been on leaving the Municipal limits of Kodaikanal arrested without a warrant by Mr. Cameron. It would follow therefore that in asking the Sub-Inspector to detain the ex-Maharaja, Mr. Cameron was not only doing what he was fully entitled to do but was executing a duty that he was bound to discharge in view of the orders of the Government of India conveyed to the Inspector General of Police in Ex. 7-D and by the latter to the District Superintendent of Police in Ex. 7.

As regards the Sub-Inspector and the two constables Mr. Bhashyam contended that the act done or purported to be done by them must have been in the execution of a duty and in so far as they could not be said to have been under any duty or entitled to arrest plaintiff 1 under section 54, Criminal P. C., they clearly exceeded their powers and could not be brought within the ambit of S. 270 (1), Government of India Act. In other words, his contention is that in order to attract S. 270 (1), the power and duty to arrest must be clearly found to be existing under S. 54, Criminal P. C., and it should not be merely a purported duty or a duty that a person wrongly thought he was bound to discharge. We agree with the learned counsel's contention that the word "duty" as used in the section of the Constitution Act refers to the actual duty and not what a person merely thinks to be his duty. We also agree that S. 54, Criminal P. C., cannot help these defendants. None of its provisions can be held to empower them to restrain or confine plaintiff 1. There was no requisition by Mr. Cameron to arrest plaintiff 1, and even if the request to arrest the ex-Maharaja may be taken to have been wrongly understood as a request to arrest her, there was no disclosure of the offence or other cause for which she could have been arrested.

In the absence of any disclosure of an offence or any other cause, it is contended on behalf of the appellants that it was not possible for the Sub-Inspector to detain or arrest plaintiff 1 under the provisions of S. 54, Criminal P. C. If S. 54 were the only section under which it would have been possible for the Sub-Inspector to act, there would have been undoubtedly a great deal of force in the learned counsels' contention. But under S. 21, Police Act, it is the duty of every subordinate Police Officer as defendant 3 was, to obey the orders of the senior Police Officer as Mr. Cameron, the District Superintendent of Police, happened to be at the time. If therefore Mr. Cameron ordered the Sub-Inspector to arrest or detain the ex-Maharaja, the Sub-Inspector was bound to comply with that order. If in pursuance of such an order, the Sub-Inspector had arrested or detained the ex-Maharaja, he would have been acting in execution of his duty. But if by a mistake in reading or hearing the order, the Sub-Inspector detained some one else as it happened in the present case, he could not be said to have been acting in execution of his duty in carrying out the orders of his superior officer, but nonetheless he can be said to be purporting to carry out an order which he understood to have been passed by Mr. Cameron and which it was his duty to execute. It was in the end urged that under S. 21, District Police Act, a police officer is bound to execute merely lawful orders and the order to arrest or detain plaintiff 1 could not be regarded to be lawful. It was also contended that this section only dealt with disciplinary jurisdiction of the Police Officers and had no application when they were dealing with the public generally. This section provides that it shall be the duty of every police officer "to obey and execute all orders and warrants lawfully issued to him."

It may be argued, and not without some force, that it would not be open to a subordinate police officer to question the legality of the orders of his superiors and that if an order or warrant was lawfully issued to him, it would be his duty to obey and execute the same. In other words, the argument is that the word "lawfully" does not qualify the words "orders or warrants" and merely refers to the method of their issue. Prima facie, this seems to be correct; but even if it is not so and the word lawfully is found to qualify the words "orders or warrants", there is no difficulty in overruling this contention. The order to arrest or detain the ex-Maharaja issued by Mr. Cameron was, as has been already held, a perfectly lawful order. It does not become unlawful merely because it was misunderstood by the person who was to execute the same. The only difference would be, as pointed out before, that the Sub-Inspector instead of acting in execution of his duty could only be said to have purported to act in execution of his duty. But either of them is covered by S. 270 (1), Constitution Act, and cannot legally give rise to a cause of action except with the consent of the Governor. There is also no force in the contention that S. 21 is applicable between police officers inter se and has no application when they are dealing with private individuals. The orders which they as police officers are to give and the warrants which they are to issue will relate largely if not solely to private individuals or to individuals even if they happen to be police officials in their private capacity. The Police Act does not deal with administrative matters of the police as a department but with matters and duties which they in their official capacity are called upon to undertake and discharge.

It is not easy to understand why the lower Court considered that defendant 3's action was not protected by law. He was purporting, to perform a duty which he was bound to discharge. It follows therefore that the plaintiffs must be, both according to their allegation in the plaint and on the merits irrespective of any such allegation, held not to be entitled under S. 270 (1), Government of India Act, to institute this suit against defendants 2 to 5 without the consent of the Governor. We have already held that the actions of defendants 2 and 3 were bona fide. The police constables (defendants 4 and 5)

were similarly bound to obey the orders lawfully issued by the Sub-Inspector and there can be no manner of doubt that what they were ordered to do and what they did in pursuance of such orders as were given to them was done by them in the execution of their duties as servants of the Crown in India and was done by them in good faith. Under S. 270 (2), Constitution Act, all civil and criminal proceedings against such persons have to be dismissed unless the Court is satisfied that the acts complained of were not done in good faith. In other words, the onus of proving want of good faith in the case of such persons and such acts as are referred to in this sub-clause is placed upon the plaintiff or the complainant as the case may be. There is no proof on the record that any of the four defendants (2 to 5) did not act in good faith. Indeed we have found that all of them acted in good faith. For that reason also, the case against these defendants must fail.

The incident which led to the institution of this suit occurred as stated before on 13th January 1937. The plaint was presented on behalf of the plaintiffs on 17th June 1937 after a notice of two months had been given on behalf of the plaintiffs as required by S. 80, Civil P. C. The period of such notice has to be excluded in computing the period of limitation under S. 15, sub-cl. (2), Limitation Act. The civil Courts in Madura were closed on account of summer recess and reopened on 14th June 1937. If the period of limitation for a suit of this nature were found to be three months under Art. 2, Limitation Act, as it has been contended on behalf of the defendants to be, the suit would be barred by time, the last date of its institution in that case being 14th June 1937. Learned counsel for the plaintiffs however relies on Arts. 19, 36 and 120 and contends that Art. 2, Limitation Act, would not be, in any case, applicable to the facts of the case. It is urged by him in the alternative that even if Art. 2, Limitation Act, is found to be applicable, the period of limitation under S. 24, Limitation Act, should be computed from the time when the injury (i e., the illness in Madras) to the plaintiff resulted in consequence of the happenings of 13th January.

Article 19, Limitation Act, would have been undoubtedly more appropriate if we had been of opinion that plaintiff 1 was wrongfully confined or falsely imprisoned. In view of our finding however that she had been only wrongfully restrained, Art. 19, Limitation Act, would have no application. Article 36 makes a general provision for suits founded on torts. Provisions for particular cases are to be found in Arts. 19 to 27 and 37 to 49. If a case falls under any of the special articles, Art. 36 will have no application. It clearly provides that it would have no application if the limitation for acts complained of had been specially provided for. It cannot apply if the malfeasance, misfeasance or non-feasance referred to therein were committed or purported to be committed in pursuance of any enactment in force in British India. Much less can Art. 120 which is a residuary article have any application. It can only be invoked as a last resort and in case no other article is found to be applicable. If the suit happens to be for compensation for doing an act alleged to have been done in pursuance of any enactment in force for the time being in British India, as this happens to be, Art. 2 will have to be applied in preference to either Art. 36 or any other article referred to above and this is because it has been proved now that the various defendants acted on 13th January 1937 or purported to act in pursuance of some enactment. It is true that the use of the word "alleged" by the Legislature in this article is not happy. It cannot be taken to mean that a mere allegation by a party invoking its assistance or pleading that he had acted or omitted to act in pursuance of an enactment would attract its provisions. But when the act is found to have been done or purported to have been done in pursuance of an enactment, as the acts of defendants 2 to 5 have been found to be, this article must be held to apply.

Relying on the word "alleged" in this article, learned counsel for the appellants argued that before it could be found to govern the present suit, the allegation by the defendants that they were acting in pursuance of an enactment must have been made by them when they were acting. This is obviously incorrect. First of all, a contention like this assumes that every person who is acting in pursuance of an enactment must not only know at the time when he is acting, the correct title and provision of the Act under which he was authorised to act (as if it happens to be wrong, it may be argued that the correct enactment was not alleged by the person doing the act) but also the provisions of the Limitation Act (which is after all an adjectival law) which make it essential for him to mention his authority for the act done by him. Secondly, this article applies both to the doing of an act or omitting to do an act; it might be physically possible for a person to speak and to refer to the enactment at the time when he is acting in pursuance of the enactment but what about the omission to act? If a man does not act and is not even present for the simple reason that he did not wish to act, is he even then required to speak and name the provision of law under which he thinks he is not required to act or on account of which he omitted to act? The enactment under which he acted or omitted to act can surely be referred to by him or on his behalf when he is called upon to explain his conduct later. As we have found that the defendants were acting under the provisions of S. 54, Criminal P. C., and S. 21, Police Act, both of which were and are in force, the suit must be held to be governed by Art. 2, Limitation Act.

The contention advanced on behalf of the plaintiffs that col. 3 of the article should be governed by S. 24 of the Act and limitation should not be held to start under Art. 2 from the time when the acts took place but from the time when the injury to the plaintiff (i. e., the illness in consequence of her detention) occurred in Madras a few days later has also no force in our opinion. If the act complained of had not given rise to a cause of action until some special damage had resulted therefrom, S. 24, Limitation Act, might have been of help to the plaintiffs. In so far as their learned counsel vehemently contended and we are not inclined, as at present advised to disagree with him that the wrongful restraint complained of and found to have been committed would be a tort and actionable per se, it could have given rise to a cause of action immediately. Section 24 of the Act cannot thus help the plaintiffs and the period of limitation cannot be computed from the time when the injury is alleged by the plaintiffs to have resulted to them. It was moreover contended by the learned Government Pleader that S. 53, District Police Act, was also a bar. The relevant provisions of that section read as follows:

"All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done, either under the provisions of this Act or under the provisions of any other law

for the time being in force, conferring powers on the police shall be commenced within three months after the act complained of shall have been committed and not otherwise."

The learned Subordinate Judge overruled this contention as he held that :

"The act could not be said to be one done or intended to be done under the provisions of the Police Act or the Criminal Procedure Code, though defendant 3 honestly believed that in doing that act he was carrying out the orders of the District Superintendent of Police and though that was an act done by him in execution of his duty as a servant of the Crown in India."

No reason has been given by him why S. 54, Criminal P. C., or S. 21, Police Act, to which reference was made by him in the preceding sentence had no application to the defendants. We have in an earlier part of this judgment discussed the question and taken pains to show that the acts of these officers were covered by the provisions of the Criminal Procedure Code and those of the Police Act. The very fact that the Sub-Inspector was carrying out or purported to carry out the order of the District Superintendent of Police would bring him within the protection afforded by the Government of India Act read with the provisions contained in the Police Act. We must therefore hold that the finding of the learned Subordinate Judge in para. 29 of his judgment is erroneous and S. 53, Police Act, applies to the case so far as defendants 2 to 5 are concerned and the suit is therefore barred by limitation against them on this ground as well. The last question to decide is whether the Province of Madras could be held liable for the acts of the other defendants. Relying on the cases such as those in (1862) 1 H. & C. 526=158 E.R. 993;[9] (1927) 1 K.B. 236[10] and (1872) 7 C. P. 415[11] it was contended by learned counsel for the appellants that the Government would be, like any other master, responsible for the acts of its servants when they are done by them within the scope of their authority even if they happen to be against the express orders or instructions of the Government. In the present case, however, it was argued by Mr. Bhashyam, that there was no question of the defendants' and of at any rate Mr. Cameron's acting in contravention of the Government's orders. The duty of keeping the ex-Maharaja within the Municipal limits of Kodaikanal was imposed on Mr. Cameron as the District Superintendent of Police and on defendant 3 either directly or through Mr. Cameron and anything done or purported to be done by both of them within the scope of their authority would, if it amounts to a civil wrong, make the Government liable. It was further argued that the Government would be responsible for the negligence of its servants committed by them in complying with its express orders.

Had we been dealing with a private individual or his servants who were shown to have committed a civil injury in the course of their employment and for their master's benefit even if the act would have been against his specific instructions, he, i. e., the master would have been liable. But the question now to decide is whether the Government could be made liable when the acts were done or purported to be done by certain police officers in discharge of their duties. The fact that the ex-Maharaja must be regarded to have been taken into or kept in custody under the orders of the Government of India is immaterial. He was interned by an order of the Government which was nothing but an act of State and which could not be questioned by the Municipal Courts of the country. Nor would his being in the custody of defendants 2 and 3, even if that be assumed to be correct, make any difference if they were under a statutory duty to keep him in custody and entitled to arrest him if he in spite of being a detenu happened to transgress the Municipal limits of Kodaikanal. That they were both empowered and bound to arrest him admits of no doubt, in our opinion. Had the ex-Maharaja left the Municipal limits of Kodaikanal, he would have fallen within the mischief of S. 225-B, Penal Code, and would have been liable to be arrested by any police officer without a warrant. This was not because of any special request made either by the Government of India or the Government of Madras but because in his capacity as a police officer, it is his duty to arrest an offender without a warrant if he can in law do so and with a warrant when he has been ordered to do so by the authorities entitled to issue the same. The decision in (1864) 33 L.J.C.P. 199[12] is a clear authority for the proposition that a petition of right could not have been on the facts of the present case maintained against the Queen although in that case a naval officer had, purporting to act in pursuance of a statutory authority, wrongly seized a ship in the supposed performance of a duty imposed upon him by an Act of Parliament. It was held in that case that on these facts, the maxim "respondeat superior" would not apply and make the Crown liable. The question how far the Government is liable for the acts of its servants when they are performed not in the carrying on of an ordinary business transaction which as successors of the East India Company they have at times to undertake, but in pursuance of the exercise of Governmental or sovereign power has been the subject of several decisions by the various High Courts in India. It was held by Sir Lawrence Jenkins C. J., of the Bombay High Court (as he then was) and another learned Judge in 28 Bom. 314[13] that the Government was not liable on account of the act of a chief constable who had seized certain bundles of hay not in obedience to an order of the executive Government but in performance of statutory power vested in him by the Legislature. To the same effect there are decisions of other Courts including our own where this question has been fully discussed : *see* 9 Rang. 375;[14] 39 Mad. 781;[15] 51 M.L.J. 446[16] and 59 Cal. 1289.[17] It will be supererogatory on our

9. (1862) 1 H. & C. 526 : 32 L. J. Ex. 34 : 9 Jur. (N.S.) 333 : 7 L. T. (N. S.) 641 : 11 W. R. 149 : 130 R.R. 641 : 158 E. R. 993, Limpus v. London General Omnibus Co.
10. (1927) 1 K.B. 236 : 96 L.J.K.B. 152 : 136 L.T. 271, Poland v. John Parr & Sons.
11. (1872) 7 C. P. 415, Bayley v. Manchester Sheffield and Lincolnshire Railway Co.
12. (1864) 33 L.J.C.P. 199 : 16 C.B. (N.S.) 310 : 10 Jur. (N.S.) 1029 : 10 L.T. 762 : 12 W.R. 838, Tobin v. Queen.
13. ('04) 28 Bom. 314 : 6 Bom. L.R.65, Shiva Bajan Durgaprasad v. Secy. of State.
14. ('31) 18 A. I. R. 1931 Rang. 294 : 135 I.C. 74 : 9 Rang. 375, Kadir Zilani v. Secy. of State.
15. ('16) 3 A. I. R. 1916 Mad. 1157 : 31 I. C. 224 : 39 Mad. 781 : 29 M. L. J. 280, A. M. Ross v. Secy. of State.
16. ('26) 13 A.I.R. 1926 Mad. 1084: 97 I.C. 847:51 M. L. J. 446, Secy. of State v. Ganrapati Somayya.
17. ('32) 19 A. I. R. 1932 Cal. 834 : 140 I. C. 856 : 59 Cal. 1289 : 55 C. L. J. 542 : 36 C. W. N. 606, Secy. of State v. Srigobinda Chaudhuri.

part to tread the same ground once again. These authorities clearly establish that the Government could not be made liable if the act was done or purported to be done by the defendants in discharge of their duty imposed upon them by statute.

In determining the application of S. 270 (1), Government of India Act, to defendants 2 to 5, we have already held that the acts done or purported to be done by these police officers were in execution of their duty. Mr. Cameron who telephoned to the Sub-Inspector for the ex-Maharaja to be detained at the Kodaikanal Road Station was performing a statutory function and did not act because he was expressly authorised by the Government to detain the ex-Maharaja on that day. In the same way defendant 3 was bound to carry out the orders which were given or which he erroneously understood to have been given by his superior officer. The orders passed by defendant 3 had to be obeyed by defendants 4 and 5. Had defendant 3 been found to have detained plaintiff 1 not bona fide but on account of malice, the situation would have been different. Had these defendants been carrying out an order passed by the Government not in the exercise of its governmental functions but in carrying on the ordinary businese transactions, the position might have been also different. But in this case these considerations are out of place. The contention advanced by Mr. Bhashyam that these police officers were acting as agents to keep the ex-Maharaja in custody and not as police officers has absolutely no force. The direction of the Government of India contained in Ex. 7-C that they wanted a "watch to be maintained by the police at any railway station where the detenu is likely to entrain and steps to be taken to ensure his rearrest in the event of his absconding" do not enable a police officer to do anything more than he was bound to do under the provisions of the Criminal Procedure Code, or under the Police Act, irrespective of this direction having been given by the Government of India. The Government expects all officers to discharge the duties imposed upon them by statute and in this case the Government were not asking or expecting anything else or in addition to be done. In fact, the Government in passing this order was trying to minimise the rigour with which the movements of the ex-Maharaja could have been closely supervised. Paragraph 1 of this very letter indicates that the Government did not favour the employment of any special police guard and clearly stated that they did not wish a close supervision over the ex-Maharaja of Nabha. That is why the special police staff employed apparently by the Local Government was ordered by the Government of India to be disbanded. We might also state in passing that if any act had been found to have been committed maliciously, it could not be held to have been done on behalf of the Government. Similarly, the detention of plaintiff 1 being wholly wrongful and illegal and in excess of the Sub-Inspector's duty could not render the Government liable unless it was found to have been subsequently ratified or adopted by it. It was so held by their Lordships of the Judicial Committee in 8 M.I.A. 500[18] where they observed at p. 554:

"Again, the acts of a Government officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceeds that authority, when the Government in fact, or in law, directly or by implication, ratifies the excess."

The position is therefore reduced to this that the Government could not be held liable either when an officer takes an action in pursuance of a statutory duty or when the act committed by him happens to be in excess of his authority unless in the latter case the act is either done by the Government's express orders or is subsequently ratified and adopted by it. Nor could any action be maintained against the Government for a tort committed by its servants if in passing the order in the performance of which the tort was committed the Government was discharging its governmental functions as a sovereign. In view of our conclusion as regards all the defendants it is unnecessary to go very minutely into the question of damages. Having regard to the status of the plaintiffs and to the inconvenience to which they were put, the lower Court would have been inclined to pass a decree for a sum of Rs. 5000 if it had held that any of the defendants could be made liable in this suit. We are, on the whole, satisfied that the view taken by the lower Court in regard to the quantum of damages was not in the circumstances, erroneous or unreasonable. For the above reasons, the appeal fails against all the defendants and is dismissed. Having regard to the peculiar circumstances of the case, we consider that the lower Court's order in directing the parties to bear their own costs was fully justified and we would follow the same course ourselves. The memorandum of cross-objections must therefore be dismissed but without costs.

A portion of the argument in this case centred on the interpretation of the word "duty" used in S. 270, sub-cl. (1), Government of India Act. It was contended on behalf of the appellant that the word "duty" could not include what was characterised by Mr. Bhashyam as "purported duty," i.e., a duty which an officer may erroneously consider that he was required to perform. The learned Government Pleader however contended that the word "duty" used in the section would also include a duty that an officer might think he was entitled or liable to discharge. We accepted the interpretation placed upon that word by Mr. Bhashyam but decided the point (in connexion with which this interpretation was put) against him as we held the acts done by the defendants to be in discharge of duty and not of what was described as a "purported" duty. Since this case involves a substantial question of law as to the interpretation of the Act within the meaning of S. 205 a certificate will issue to this effect.

C.R.K./G.N. *Appeal dismissed.*

18. (1859-61) 8 M.I.A. 500 : 2 W. R. 61 : 1 Suther 476 : 1 Sar 820 (P. C.), Collector of Masulipatam v. Cavali Venkata Narainapah.

A. I. R. (29) 1942 Madras 550

HORWILL J.

In re Venkata Subbayya—Accused.

Criminal Revn. Case No. 2 of 1942 and Case Referred No. 1 of 1942, Decided on 26th February 1942, referred by Dist. Magistrate, Kurnool, in his letter D/- 29th December 1941.

Penal Code (1860), S. 325—Scope—Sentence—Mere fine for offence under, is not legal.

The wording of S. 325 makes it clear that there must be a sentence of imprisonment, whether a fine is imposed or not. [P 551 C 1]

Accused threw a stone at the face of complainant with a force sufficient to cut his upper lip and knock out six teeth :

Held that he must be presumed to have intended to cause such injury and that he should be convicted under S. 325. [P 551 C 1]

Held further a sentence of Rs. 25 fine was not legal and sufficient for the offence. [P 551 C 1]

Penal Code —

('36) Ratanlal, Page 807 Pt. 2 and Note "Punishment."

('36) Gour, Page 1113 Pt. 2 and Page 1116, N. 3770.

K. Venkataraghavachariar for Public Prosecutor—for the Crown.

ORDER. — The prosecution case, which was accepted by the Joint Magistrate, is that three accused went to the house of P. W. 1 and attacked him. Accused 2 struck him on the mouth with a stone, knocking out six teeth and cutting his upper lip right through. Accused 1 struck P.W. 1 with a stick while accused 3 caught hold of his hair and punched him. On this evidence the Joint Magistrate convicted accused 1 and 3 under S. 323, Penal Code, and accused 2 under S. 325, Penal Code. He sentenced accused 1 and 3 to a fine of Rs. 10 and accused 2 to Rs. 25. The District Magistrate has referred the matter to this Court because the sentence imposed on accused 2 is not a legal one. I find no reason to think that the prosecution story is not true. If accused 2 threw a stone at the face of P. W. 1 with a force sufficient to cut his upper lip and knock out six teeth, he must be presumed to have intended to cause such injury. He was therefore rightly convicted under S. 325, Penal Code. Section 325 requires that a person who is convicted of causing grievous hurt shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine. The wording of this section makes it clear that there must be a sentence of imprisonment, whether a fine is imposed or not. Even if S. 325 were not so worded, it seems clear to me that the sentence of Rs. 25 was an insufficient punishment for an injury which deprived P. W. 1 of six teeth and permanently disfigured his face. The sentence imposed on accused 2 is therefore changed to one of rigorous imprisonment for two months and a fine of Rs. 25. The order of compensation will stand.

C.R.K./K.S. *Sentence enhanced.*

A. I. R. (29) 1942 Madras 551

WADSWORTH AND PATANJALI SASTRI JJ.

N. Narayana Bhat — Appellant

v.

Rama and others — Respondents.

Appeal No. 309 of 1939, Decided on 7th October 1941, against decree of Sub-Judge, South Kanara, in O. S. No. 67 of 1938, D/- 11th February 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 8 (1) — "Outstanding" means "unpaid"—Interest unpaid as on 1st October 1937 is liable to be cancelled.

Although a date be fixed for the payment of interest, interest must be deemed to have accrued due from day to day according to the ordinary rule. The word "outstanding" used in S. 8 (1) has been used in its ordinary dictionary sense of "unpaid." Hence the interest outstanding as on 1st October 1937 is liable to be cancelled under S. 8 (1). [P 551 C 2]

(b) Costs—Major portion of claim admitted—Costs on uncontested scale should be granted on such claim and on contested scale on portion contested.

When the defendants have admitted liability for the major portion of the decree and raised a contest only regarding a small item, costs on the uncontested scale should be given so far as the admitted amount of the plaint claim and costs on the contested scale should be allowed only to the extent to which the claim was actually contested : ('42) 29 A. I. R. 1942 Mad. 507, *Rel. on.* [P 552 C 1]

C. P. C. —

('40) Chitaley, S. 35, N. 26.

('41) Mulla, Page 149 N. "Costs to be in the discretion of the Court."

K. Y. Adiga and N. Sankar Bhat—for Appellant.

T. Krishna Rao — for Respondents.

WADSWORTH J. — This appeal raises two questions. One relates to the meaning of the phrase "all interest outstanding on 1st October 1937" occurring in S. 8 (1) of Act 4 of 1938. The other question relates to the fixing of costs on the basis of confession of judgment when there was not a full confession of judgment. The suit arose out of a mortgage of 1930 executed by the father of defendants 1 to 4. Defendant 5 was a puisne mortgagee. The suit was filed on 14th November 1938, that is, after Act 4 of 1938 came into force. The plaintiff claimed the principal amount due on the mortgage with interest at 6¼ per cent. for the year ending March 1938 and for the subsequent broken period on the basis that the date on which the interest was payable was 10th March in each year. The mortgagors admitted the suit debt and confined themselves to disputing their liability for interest from 10th March 1937 upto 1st October 1937. As for the rest of the claim, the defendants pleaded that a decree for the principal amount of Rs. 5000 with interest at 6¼ per cent. from 1st October 1937 with proportionate costs on the admitted amount at the "confession of judgment rate" and future interest at 6 per cent. might be passed and claimed that the rest of the plaintiff's suit should be dismissed with costs. Defendant 5, the puisne mortgagee, disputed the whole of the plaintiff's claim. Now on the interest question it seems to us clear that, although a date was fixed for the payment of interest, interest must be deemed to have accrued due from day to day according to the ordinary rule. The word "outstanding" used in S. 8 (1) appears to have been used its ordinary dictionary sense of "unpaid." On 1st October 1937 interest from 10th March 1937 to that date had certainly accrued due and though it was not payable until 10th March 1938 and was therefore not overdue, it certainly had accrued and was unpaid. It follows that this interest was outstanding as on 1st October 1937 and therefore liable to be cancelled under S. 8 (1) of Act 4 of 1938. The lower Court's decision was right in this respect.

As to costs, the lower Court has given the plaintiff proportionate costs on the amount decreed allowing the pleader's fee only at 1¼ per cent. apparently under the first proviso to R. 31 of the Legal Practitioners Fees Rules. This decision was clearly wrong so far as defendant 5 was concerned for he raised issues which had to be decided after taking evidence. As against defendant 5 therefore the plaintiff was entitled to proportionate costs on the contested scale. It is contended that as against the mortgagors (defendants 1 to 4) the plaintiff was also entitled to costs on the contested scale because they had raised an issue regarding the interest from 10th March

1937 to 1st October 1937. We are of opinion that this contention should not succeed. In a recent case Appeal No. 107 of 1938,[1] this Bench had to deal with a similar matter when the defendants admitted liability for the major portion of the decree and raised a contest only regarding a small item. We approved of the decision of the lower Court which gave costs on the uncontested scale so far as the admitted amount of the plaint claim, was concerned and allowed costs on the contested scale only to the extent to which the claim was actually contested. We pointed out that it was open to the plaintiff under O. 12, R. 6, Civil P. C., to have asked immediately for a decree for the admitted amount on the strength of the written statement. The present case is even clearer, for defendants 1 to 4 definitely submitted to a decree for the amount which has actually been awarded asking that costs should be fixed on the uncontested scale and claiming a right only to contest the small claim for interest before 1st October 1937 on which they succeeded. Strictly speaking therefore they should have been awarded their own costs to the extent to which they succeeded and the lower Court was quite right in giving costs against them only on the uncontested scale for the amount for which they had confessed judgment. The appeal against defendants 1 to 4 is therefore dismissed with costs. As against defendant 5 the appeal is allowed with costs and the lower Court's decree will be amended so as to give the plaintiff costs on the contested scale proportionate to the amount decreed as against defendant 5 only.

C.R.K./R.K. *Order accordingly.*

1. ('42) 29 A.I.R. 1942 Mad. 507 : (1942) 1 M.L.J. 448, Rangaswami Ayyar v. Jainabee Bibi.

A. I. R. (29) 1942 Madras 552 (1)

HORWILL J.

P. Varadarajulu Chetty — Petitioner

v.

Janakirama Chetty — Respondent.

Criminal Revn. No. 1055 of 1941 and Criminal Revn. Petn. No. 992 of 1941, Decided on 27th February 1942, to revise order of acquittal passed by Stationary Sub-Magistrate, Chingleput, D/- 15th October 1941.

Criminal P. C. (1893), Ss. 253 (1), 259 — Charge framed — Order of acquittal for complainant's absence under S. 253 (1) is illegal — Nor can order under S. 259 be passed.

Where a Magistrate has framed a charge, he cannot dismiss the case for default. The only section which deals with the procedure upon default of appearance of the complainant in warrant cases is S. 259, which authorizes the Magistrate in his discretion to discharge the accused at any time before the charge is framed if the complainant fails to appear. The Magistrate cannot act under that section when the charge has already been framed. Therefore an order of acquittal by a Magistrate purporting to be under S. 258 (1) after the charge has been framed for complainant's absence is illegal.

[P 552 C 2]

Cr. P. C. —

('41) Chitaley, S. 259, N. 9 Pt. 2.

('41) Mitra, Page 939, N. 852.

K. S. Jayarama Iyer and C. K. Venkatanarasimham — for Petitioner.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER.—The day after the charge was framed the complainant was absent. The Magistrate thereupon passed an order purporting to be under S. 258 (1), Criminal P. C., acquitting the accused. Where a Magistrate has framed a charge, he cannot dismiss the case for default. The only section which deals with the procedure upon default of appearance of the complainant in warrant cases is S. 259, which authorizes the Magistrate in his discretion to discharge the accused at any time before the charge is framed if the complainant fails to appear. The Magistrate could not have acted under that section because the charge had already been framed; and there can be no discharge after the charge has been framed. The Magistrate, therefore, acted illegally. His order of acquittal is, therefore, set aside and he is ordered to continue the trial from the point at which it was when he passed the order of acquittal.

C.R.K./K.S. *Order set aside.*

A. I. R. (29) 1942 Madras 552 (2)

HORWILL J.

In re Thimmakka and another Petitioners.

Criminal Revn. No. 354 of 1941 and Criminal Revn. Petn. No. 336 of 1941, Decided on 9th October 1941, to revise judgment of Joint Magistrate, Penukonda, D/- 13th January 1941.

(a) Madras Co-operative Societies Act (6 of 1932), S. 52 — Shutting door on face of sales officer of society while trying to enter house to attach property is not offence under S. 52 but one under S. 186, Penal Code — Trial of such offence by Second Class Magistrate held proper.

Accused slammed the door in the face of a sales officer of a co-operative society when he tried to enter the house to attach some property in the performance of his duty :

Held that the offence committed was not under S. 52 of the Act but one under S. 186, Penal Code. Even if it was an offence under S. 52 of the Act, an offence under S. 186, Penal Code, was more serious and therefore the Second Class Magistrate was quite competent to try the accused for that offence even though an offence under S. 52 of the Act could be tried only by a First Class Magistrate.

[P 553 C 1]

(b) Penal Code (1860), S. 186—Shutting door in public servant's face when he wants to enter it is obstructing him.

Shutting the door in the face of a public servant who wants to enter a house to attach some property in the performance of his duty is obstructing him : 15 Mad. 221 and ('17) 4 A. I. R. 1917 Cal. 180, *Ref.*

[P 553 C 1]

Penal Code —

('36) Ratanlal, Page 443 N. "Obstruction in the discharge of public functions."

('36) Gour, Page 629 Para. 1875.

(c) Penal Code (1860), Ss. 21 and 186—Sales Officer whose duty it is to take property in execution of decree is public servant.

"Public servant" denotes a person whose duty it is to execute any judicial process and also any officer whose duty it is to take property. Therefore, a Sales Officer of a Co-operative Society whose duty it is to take property in execution of the decrees of the

Society is a public servant and a person obstructing him is guilty under S. 186. [P 553 C 1]

Penal Code —

('36) Ratanlal, Page 50 N. "Clause 4"; Page 441 N. "Public servant."

('36) Gour, Page 153 Para. 150.

J. R. Gundappa Rao — for Petitioners.

Public Prosecutor — for the Crown.

ORDER.—The petitioners were convicted under S. 186, Penal Code, by the Taluk Second Class Magistrate of Hindupur and sentenced to a fine of Rs. 100 each. The convictions and sentences were confirmed in appeal by the Joint Magistrate of Penukonda. P. W. 1 is a sales officer of the Hindupur Credit Co-operative Societies and in execution of a decree went to a certain house in the village of Mothukapalli with the intention of entering it to seize some moveables in the house which is said to belong to accused 2, against whom the decree was being executed. Accused 1, the wife of accused 2, just when P. W. 1 was about to enter the house, slammed the door in his face and prevented him from entering the house to do his duty.

The first objection raised by the petitioners was that the offence was really one under S. 52, Madras Co-operative Societies Act, which is triable only by a First Class Magistrate. The Hindupur Second Class Magistrate ignored the offence under S. 52, Co-operative Societies Act, and by trying the accused under S. 186, Penal Code, clutched at jurisdiction and so acted improperly. In the first place, it does not seem that an offence was committed under S. 52 of the Act; but even if there was, an offence under S. 186, Penal Code, is more serious. The Magistrate was therefore quite competent to try the accused for that offence. The second point raised was that the house which P. W. 1 sought to enter belonged not to the judgment-debtor but to his wife, accused 1, and that therefore P. W. 1 would have committed trespass if he had entered into the house. The moveables therein, both the accused said, belonged to accused 1. That is a question of fact and it has been found against the accused by the Courts below. It is next contended that shutting the door in P.W.1's face was not obstructing him. I can however think of no more effective method of obstructing P. W. 1 in the performance of his duty of attaching the property inside the house than by shutting the door in his face. 15 Mad. 221[1] and 20 C. W. N. 857[2] which have been cited in support of this contention, do not support the petitioners in any way. The last question is whether the sales officer was a 'public servant'. "Public servant" is defined in S. 21, Penal Code. "Public servant" denotes a person whose duty it is to execute any judicial process and also any officer whose duty it is to take property. It was undoubtedly a part of the duty of P. W. 1 to take property in execution of the decrees of the society. He would therefore conform to the definition of a public servant. The petition fails on all grounds and is dismissed.

C.R.K./K.S. *Petition dismissed.*

1. ('92) 15 Mad. 221 : 2 M. L. J. 120 : 1 Weir 133, Queen-Empress v. Somanna.
2. ('17) 4 A. I. R. 1917 Cal. 180 : 37 I. C. 46 : 18 Cr. L. J. 62 : 20 C. W. N. 857, Nishi Kantapal v. Emperor.

** A. I. R. (29) 1942 Madras 553

SPECIAL BENCH

LEACH C. J., LAKSHMANA RAO AND KRISHNASWAMI AYYANGAR JJ.

In re Sri K. Rajagopala Ayyangar Pleader, Trichinopoly.

Referred Case No. 9 of 1942, Decided on 13th July 1942.

** Legal Practitioner — It is improper for pleader or advocate to advance money to his client at any time for purposes of action in which he is engaged—Since pleader had acted in good faith in financing his client's litigation no action held was called for.

In India a pleader, like the advocate combines the functions of the solicitor and the barrister in England. He does the solicitor's part of the work and he pleads in Court. As he fulfils both roles he must be subject to the disabilities of both. There would be nothing improper for a solicitor to advance monies to his client for purposes of litigation but it would be improper for a barrister briefed by a solicitor to do so and the higher standard must be applied. By financing his client's litigation, the pleader acquires a personal interest in the litigation. This is surely not in keeping with the standard of conduct which his profession demands of him. It is therefore improper for a pleader or an advocate to lend money to his client at any time for the purposes of an action in which he is engaged. [P 554 C 1]

[Since pleader had acted in good faith in financing his client's litigation no action held was called for]. [P 554 C 1]

Advocate-General — for the Crown.

V. V. Srinivasa Ayyangar and K. S. Desikan — for Respondent (Pleader).

K. Aravamudha Ayyangar—for Complainant.

LEACH C. J. — Three charges of professional misconduct were framed against the respondent who is a pleader practising in the Trichinopoly District. The first two charges were to the effect that he financed litigation in which he had appeared in his professional capacity. The third charge was that he had filed a false fees certificate. It is obvious that there is no foundation for the third charge and no further reference to it is necessary. The respondent filed a suit on behalf of a childless widow, one Mahamu Ammal, for a declaration of her title to certain properties and for partition. The petitioner in this case was the defendant, and there can be no doubt that in instituting these proceedings against the respondent he has been actuated by malice. After the institution of the suit the respondent advanced to his client the sum of Rs. 300 on a promissory note. Out of this money the client paid to the respondent Rs. 200 for the expenses of the suit. More monies were required nine months later and the respondent advanced a further sum of Rs. 432. There was then due to him on the promissory note Rs. 318 which with the fresh advance made a total indebtedness of Rs. 750. As security for this Rs. 750 the client executed in his favour a mortgage of her interest in some of the properties in suit. The respondent made no attempt to hide what he was doing; in fact the deed of mortgage sets out the facts in full. We are satisfied that in making these advances the respondent was actuated entirely by a desire to help his client who had no one else to turn to for help. He was also satisfied with the righteousness of her case. He was justified in this view

because the suit resulted in a decree in his client's favour.

The question which the Court is called upon to decide is whether in advancing the monies to his client for the purpose of the litigation the respondent was doing something which is improper. In this country a pleader, like the advocate combines the functions of the solicitor and the barrister in England. He does the solicitor's part of the work and he pleads in Court. As he fulfils both roles he must be subject to the disabilities of both. There would be nothing improper for a solicitor in the circumstances of this case to advance monies to his client, but it would be improper for a barrister briefed by a solicitor to do so and the higher standard must be applied. By helping his client in this way the respondent had a personal interest in the litigation; in fact an actual interest in the subject-matter of the suit. This is surely not in keeping with the standard of conduct which his profession demands of him. It would be manifestly improper for a practitioner fulfilling the two roles to advance money to a person for the purpose of the institution of a suit, and it is difficult to see what difference there can be when money is advanced for the purpose of continuing the litigation. The only safe rule to lay down is that a pleader or an advocate should not lend money to his client at any time for the purposes of an action in which he is engaged. As we have indicated we fully accept the statement that the respondent acted in good faith and in these circumstances we do not consider that any action is called for. It will be sufficient in this case to draw attention to the rule which we have stated and leave the matter there.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. (29) 1942 Madras 554

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND SOMAYYA JJ.

Pothuru Sreeramulu Chetti and another — *Appellants*

v.

Duvvuru Subbarami Reddi and others — *Respondents.*

Second Appeals Nos. 57 and 58 of 1939, Decided on 4th March 1942, against decrees of Dist. Court, Nellore, in A. S. Nos. 184 and 183 of 1937.

* Hindu law—Joint family—Rights of person acquiring member's undivided share—*A* and his brother *B* members of joint Hindu family executing pronote in favour of *C* for family necessity—*C* suing on pronote attaching family properties before judgment, and obtaining decree against *A* and *B* personally and their sons limited to their interest in family properties — *A* and *B* adjudicated insolvents on their own petition — Sons' interest alone sold in execution — Proceeds distributed among decree-holder and other creditors who had obtained decrees binding on family and applied for rateable distribution — Purchasers at execution sale suing for partition of sons' shares in family properties—Partition decree entitling purchasers to sons' shares subject to payment of other family debts — Condition imposed by decree held not sound in law—In unique circumstances of case, execution sale held conveyed good title to purchasers notwithstanding that other family debts were left unsatisfied.

Under the Mitakshara law a member of a joint family cannot claim to be given his share in a particular asset of the family. The coparceners are entitled to joint possession and there is community of interest. If a member of the family wishes to take his share there must be a partition of the whole estate. In the same way a person who has acquired the interest of a member of a joint family in the family properties must, when he wishes to enforce his rights, institute a suit for partition of all the assets, and the value of the share acquired, is, of course, only arrived at after making provision for the payment of the debts of the family. When the plaintiff has obtained a decree for partition and it appears that the value of the particular property does not exceed the net value of the member's share, the Court may direct that the particular property shall be allocated to the plaintiff, but in ordinary circumstances the Court will not go beyond this. [P 555 C 2]

A and his brother *B* who were members of a joint Hindu family executed a pronote in favour of *C* for family necessity. *C* sued upon the pronote impleading *A* and *B* and their sons and obtained attachment before judgment of the properties in suit. Eventually a decree was passed against *A* and *B* personally and against their sons limited to their interest in the family properties. Subsequently, *A* and *B* were adjudicated insolvents on their own application. The decree-holder's prayer to implead the Official Receiver in execution proceedings as representing *A* and *B* having been disallowed the decree-holder was compelled to limit his execution application to the interest of the sons in the properties attached. The sons' interests alone accordingly were sold and the proceeds distributed rateably among the decree-holder and other creditors who had obtained decrees against the family and had applied for rateable distribution after the order for attachment was passed. The debts due to them were debts which were binding on the family. The purchasers of the properties at the execution sales having obtained symbolical possession instituted suits for partition of the sons' shares in the properties. The trial Court granted to the purchasers decrees for partition but at the same time held that they were only entitled to take the shares of the sons in the properties in suit subject to the payment of other family debts :

Held that the condition imposed by the trial Court was not sound in law because as the sons' interests had already been sold for the payment of family debts, the condition imposed amounted to a direction that the same properties shall be sold twice over for that purpose. [P 555 C 2]

Held further that having regard to the terms of the decree under which the purchasers had bought the interests of the sons it was in consonance with both natural justice and the spirit of Hindu law to hold that the sale for the satisfaction of family debts was capable of conveying to the purchasers a good title in the unique circumstances of the case notwithstanding that other debts equally binding on the family were left unsatisfied. [P 555 C 2]

Hindu law —

('40) Mulla, Page 294 S. 261.

('38) Gour, Page 421 S. 127.

V. Govindarajachari and N. Vasudeva Rao — for Appellants.

K. Kuppuswami — for Respondents.

JUDGMENT.—These second appeals have been placed before a Full Bench for decision because they raise a question of Hindu law of some importance

and there is no textual or other authority having bearing. On 7th September 1931 Seshayya Chetti, the appellant in S. A. No. 58 of 1939 filed a suit in the Court of the District Judge of Nellore to recover an amount claimed by him to be due on a promissory note. The promissory note had been executed by respondent 1 and his brother Rami Reddi, who is now dead and is represented by his sons, respondents 2, 3 and 4. The defendants to the suit were the makers of the instrument and their respective sons, the family being joint. On 26th September 1931, the plaintiff obtained an interim order for attachment before judgment of the properties in suit and the interim order was made absolute on 11th January 1932. On 7th October 1932 the Court passed a decree for Rs. 3118 with interest and cost against the makers of the promissory note personally and against their sons, limited so far as the sons were concerned to their interests in the family properties. On 16th November 1932 the two principal defendants applied for their own adjudication in insolvency, and on 8th March 1933 an order of adjudication was passed. On 2nd May 1933 the decree-holder asked to be allowed to implead in the execution proceedings the Official Receiver as the representative of the makers of the instrument. The District Judge refused the application on the ground that execution could not be allowed against the Official Receiver. It is regrettable that an arrangement was not made that the interests of all the members in the properties should be sold in the execution proceedings. This could have been done by consent with full safeguard to the creditors of the insolvents; and if such an arrangement had in fact been made the present suits would have been avoided. The result of non-co-operation was that the decree-holder was compelled to limit his application for execution to the interests of the sons in the properties attached. On 19th October 1933 the sons' interests in some of the items of the properties were sold by the Court and purchased for Rs. 10,455 by the appellant in Appeal No. 57 of 1939. Their interests in the rest of the properties were sold on 27th October 1933 and were purchased by the decree-holder for Rs. 830.

It is common ground that the promissory note sued upon represented monies borrowed in order to meet a family necessity. After the order of attachment had been passed, five other creditors who had obtained decrees against the family applied for rateable distribution of the proceeds of sale. Again, it is common ground that the debts due to them were debts which were binding on the family. When the proceeds of the sales were paid into Court, they were paid out to the decree-holder and the five other creditors rateably. On 19th March 1934 the purchasers of the properties obtained symbolical possession and on 16th April 1935 each of them filed a suit for partition of the shares of the sons in these properties. These suits were numbered as O. S. Nos. 52 of 1936 and 70 of 1936 respectively. S. A. No. 57 of 1939 arises out of the first of these suits and S. A. No. 58 of 1939 out of the second. The Subordinate Judge of Nellore, in whose Court the suits were tried, granted to the plaintiffs decrees for partition but at the same time held that they were only entitled to take the shares of the sons in the properties in suit subject to the payment of other family debts. The total value of the properties held by the family was Rs. 25000 and the family owed altogether Rs. 40000. The plaintiffs appealed to the District Judge against the decision of the Subordinate Judge that they were only entitled to the shares of the sons, subject to the liability for payment of the remaining debts of the family but the District Judge concurred in the decision of the Subordinate Judge. The question which this Court is called upon to decide is whether the condition imposed by the Courts below is sound in law.

Under the Mitakshara law a member of a joint family cannot claim to be given his share in a particular asset of the family. The coparceners are entitled to joint possession and there is community of interest. If a member of the family wishes to take his share there must be a partition of the whole estate. In the same way a person who has acquired the interest of a member of a joint family in the family properties must, when he wishes to enforce his rights, institute a suit for partition of all the assets, and the value of the share acquired is, of course, only arrived at after making provision for the payment of the debts of the family. When the plaintiff has obtained a decree for partition and it appears that the value of a particular property does not exceed the net value of the member's share, the Court may direct that the particular property shall be allocated to the plaintiff, but in ordinary circumstances the Court will not go beyond this. The appellants limited their claim for partition to the sons' interests in the attached properties; and in holding that they were only entitled to take the sons' interests in these properties subject to the sons' liability in respect of other family debts, the Courts below had regard merely to the principles to which reference has just been made. The appellants say, however, that the Subordinate Judge and the District Judge lost sight of an important factor which must be taken into consideration under the peculiar circumstances which we have here. They admit that if the moneys paid into Court had not been utilised for the payment of debts due by the family, they would be compelled to take the sons' interest in the properties in suit subject to the liability for payment of the debts due by the family, but they say that, inasmuch as the sons' interests had already been sold for the payment of family debts, the condition imposed below amounts to a direction that the same properties shall be sold twice over for this purpose, a position which no Court with the power to apply principles of equity could ever contemplate.

We agree, and in doing so we have regard also to the terms of the decree under which the appellants bought the interests of the sons in the properties in suit. By the decree all the sons were directed to pay from their interests in the properties the decretal amount, and therefore under it the decree-holder had the right of bringing to sale the interests of the sons as they then stood. By reason of the sales which took place on 19th and 27th October 1933 the value of the sons' interests in the properties was realised and applied in full in the discharge of family debts, a burden which the Courts below would subject them to again. The situation is undoubtedly unique and consequently the Court is called upon to formulate a rule which is in keeping with natural justice and the spirit of Hindu law. We consider that it is in consonance with both to hold that a sale for the satisfaction of family debts is capable of conveying to the purchaser a good title in such circumstances as we have here notwithstanding that other debts equally binding on the family were left unsatisfied. The creditors who had been diligent got their shares of the proceeds when the sons' interests in the properties were sold in order to meet family liabilities and we can see no warrant for the condition which has been attached to the decree obtained by the appellants. The inter-

ests of the fathers remain and as these have devolved on the Official Receiver he can realise them for the benefit of the creditors who are still unpaid. For these resons we hold that the decisions of the Courts below are erroneous and the appeals will be allowed. This means that the appellants will be entitled to a decree for partition free from any condition. It follows that the appellants are entitled to their costs throughout.

C.R.K./G.N. *Appeals allowed.*

A. I. R. (29) 1942 Madras 556

SPECIAL BENCH

LEACH C. J., WADSWORTH AND PATANJALI SASTRI JJ.

Commissioner of Income-tax, Madras — Petitioner

v.

Papammal — Respondent.

O. P. No. 215 of 1941, Decided on 5th December 1941.

Income-tax Act (1922, as amended by Act 7 of 1939), S. 4B—Words "British India" in S. 4B — Meaning of — Residence in Burma prior to 1st April 1937 amounts to residence in British India.

The opening words of S. 311, Government of India Act, 1935, leave it open to the Court to examine the Income-tax Act and find out what is meant by the term "British India" in S. 4B, Income-tax Act. The words "British India" in S. 4B must be read in the light of the definition of "British India" in S. 3 (7), General Clauses Act, as amended by the Government of India (Adaptation of Indian laws) Order, 1937 and not in the light of the definition of "British India" in S. 311, Government of India Act. Therefore, for the purposes of S. 4B residence in Burma during any periods prior to 1st April 1937 amounts to residence in British India during those periods: ('39) 26 A. I. R. 1939 Mad. 77 (S. B.) and (1940) 8 I. T. R. 1 (Bom.), *Approved.* [P 556 C 2 ; P 557 C 1]

K. V. Sesha Ayyangar — for Petitioner.

M. Subbaraya Iyer — for Respondent.

ORDER.—The assessee is the widow of the late Raja Ramanatha Reddiar, and is the administratrix of his estate. Chidambaram Reddiar, the father of Raja Ramanatha Reddiar, founded a business in Rangoon and this was carried on by his son after his death. The late Raja died in Rangoon in 1932, possessed of large assets some of which were in Burma and some in the Madras Presidency. The assets in the Madras Presidency included immovable property in the Trichinopoly district. Raja Ramanatha Reddiar had previously married one Parvathi Ammal, who in 1915 purchased a house in Srirangam. This house has been regarded as ancestral property and is reserved for the occupation of the assessee during her occasional visits to the Presidency. She stayed there in 1934, 1936 and again in 1937, each time making a stay of more than three months. For the year of assessment 1939-40 the assessee made a return of the income of the estate to the Income-tax Officer, Salem, and in this she showed an income of Rs. 65,276 from moneylending in British India and Rs. 14,950 as remittance of profits brought into British India from Rangoon. She contended that she was not resident in British India, but this contention the Income-tax Officer overruled. He held that she was resident in British India within the meaning of S. 4A (a) (ii) and 4A (a) (iii), Income-tax Act. Section 4A (a) (ii) was held to apply as she had maintained a dwelling house in Srirangam throughout the year previous to the year of assessment. It was held that S. 4A (a) (iii) applied because she had been in Rangoon for a period amounting to more than 365 days in the years preceding the year of account. Burma was part of British India until 1st April 1937 when it became separate by reason of the provisions of the Government of India Act, 1935. The income-tax Officer further held that the assessee was "ordinarily resident" in British India within the meaning of S. 4B as she had been in Rangoon in nine out of the ten years preceding the year of account and as she had also been in Rangoon for a period amounting to more than two years in the seven years preceding that year. The result was that the Income-tax Officer assessed the assessee for the year 1939-40 on a total income of Rs. 1,15,180 of which Rs. 70,458 was regarded as income earned in British India and Rs. 44,722 as income earned in Burma. The appellate assistant Commissioner confirmed the order of the Income-tax Officer, and at the request of the assessee the Commissioner has referred to this Court under the provisions of S. 66 (2) the following questions :

"(i) Whether for the purpose of S. 4A (a), Income-tax Act, being in Burma during any periods prior to 1st April 1937 when Burma was part of British India amounts to being in British India during those periods.

(ii) If the answer to the first question be in the affirmative whether on the facts of this case the petitioner can be found to be resident and ordinarily resident in British India for the year of assessment 1939-40?"

Under the Income-tax Act a person is assessed for a particular year on the income received by him in the previous year. Section 4 states what the total income of the year of account shall be deemed to include. If a person is resident in British India during the year of account all income, profits and gains which accrue or are deemed to arise in British India during that period are taxable and similarly all income accruing or arising outside British India, but there is a proviso to the effect that in the case of a person not "ordinarily resident" in British India income, profits and gains which accrue or arise to him without British India shall not be included, unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during the year of account. The assessee here says that she is not ordinarily resident in British India and is entitled to the benefit of the proviso in respect of the Burma income until it is brought into British India. Residence in British India is defined in S. 4A. Clause (a) (ii) states that for the purposes of the Act an individual is resident in British India in any year if he maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to 182 days or more in that year, and is in British India for any time in that year. Clause (a) (iii) says that an individual is resident in British India in any year if he, having within the four preceding years been in British India for 365 days or more, is in British India during the year of account otherwise than on an occasional or casual visit. The learned counsel for the assessee has conceded that by reason of the maintenance of the family house in Srirangam he cannot dispute the con-

tention of the Income-tax authorities that the assessee was resident in British India during the year of account, but in order to bring her within the Act in respect of the Burma income it must be shown that she was "ordinarily resident" in British India in that year. Section 4B (a) reads as follows :

"An individual is not 'ordinarily resident' in British India in any year if he has not been resident in British India in nine out of the ten years preceding that year or if he has not during the seven years preceding that year been in British India for a period of, or for periods amounting in all to, more than two years."

On behalf of the assessee it is said that in defining the term "British India" regard can only be had to what was British India in the year of account, and that on the first day of that year Burma ceased to be part of British India. It is admitted that if the term must be read as applying to British India as it stood before 1st April 1937 when considering residence during the ten or the seven years referred to in S. 4B (a) the assessee is out of Court, but reliance is placed on S. 311, Government of India Act, 1935, which defines "British India" as meaning all territories for the time being composed within the Governors' Provinces and the Chief Commissioners' Provinces. If this were the definition to be applied the assessee would be on sure ground, but the argument overlooks the words which precede the definition given in the section. The section opens thus :

"In this Act and, unless the context otherwise requires, in any other Act the following expressions have the meanings hereby respectively assigned to them, that is to say . . . ."

This statement leaves it open to the Court to examine the Income-tax Act and find out what is meant by the term "British India" in S. 4B, Income-tax Act, and in these circumstances regard must be had to what is said in S. 3, General Clauses Act. Section 3 (7) of that Act says :

"In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context, 'British India' shall mean, as respects the period before the commencement of Part 3, Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or Officer subordinate to the Governor-General of India, and as respects any period after that date means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part 3, Government of India Act, 1935, shall not include a reference to Berar."

This definition was inserted in the General Clauses Act by the Government of India (Adaptation of Indian Laws) Order, 1937, which was promulgated under the provisions of S. 293, Government of India Act, 1935. Can there be any doubt that this definition is the guide to what is meant by "British India" in S. 4B, Income tax Act? In our opinion there can be no doubt. The learned counsel for the assessee has pointed to S. 293, Government of India Act, and says that this indicates that the Adaptation Order cannot affect any Act which came into force after the promulgation of the Order. Section 293 so far as is relevant reads as follows :

"His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the Order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces."

The important words here are "His Majesty may by Order in Council to be made at any time after the passing of this Act," and by reason of the power conferred by this section His Majesty has by Order in Council amended the General Clauses Act which applies to the Income-tax Act. If S. 4B, Income-tax Act, is to be read in the light of the definition of "British India" in the General Clauses Act, as we consider it must be, there can be no doubt that the income-tax authorities have formed the correct opinion of the law. What we have said is sufficient to dispose of the reference, but there is a decision of this Court which supports in full the opinion which we have expressed. The case is I.L.R. (1939) Mad. 388.[1] There the assessee, who resided in British India, owned a saw mill in Burma. In the year of account 1936-37, the saw mill business resulted in a loss and the assessee claimed to be entitled to deduct from her income assessable in the following year what she had lost in Burma during the year of account. Burma became separated from India on the first day of the year of assessment. It was held that she was entitled to deduct the loss suffered in Burma from her other profits. In that case the Commissioner of Income-tax referred this question :

"Whether the decision of the Assistant Commissioner that the loss of Rs. 8663 incurred by the petitioner in Burma in the year of account 1936-37 is not allowable as a deduction in the year of assessment 1937-38 is correct in law?"

The Commissioner of Income tax contended that as the combined effect of S. 3 and of sub-s. (1) of S. 4 was to render the tax for the year 1937-38 leviable in respect of the income, profits and gains which in the previous year accrued, arose or were received in British India and as Burma was no longer a part of British India the loss suffered in Burma was not deductible, in other words regard could only be had to what was British India in the year of assessment. The Court refused to accept this contention and said that as the tax was charged on the income of the previous year regard must be had to what was British India in the year of account. This decision was followed by the Bombay High Court in 8 I. T. R. 1.[2] The question referred in this case will be answered in the manner indicated, and as the assessee has failed she must pay the Commissioner's costs, Rs. 250.

C.R.K./G.N. *Answer accordingly.*

1. ('39) 26 A. I. R. 1939 Mad. 77 : 180 I. C. 270 : I.L.R. (1939) Mad. 388 : (1939) 1 M.L.J. 31 (S.B.), Commissioner of Income-tax v. Valliammai Achi.
2. ('40) 1940-8 I.T.R. 1 (Bom.), In re Rawji Dhanji and Co.

A. I. R. (29) 1942 Madras 558

PANDRANG ROW AND ABDUR RAHMAN JJ.

Umade Rajaha Raje Damara Kumara Venkatalingama Nayanim Bahadur Varu, Rajah of Kalahasti—*Appellant*

v.

Panaganti Parthasarathy Rayanimgar and others — *Respondents.*

Appeal No. 496 of 1931, Decided on 16th August 1940, against decree of Sub-Judge, Nellore, D/- 23rd March 1931.

(a) Transfer of Property Act (1882) — Interpretation — English law—Applicability—Act is not exhaustive — English principles can be applied if case is not covered by Act — But if it is covered by Act, English law should be disregarded.

The Transfer of Property Act is not exhaustive and does not in terms profess to be so. The Court would, therefore, be entitled to apply to a case rules of English law as rules of justice, equity and good conscience only if it finds that the particular case is not covered by the Act. If on the other hand, it finds the case to be covered by the Act, it would have to be applied and if there is a difference between the Indian and the English law, the English law, would have to be disregarded by it in deciding the case. [P 561 C 2]

T. P. Act —
('36) Mulla, Page 2 Pts. (l), (n).
('34) Mitra, Page 4, N. 4.

(b) Interpretation of statutes — Court should adhere to grammatical and ordinary meaning of words used.

In construing a section of a statute, it would be the duty of the Courts to adhere to the grammatical and ordinary sense of the words used therein and if the meaning of the words is found to be plain and unambiguous Courts would have to give effect to them regardless of any other consideration, and would not be justified in ignoring any part of the language of the section. [P 561 C 2]

C. P. C. —
('40) Chitaley, Preamble, N. 7 Pt. 2a.
('41) Mulla, Page 2 Pt. (b).

T. P. Act —
('36) Mulla Page 2 Pt. (p).
('34) Mitra, Page 4, N. 5.

(c) Transfer of Property Act (1882 before 1929), S. 101—Scope—"Is or becomes"—They are used in contradistinction—Word "is" is not redundant — Section includes person who is owner of charge subsequently becoming absolutely entitled.

The words "or becomes" have apparently been used in contradistinction with the word "is." Either a person is absolutely entitled to a property on the date on which he becomes the owner of a charge or other encumbrance on that property or is already the owner of a charge or other encumbrance on immovable property before he becomes absolutely entitled to that property. The first case would be covered by the words "or becomes" and the second case by the word "is." The word "is" is not redundant. Therefore, it cannot be said that S. 101 appears to apply only to the converse case of the owner of an encumbrance becoming the absolute owner of the property : ('15) 2 A. I. R. 1915 All. 242, *Dissent.* [P 562 C 1, 2]

(d) Transfer of Property Act (1882 before 1929), S. 101 — "Or such continuance would be for his benefit" — Interpretation of.

Under proviso 2 or exception in S. 101 even if the person did not declare either by express words or necessary implication that the charge would continue but if the Court found that the continuance of the charge or encumbrance would be for a person's benefit, it was required to presume, in accordance with the natural presumption, that a person would not have acted or intended to act against his benefit and that he must have intended to keep the charge or encumbrance alive and not to permit it to be merged with the ownership of the property : ('30) 17 A.I.R. 1930 Cal. 530, *Rel. on*; ('22) 9 A. I. R. 1922 Bom. 211, *Not foll.* [P 562 C 2]

(e) Transfer of Property Act (1882 before 1929), S. 101 — Applicability — Existence of puisne or intervening incumbrance is not necessary to prevent merger.

There is nothing in S. 101 which limits the application of the last portion of that section to those cases only where there are other mortgages or intervening incumbrances on the property : *Case law referred.* [P 563 C 1; P 565 C 1]

(f) Transfer of Property Act (1882 before 1929), S. 101 — Extinguishment of charge or encumbrance—Relevant time for determination of question explained.

Since the relevant point of time which should be kept in view in order to ascertain whether the charge or encumbrance was extinguished or not is that of the subsequent acquisition by the prior holder of a charge or an encumbrance or of absolute title to the property, it would be immaterial to consider the subsequent circumstances which might have led the person to act differently. [P 564 C 1]

(g) Transfer of Property Act (1882), S. 101 — Section is exhaustive.

So far as the Indian law is concerned, S. 101 codifies the law of merger and it is exhaustive so far as it goes. [P 564 C 2]

(h) Transfer of Property Act (1882 before 1929), S. 101 — Owner becoming charge or incumbrance holder — He can enforce same and not merely use it by way of defence.

There is nothing to S. 101 which would entitle a person who has acquired an absolute title to the property or happens to become a charge or an incumbrance holder of the property of which he was the owner to plead the charge or incumbrance only by way of defence and not to enforce the same against the puisne or the mesne encumbrances as a plaintiff : *Case law referred.* [P 565 C 1]

(i) Succession — Heir is not personally liable for debts of deceased.

An heir is not personally liable for the debts of the person of whom he is the representative. [P 566 C 2]

Hindu law —
('40) Mulla, Page 332 Pt. (c).
('38) Gour, Page 492 S. 146.

(j) Transfer of Property Act (1882 before 1929), S. 101—Person only qualified owner and not absolute owner — No merger.

Where a person who holds an encumbrance becomes a qualified owner and not an absolute owner,

there is no merger : ('30) 17 A. I. R. 1930 Cal. 530, *Rel. on.* [P 568 C 1]

(k) Transfer of Property Act (1882 before 1929), S. 101 — Intention to keep incumbrance alive need not be simultaneous with becoming absolute owner.

It is not correct to say that the owner of a charge or encumbrance must simultaneously with his succeeding to the equity of redemption, declare his intention to keep the charge or encumbrance alive expressly or by necessary implication and if he fails to do that, the liability must be held to be extinguished. It would be enough for him to do so within a reasonable time. [P 568 C 2]

(l) Transfer of Property Act (1882 before 1929), S. 101—General principle of extinguishment of debt by merger in case of debtor and creditor is not applicable.

The general principle of law that a debt is extinguished when the same person occupies the position of creditor and debtor in regard to the same debt is not applicable to S. 101, as that section contains two provisos or exceptions. Therefore, it cannot be said as a general rule that the mortgagee's rights are extinguished as soon as they come to vest in a person who happens to become a representative of the mortgagor subsequently. [P 569 C 1, 2]

(m) Transfer of Property Act (1882 as amended in 1929), S. 101 — Amendment of S. 101 is not retrospective — Nor can principle underlying amended section be applied to cases before 1929.

Under general principles of construction retrospective effect cannot be given to a statute unless an intention to that effect is expressed therein in plain and unambiguous language or at least unless such an interpretation arises by necessary implication. There is nothing in the amending Act 20 of 1929 which may lead the Court to construe that Act in that manner. It is impossible to hold that the other sections of the enactment were retrospective in character simply because only some of the sections were stated not to have any retrospective effect. Therefore S. 101 as amended in 1929 cannot be said to have retrospective effect : ('36) 23 A.I.R. 1936 Mad. 171 (F.B.) and ('32) 19 A.I.R. 1932 Mad. 734; *Rel. on*; ('32) 19 A.I.R. 1932 All. 489 (F.B.), *Dissent.* [P 570 C 1]

Nor will it be possible for the Courts to apply the principles underlying the amended section on the ground that it would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of the Act 20 of 1929. This would be virtually holding the section to be retrospective in effect and to ignore that the Legislature must have intended to amend or alter the law from what it was before the amending Act was passed, although the change in the language clearly points to the conclusion that the Legislature intended to amend the law. Nor can it be further held that the amending Act of 1929 was purely declaratory and was merely reproducing the law as it existed prior to that date. [P 570 C 1]

T. P. Act —
('36) Mulla, Page 552, Pts. (h), (i).
('34) Mitra, Page 553.

(n) Pleadings—They should not be interpreted rigidly.

Pleadings in India are not up till now drafted with as much care and precision as they should be and it would not be proper or conducive to justice to interpret them very rigidly. [P 570 C 2]

C. P. C. —
('40) Chitaley, O. 6 R. 2, N. 10, Pts. 1, 2.

(o) Gift — Real or benami — Things to be considered in determining, explained.

In order to determine whether a gift is true or benami it is necessary to take the position of parties, their relationship to each other, the surrounding circumstances, the motives which could govern their actions and their subsequent conduct into consideration. [P 570 C 2]

Hindu law —
('40) Mulla, Page 628, Pt. (v).
('38) Gour, Page 731, Para 1810, Page 732, Paras, 1811 to 1813.

(p) Gift — Gift between husband and wife—Ordinarily presumption is transferee holds for benefit of transferor.

Ordinarily if a transfer is effected as between a husband and wife, the presumption, in the absence of any other circumstance to the contrary, would be that the transferee holds the property for the benefit of the transferor. [P 570 C 2]

(q) Deed—Construction—It must be read as a whole.

A document has to be read as a whole and it is impossible to tear a sentence out of the context and read it regardless of what was said there both before and after. [P 572 C 1]

(r) Evidence Act (1872), S. 74 — Copies of execution petition or of counter-affidavit are not public documents.

Copies of an execution petition or of a counter affidavit are not public documents. They require to be proved before they are admitted in evidence. [P 572 C 2]

(s) Benami—Benami and nominal.

There is considerable difference between the benami and nominal nature of a transaction. [P 570 C 2]

(t) Hindu law — Joint family — Manager—Alienation by—Validity—Alienation for necessity and binding on estate — Renewal of, by successor is also valid.

An alienation by a managing member of a joint family will be binding on the other members if it is made either for legal necessity or for the benefit of the estate. An alienation which is found to be for necessity and for discharging antecedent debts is binding on the estate and a renewal of the same by the succeeding heir is also valid. [P 573 C 1]

Hindu law —
('40) Mulla, Page 271, Pt. (r).
('38) Gour, Page 444, Pt. (5); Page 507, Pt. (1).

(u) Hindu law — Impartible estate — Impartible estate taken as self acquired property by member of joint family—Other members have no right to be maintained in absence of custom.

Where a member of joint Hindu family takes an impartible estate as his self acquired property, the other members are not entitled as of right to be maintained out of the estate in absence of a custom or agreement to that effect : ('36) 23 A.I.R. 1936 Mad. 828, *Rel. on.* [P 573 C 2 ; P 574 C 1]

Hindu law —
('40) Mulla, Page 615, Pt. (f).
('38) Gour, Page 705, Pts. (1), (2).

(v) Merger — Merely because same person holds rights in one capacity against himself in

another capacity, his rights and duties are not extinguished.

It may at times happen that a person may come to occupy two capacities and may hold rights in one capacity against himself in another capacity. But it would not necessarily follow that his rights and duties are on account of that incident extinguished. [P 575 C 1]

(w) Practice—Defendants requesting to pass decree so as to affect them in particular manner —Prayer may be granted but it should not affect plaintiff adversely.

Two of three defendants requested that their shares may be sold in execution of the decree against them all only if the properties of defendant 3 were not sufficient to satisfy the decree. To this defendant 3 raised no objection :

Held that this prayer so far as the defendants inter se were concerned could be acceded to but as the plaintiff was no party to any arrangement it was only equitable that the order should not affect him adversely. [P 578 C 1]

P. Satyanarayana Rao and D. R. Krishna Rao — for Appellant.

V. S. Narasimhachar, P. V. Rajamannar, K. Subba Rao, K. Kuppuswami, V. S. Subramaniam and P. S. Raghavarama Sastri — for Respondents.

ABDUR RAHMAN J.—This appeal arises out of a suit instituted by the present Raja of Kalahasti (Venkatalingamma by name) on the basis of a mortgage deed executed by his father the late Rajah of Kalahasti (Timma Nayanim Varu) in favour of his second wife Chinnamma for a sum of Rs. 63,000 on 2nd January 1913, Ex. RR. The late Rajah of Kalahasti whom it will be more convenient to refer in this judgment as Timma, died on 5th December 1919 after he had held the impartible estate of Kalahasti for about 14 years. Timma had two sons by his first wife Chellamma one of whom is the present plaintiff and the other was Akkappa. Akkappa was given in adoption by Timma to his elder brother Muddu Venkatappa who held the impartible estate of Kalahasti after the death of his father Venkatappa Nayanim Varu (commonly known as the C. S. I. Rajah) up till 22nd March 1894. Muddu Venkatappa had, while he held the impartible estate, executed a mortgage in 1893 on some of the villages of his estate for a large sum of money in favour of a rich Hyderabad banker Raja Narasingh Girji. Muddu Venkatappa was succeeded by his adopted son Akkappa who, as stated above, was the natural son of Timma and remained in possession of the impartible estate of Kalahasti, between March 1894 and May 1905. It might be mentioned here that the estate being indebted to the extent of a sum of Rs. 33,48,879-1-6 was made over by Akkappa to the Court of Wards sometime in 1900 but they relinquished their charge of the same on Akkappa's death or to be definite three months later. Since then the estate remained in Timma's possession up to the time of his death when it passed on to the present plaintiff. During his lifetime Timma seems to have been obliged to renew the mortgage in Raja Narasingh Girji's favour for an amount which had by then grown to be six lakhs but to this we will have to refer again. Timma had a daughter Rangamma by his second wife Chinnamma. She was alive when Chinnamma died in 1919 and passed away in 1925 leaving behind her an adopted son Venkatarama, who is defendant 5 in the present suit.

Venkatappa Nayanimvaru, (that is the C. S. I. Raja) executed a will on 16th February 1881 (Ex. A) in favour of his eldest son Muddu Venkatappa under which the whole of the estate of Kalahasti was bequeathed by the former to the latter although a charge was created in favour of his other sons for their maintenance. Timma and his son Venkatalingamma the present plaintiff instituted a suit (Ex. B) on 17th March 1890 (O. S. No. 12 of 1890) in the District Court of North Arcot for partition on the ground that Kalahasti was not impartible and that it could not be legitimately bequeathed by the C. S. I. Raja to his eldest son. To this suit Akkappa who had already been given in adoption to Muddu Venkatappa, was impleaded as a defendant along with Timma's other brothers. This suit was compromised on 1st August 1892 (Ex. C) according to which the estate was conceded by all the parties to the suit to be impartible and the allowance fixed by C. S. I. Raja in his will for his sons was increased to some extent although certain villages which were allotted to Timma and his brothers under the will were agreed to be relinquished by them. This compromise was incorporated in a decree passed on 30th March 1893 (Ex. C-1). Muddu Venkatappa died on 22nd March 1894; but before his death objections were taken to certain clauses being embodied in the decree. The matter eventually came up to this Court and was decided by the judgment appearing in 18 Mad. 410.[1] It was held in that appeal that the decree should not have embodied matters which did not form the subject matter of that suit. This seems to have led to some differences between Timma and his natural son Akkappa, the holder of the impartible estate. Akkappa however executed a deed of mortgage in respect of maintenance due by him in favour of his natural father Timma on 14th July 1896 for a sum of Rs. 1,00,000, Ex. M. This was followed by another agreement executed on 14th October 1896 (Ex. D) by which Akkappa undertook to raise Timma's maintenance from Rs. 600 the sum which he had agreed to pay in the compromise in O. S. No. 12 of 1890, to Rs. 650 per mensem from 1st July 1896. On 30th August 1898, Akkappa executed a registered promissory note in Timm's favour (Ex. G). On 1st April 1899, Akkappa executed a mortgage deed (Ex. F-1) for Rs. 50,000 in Timma's favour for amounts due to him under the promissory note Ex. G and for the balance which had still remained unpaid out of the decree in O. S. No. 12 of 1890. Akkappa was succeeded by his natural father Timma under the rule of primogeniture. Thus, Timma became a representative of Akkappa, the person who had mortgaged the property with Timma—being already a mortgagee of some of the villages of the estate under Exs. M and F-1.

In the meantime an Act was passed by local Legislature in regard to impartible estates. It was the Madras Impartible Estates Act (2 of 1904) under which certain restrictions were placed on impartible estate holders in regard to the alienations of such estates. This was due to the fact that in several cases that had gone up to the Privy Council, it was held that the impartible estate holders could devise or bequeath their estates in any manner that they liked without any restrictions while the prevention of such transfers was considered desirable on grounds of public policy. Be that as it may, the effect of the legislation passed in 1904 on the impartible estate holders was that they did

1. ('95) 18 Mad. 410, Venkatappa Nayanim v. Thimma Nayanim.

not continue to be absolute owners of the property as they were before this legislation and could only deal with it in certain circumstances mentioned in the Act. It was after this legislation that Timma succeeded to the impartible estate of Kalahasti in 1905. A creditor of Akkappa had instituted a suit O. S. No. 7 of 1899 in the District Court of Nellore for a sum of Rs. 5,89,415-9-0 which was decreed a couple of months later. This was a simple money debt. It was in execution of this decree that the equity of redemption of the villages belonging to the estate which were mortgaged with Raja Narasingh Girji and Timma was sold and purchased by defendants 1, 2 and the father of defendant 3. A suit for redemption (O. S. No. 1 of 1917) was instituted by them in the Court of the Subordinate Judge of Nellore against Raja Narasingh Girji and others. This was decreed by their Lordships of the Privy Council finally in 1924: *vide* 47 Mad. 729.[2] They however failed to pay the mortgage in Timma's favour.

Since the sale comprised the villages which were mortgaged by Akkappa in favour of Timma in 1899 under Ex. F-1 and since Timma had on account of his succession to the Kalahasti estate become subsequently a representative of Akkappa, he was advised to transfer the mortgage Ex. F-1 by way of gift in favour of his wife Chinamma. This he did by the deed dated 19th August 1912 (Ex. PP-1). As the sum of Rs. 50,000 for which Ex. F-1 was executed in 1899 had according to him come to be more than Rs. 1,13,600, Timma in his capacity of the holder of the impartible estate and hence as a mortgagor and in renewal of the mortgage Ex. F-1 executed a usufructuary mortgage in favour of his wife for Rs. 50,000 on 2nd January 1913 (Ex. QQ) and a simple mortgage on the same date for a sum of Rs. 63,600 (Ex. RR). The usufructuary mortgage has been paid off and has passed outside the pale of controversy—although the question whether the money was received by Timma or by Chinnamma is still relevant in order to ascertain the legal effect of the other deed, Ex. RR which had come into existence on the same date. The present suit was instituted in January 1927 on the basis of the mortgage (Ex. RR) by Timma's son Venkatalingamma who is also the present holder of the impartible estate. It was dismissed in March 1931 on a portion of one of the issues framed by the trial Court. The portion read as follows :

"Whether the plaintiff is entitled to sue thereon (the mortgage deed dated 2nd May 1913) seeing that the plaintiff's father was himself the mortgagor."

When the matter came up in appeal, a Division Bench of this Court, without going into the merits of that decision, preferred to have all the issues in the suit decided and remanded the suit for that purpose in January 1938. The learned Subordinate Judge of Nellore has submitted his findings on the other issues as well and the whole appeal has been argued before us now. Chinnamma's daughter Rangamma died as stated before in 1925. Venkatarama Nayanim Varu, defendant 5 is her adopted son. Defendant 1 who is no other than the present Raja of Panagal made a settlement of his rights in the property on 4th July 1929 in favour of defendant 6 who, while a minor, unfortunately died in England. His father, defendant 7, is his legal representative. The defendants who had purchased the equity of redemption in the Court sale (defendants 1-2 and father of defendant 3) mortgaged their rights with the Raja of Venkatagiri with the object of paying off Raja Narasingh Girji and redeeming the villages mortgaged with him. The Rajah of Venkatagiri was defendant 4 but he died pendente lite and his legal representatives are defendants 8 to 10. The dispute between these defendants and the plaintiff was compromised after the appeal was remanded for a decision on the remaining issues.

A number of objections have been raised on behalf of the defendants. It has been contended on behalf of defendant 1 that since Timma, who was the original mortgagee, became the representative of the mortgagor Akkappa, his rights in the mortgage which he had taken from his son in 1899 under Ex. F-1 were, on his succession to the impartible estate, extinguished and there was no subsisting mortgage after that day. This contention has found favour with the Court below. Mr. Satyanarayana Rao, however, contends that in view of Timma's declarations both expressly and by necessary implication, his rights as a mortgagee continued to subsist and in any case, since their continuance was for his benefit, they could not be held to have been extinguished. It was further urged that at all events, after the Madras Impartible Estates Act had come into existence in 1904, Timma could not be said to have been absolutely entitled to the impartible estate to which he succeeded only in 1905. Section 101, T. P. Act, was amended in 1929 by Act 20 of 1929. Since the present suit was instituted in 1927 and all the rights which have to be dealt with in this appeal arose even earlier, they would have to be determined in accordance with the law as it existed prior to the Amending Act—unless that Act was either retrospective in its operation or it remained unaffected by this new piece of legislation which was purely declaratory in character.

The first question to decide therefore is whether there was a merger within the meaning of that section (S. 101, T. P. Act). The Transfer of Property Act is not exhaustive and does not in terms profess to be so. We would, therefore, be entitled to apply rules of English law as rules of justice, equity and good conscience only if we find that the present case is not covered by the Act, as it existed in 1927. If on the other hand, we find the present case to be covered by the Act, as it existed on the relevant dates in this case it would have to be applied and if there was a difference between the Indian and the English law on that date, the English law would have to be disregarded by us in deciding this case. Before we examine the cases which have been cited by the learned counsel for the parties it seems to be preferable to have the provisions of the old S. 101, T. P. Act, before us. The section reads as follows :

"Where the owner of a charge or other encumbrance on immovable property is or becomes absolutely entitled to that property, the charge or encumbrance shall be extinguished unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

In construing the section, it would be our duty to adhere to the grammatical and ordinary sense of the words used therein and if the meaning of the words is found by us to be plain and unambiguous we would have to give effect to them regardless of any other consideration, and would not be justified in ignoring any part of the language of the section. Bearing these principles in mind, let us now examine the language of the section and ascertain its

2. ('24) 11 A.I.R. 1924 P. C. 226 : 82 I. C. 993 : 47 Mad. 729 : 51 I. A. 305 (P.C.), Narasingirji v. Parthasaradhi Nayanim Garu.

meaning. The first words which seem to be necessary to be borne in mind are "is or becomes." The word "is" was apparently meant to convey the idea that a person who is absolutely entitled to the property may, on account of certain circumstances, subsequently become the owner of a charge or other encumbrance which was in existence on the date when he acquired the property. This might happen in various circumstances — the case which we are now called upon to decide being one of the illustrations of such instances. The words "or becomes" have apparently been used in contradistinction with the word "is". Either a person is absolutely entitled to a property on the date on which he becomes the owner of a charge or other encumbrance on that property or is already the owner of a charge or other encumbrance on immovable property before he becomes absolutely entitled to that property. The first case would be covered by the words "or becomes" and the second case by the word "is."

In this connection our attention was drawn by Mr. Narasimhachari to an Allahabad case reported in 37 All. 309.[3] The facts of that case were that one Badan mortgaged his property first to one Umrao Singh and then to Bhoop Singh. Umrao Singh brought a suit on his mortgage without impleading Bhoop Singh (the puisne mortgagee) and obtained a decree for sale which he transferred to the mortgagor's brother Bahal. The puisne mortgagee subsequently transferred his mortgage rights to the respondents in that appeal who obtained a decree for sale subject to the prior mortgage. Bahal died leaving Badan, the mortgagor, as his sole heir. The respondents applied for the execution of their decree and claimed to be entitled to bring the property to sale free from the prior mortgage. They contended that when Bahal died, the benefit of the prior mortgage passed to Badan, the mortgagor, and since he was the owner of the property, the mortgagee's rights became merged and were extinguished. Badan, on the other hand, opposed this contention. The Court of first instance held against the merger. On appeal, the lower appellate Court overruled the first Court's decision and found in favour of the merger. When the case came up before the High Court, the learned Judges were of opinion that the lower appellate Court was right and the first Court wrong. While deciding that case, the learned Judges expressed themselves in the following manner :

"Section 101, T. P. Act, was referred to in the course of the argument; but that section appears to apply only to the converse case of the owner of an encumbrance becoming the absolute owner of the property though it is not easy to see why the words "is or" were inserted in the section."

Having failed to appreciate the meaning of the words "is or", the learned Judges continue to say :

"There being no legislative provision on the question for decision, the case must be decided according to broad principles of equity and good conscience, with such assistance as may be afforded by the reported decisions of the Courts."

In our view, the assumption made by the learned Judges that there was no legislative provision on the question for decision, was unjustified. Had the learned Judges tried to appreciate the meaning of the word "is" as it appears in the context, we have no doubt that they would have seen that S. 101, was in terms applicable to the facts of the case which they were called upon to decide. Unless we hold that the word "is" was redundant and this we cannot do on the well recognised principles of interpretation, it would be impossible to agree with the reasoning of the learned Judges in this decision. The plain object of the Legislature in placing the word "is" was obviously to provide for one of the contingencies to which we have referred a little while ago. It is true that ordinarily it is the holder of a charge or an encumbrance who acquires the equity of redemption subsequently—but we can well conceive of a case where a person may have acquired the equity of redemption by inheritance or otherwise first and subsequently come to be the holder of a charge or an encumbrance, e. g., when he inherits the property from two persons one of whom was the owner of the equity of redemption and the other the owner of a charge or an encumbrance. We are thus not satisfied, and say so with considerable deference, that the case in 37 All. 309[3] was correctly decided.

To resume the construction of S. 101. The next words which call for our attention are those which begin with the word "unless." Having laid down the general rule of law in regard to cases where a charge or encumbrance shall be extinguished, the Legislature added two provisos or exceptions, the first being that when the owner of a charge or other encumbrance or immovable property as the case may be, became absolutely entitled to the property or came to own the charge or encumbrance, the charge or encumbrance was extinguished unless he declared "by express words or necessary implication that it" 'would' "continue to subsist." If he did so declare, the rule laid down by the section was that the charge or encumbrance was not extinguished. Proviso 2 or exception went even further. Even if such a person did not declare either by express words or necessary implication but if the Court found that the continuance of the charge or encumbrance would be for a person's benefit, it was required to presume, in accordance with the natural presumption that a person would not have acted or intended to act against his benefit and that he must have intended to keep the charge or encumbrance alive and not to permit it to be merged with the ownership of the property. This was held by a Division Bench of the Calcutta High Court in 57 Cal. 473[4] and we are inclined, with respect, to agree with that decision and not with certain observations which are to be found in 46 Bom. 1009.[5] The same view appears to have been taken by Dr. Rash Behari Ghose in his well known work on the Law of Mortgages at page 524, Vol. 1 (5th edition).

In this particular case, Timma was the owner of a charge or encumbrance before he became a representative of the mortgagor and became entitled to the property. Leaving the question whether he became absolutely entitled to the property or not for the time being out of consideration in view of Act 2 of 1904, we will have to determine, on the language of the section, whether the continuance of the charge or mortgage was for Timma's benefit or whether he made any declaration either by express words or necessary implication that the charge or encumbrance which he had acquired in 1899 continued to subsist in 1905 when he became the representative of his natural son Akkappa the mortgagor. It has been argued by the learned counsel for the respon-

3. ('15) 2 A. I. R. 1915 All. 242 : 28 I. C. 973 : 37 All. 309 : 13 A. L. J. 397, Badan v. Murarilal.

4. ('30) 17 A. I. R. 1930 Cal. 530 : 126 I. C. 413 : 57 Cal. 473, Sonaullah Karikar v. Abu Syed Mohamed Ismail.

5. ('22) 9 A. I. R. 1922 Bom. 211 : 70 I. C. 912 : 46 Bom. 1009 : 24 Bom. L. R. 720, Bai Rewa v. Vali Mahomed.

dent that S. 101 has, in the absence of any intervening encumbrances, no application. In other words, the contention is that the doctrine of merger must be held to come into operation in every case when the owner of a property or encumbrance happens to become the owner of the encumbrance or property unless an intervening encumbrance had been created in the meantime, i. e., between the time when he was the owner of the property or encumbrance and the date on which he subsequently acquired the encumbrance or the property. There is nothing in the language of S. 101, T. P. Act, which would justify us in imposing a condition which is not to be found in the section itself unless it be that some other principle of law is attracted which renders it incumbent upon us to read something more in the section; but if as we have said before, the case falls within the ambit of that section and no other principle of law is found which has to be super-imposed on the provisions contained in the section, it would be impossible for us to go to English or to any other system of law to find what the Indian law on the subject is. We would have in that case to be governed by the statute law in force in this country in preference to any other law and apply it regardless of the principles that are being acted upon elsewhere.

A number of rulings were cited on behalf of the parties in this connexion and since, as we have said before, there is nothing in the words of S. 101, T. P. Act, itself, it would be better to examine the decisions with the object of ascertaining if it is essential for us to introduce any other principle and read the provisions of the section subject to that principle. The first case on which great stress was laid by the learned counsel for the respondent was that in 40 Cal. 89.[6] The facts of that case briefly were that a mortgagee brought a suit on the basis of his mortgage deed and purchased the mortgaged property himself on 19th March 1900 in execution of his decree. Nine days later a charge for arrears of land revenue arose and the land was sold by the Collector. The revenue sale purchaser sued to recover possession and the mortgagee set up his mortgage as a defence. This contention, although it found favour with the Courts in India, was overruled by their Lordships of the Privy Council, who held that the mortgage was extinguished by merger. One of the reasons given by their Lordships in their judgment was that there were no interests of any kind existing on 19th March, the crucial date in question, which could enter into account or be taken into consideration so as to impede the full and complete ownership of the estate as such. They also adverted to the fact that the whole property, and not merely the equity of redemption, was put for sale by the Court in execution of the mortgage decree and purchased by the decree-holder and that even if a stranger other than the mortgagee had purchased the property his position would have been the same as that of the mortgagee purchaser. Mr. Narasimhachar however drew our attention to their Lordships' observation appearing at page 103 which reads as follows:

"And it would seem to follow as a necessary consequence that when the mortgagee thus became the purchaser and owner of the subjects mortgaged, he was not in a position to maintain *as against himself, or as against third parties unconnected with mortgage transactions upon the property*, the position that his mortgage still remained an incumbrance thereon."

Emphasis was laid by the learned counsel for the respondent on the underlined (here italicized) words and he urged that their Lordships intended to lay down that if a mortgagee became a purchaser and owner of the subjects mortgaged—such as Timma was after he had succeeded to the impartible estate—he or the plaintiff who is no other than Timma's legal representative would not be able to maintain as against third parties—such as his client who happens to be a stranger purchaser of the property is — the position that Timma's mortgage still remained alive and did not merge in the equity of redemption. We do not understand their Lordships to mean anything of that kind. They were not intending to lay down the whole of the law in that sentence but were merely confining their attention to the usual type of cases in which a merger ordinarily takes place. This would be clear when we find that towards the close of the very next paragraph they expressed themselves as follows:

"On 19th March 1900, the crucial date in question there were no interests of any kind to enter into account or consideration so as to impede the full and complete transfer of ownership of the estate as such."

If Mr. Narasimhachari's contention be correct, why did their Lordships use the expression "interests of any kind." It would be futile to contend that this expression was losely used by their Lordships in the judgment or that they were meaning to refer to mesne incumbrances alone when they used these words. In the present case, there are interests of one kind which have to enter into account or to be taken into consideration. We have already pointed out that when Akkappa died, the Kalabasti estate was very heavily encumbered. It was therefore only natural or, would in any case be beneficial, for Timma to keep the mortgages which he had taken from Akkappa during the time that the latter was the holder of the impartible estate, distinct and separate.

It might be mentioned here that in order to advance his argument Mr. Narasimhachari urged that Timma's personal property became liable for the debts due by Akkappa although his liability, he conceded, had to be limited to the extent of the estate received by the former from the latter. He argued that the decree was not against the estate of Akkappa but to the extent of the estate of Akkappa in his i. e. Timma's hands and this meant that even his personal property was liable to discharge the debts although to the extent of the estate received by him from Akkappa. The contention was so unreasonable and would have led to such startling results that it would have been impossible for us to accept it, even if S. 52, Civil P.C., had not been fortunately as explicit in this respect as it is. But a perusal of that section leaves no room for doubt that the contention is entirely wrong and it is the duty of the decree-holder to proceed against the estate of the deceased first and only when no such property remained in his legal representative's possession that the decree-holder is entitled to request the Court to proceed against the legal representative's property and this also after he i.e., the legal representative, fails to satisfy the Court that he had duly applied such property of the deceased as was proved to have come into his possession. The next case in the chronological order on which stress was laid by the learned counsel for the respondent was that of 29 M. L. J. 583,[7] where a Division

6. ('13) 40 Cal. 89 : 16 I. C. 210 : 39 I. A. 228 : 16 C.W.N. 985: 16 C.L.J. 606 (P.C.), Bhawani Kumar v. Mathura Prasad Singh.

7. ('16) 3 A.I.R. 1916 Mad. 875 : 29 I. C. 916 : 29 M.L.J. 583, Arumughasundara Maharaja Pillai v. Narasimha Iyer.

Bench of this Court held that if a mortgagee purchased the equity of redemption, the mortgage or encumbrance would be merged in the subsequent purchase in the absence of any mesne encumbrances on the property. The facts of that case are given fairly clearly in the headnote to that decision which reads as follows:

"*A* mortgaged his property to *M* who assigned his mortgage right to *B's* father in 1892. In 1897 *B's* father obtained a fresh mortgage from *A* for the amount due on the mortgage of 1892. On his father's death, *B* succeeded to his mortgage right. In 1899 *B* purchased *A's* equity of redemption in the mortgaged property. In 1905 *B* sold the same property to *A* purporting to reserve his rights under the mortgage in favour of his father. Subsequently, *B* instituted a suit on foot of the mortgages reserved in the conveyance of 1905."

From the facts, it would be seen that at the time when the equity of redemption of the mortgaged property was purchased by *B* in 1899, there were no encumbrances and no reason of any other kind which could have led him to declare either by express words or necessary implication that the mortgagee's rights which had devolved on him from his father would continue to subsist separately from the equity of redemption subsequently purchased by him or that such continuance would have been for his benefit. Since the relevant point of time which we have to bear in mind in order to ascertain whether the charge or encumbrance was extinguished or not is that of the subsequent acquisition by the prior holder of a charge or an encumbrance or of absolute title to the property, it would be immaterial to consider the subsequent circumstances which might have led him to act differently. It is on that date that the Court would have to ascertain whether there was a merger or to use the words of the section "an extinction of liability under the charge or incumbrance" and this could only mean whether there was any declaration express or implied by him or whether it was beneficial for him to keep his subsequently acquired rights separately and not permit them to be merged in his rights of which he was already the owner on the date of his subsequent acquisition. If we bore those considerations in mind we would have to respectfully agree with the decision of the Division Bench of this Court that there was a merger of the mortgagee's rights, which had devolved on *B* on his father's death, with the equity of redemption which he had purchased in 1899. This is because there were no circumstances existing on that date which could have possibly led the purchaser of the equity of redemption in 1899 to keep the mortgagee's rights unextinguished and once they were merged and the purchaser of the equity of redemption became the complete owner of the property, it would not have been possible for him later on to separate the mortgagee's rights which his father had acquired in 1892 or 1897 and alienate the equity of redemption alone which he i.e., B had purchased in 1899. We have, therefore, absolutely no hesitation in coming to the conclusion that the decision of that case was unassailable. But in concurring with the judgment delivered by Sir John Wallis C. J. as he then was, Seshagiri Ayyar J., observed that he understood the decision in 40 Cal. 896 to lay down that when there were no encumbrances, there would be an extinguishment of the rights under the mortgage when the equity of redemption was acquired. While interpreting S. 101, T. P. Act, he observed at page 594 as follows:

"It is clear that section contemplates the existence of *puisne incumbrances*. Unless that be the object, the clause relating to the subsistence of the encumbrance being for the benefit of the purchaser can have no meaning. The person who becomes absolutely entitled to the property cannot reserve in his favour and as against himself his own mortgage. As I read the section it leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption the encumbrance in his favour is extinguished. It only enacts that where there are other mortgages on the property an intention will be imputed to the mortgagee purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. The discussion in the House of Lords in the case already referred to shows that the rule enabling the purchaser to fall back on his mortgage is an infringement of legal rights. Consequently, a strict construction should be placed on this provision of law. I am of opinion that the mortgagee purchaser can use his previous mortgage only as a shield if there are mesne encumbrances and that also only in respect of the properties which are covered by such encumbrances."

With very great deference to the learned Judge, we cannot agree to most of these observations. There is nothing in S. 101, T. P. Act, itself, which provides for the existence of puisne encumbrances. That is why the learned Judge uses the word "contemplates" in the first sentence quoted above. The reason for this conclusion is given by him in the next two sentences. The provisos or exceptions which have been added to the section lay down clearly when may a person "reserve in his favour and as against himself his own mortgage" and when that encumbrance would not be extinguished. It cannot be denied that the existence of puisne encumbrances may be one such consideration; but to say that it is the only consideration does not seem to us to be justified. There may be other reasons for instance, such as those existing in the present case which may lead a previous mortgagee to keep his mortgage rights unextinguished or which may lead the Court to hold that the continuance of his previously acquired rights was for his benefit.

In fact as we read the section, we are of opinion, that if a purchaser makes a declaration, either express or implied, that he would keep his subsequently acquired rights as subsisting and not allow them to be merged, it would be unnecessary to find whether such subsistence was to his benefit or not so. Under the section he is the sole arbiter of his destinies and it seems to be impossible to substitute any other person's will for his. Then the learned Judge adverted to the general rule of law that when a mortgagee purchases the equity of redemption, the encumbrance in his favour would be extinguished. By the general rule of law, we suppose he means the general rule of common law of England. So far as the Indian law is concerned, S. 101 codifies the law of merger and it cannot be denied that it is exhaustive so far as it goes. If a mortgagee who purchased the equity of redemption happened to fall within the ambit of this section, there seems to be no justification for us to go to the common law of England. Moreover there are instances where a person may occupy a dual or a double capacity but these do not seem to have been considered by the learned Judge. We will discuss this question in some detail a little later when we examine Mr. Narasimhachari's arguments which he advanced in connexion with cases where debts were held to have been extinguished by the coalesence of the rights of creditors and the duties of debtors in the same persons. The learned Judge then goes on to say that

S. 101 only enacts that when there are other mortgages on the property, an intention will be imputed to the mortgagee purchaser that he intended to keep his own mortgage alive.

We are afraid we do not find anything in S. 101 which will lead us to limit the application of that section to those cases only where there are other mortgages on the property. Then there is nothing in the section that the mortgagee purchaser can use his previous mortgage only as a shield and cannot use his previous mortgage which has not been extinguished under S. 101 as a spear or by way of an attack. In coming to that decision the learned Judge referred to an old decision of this Court in 7 M.H.C. R. 229[8] where it was held that the mortgage right could only be used as a shield against puisne encumbrances. We find nothing to S. 101 which would entitle a person who has acquired an absolute title to the property or happens to become a charge or an encumbrance holder of the property of which he was the owner to plead the charge or incumbrance only by way of defence and not to enforce the same against the puisne or the mesne encumbrances as a plaintiff. See in this connexion cases reported in 59 Mad. 44[9] and 59 Mad. 1042.[10]

The third case to which our attention was drawn was that of 30 M. L. J. 391.[11] It is interesting to observe that this was the appeal which was brought by Tmima himself. It is true that it was held in that case that where a mortgagee became also entitled by inheritance to the equity of redemption, his rights under the mortgage would be, unless there were puisne encumbrancers against whom he was to be protected, extinguished. But this judgment simply follows the observations by Sesbagiri Ayyar J., in 29 M. L. J. 583[7] and advances the position no further.

Two more cases of Lahore were cited during the course of his argument by the learned counsel for the respondent. The first one was that of A. I. R. 1924 Lah. 377[12] where it was held by a Division Bench of that Court that part 2 of S. 101, T. P. Act, would not apply where no intervening encumbrances existed and where a merger of a lesser estate takes place in a greater estate as distinguished from the merger of a lower in a higher security. We have already referred to S. 101 in some detail in an earlier portion of this judgment and it is unnecessary for us to repeat the reasons that have led us to hold that the last portion of S. 101 could not be necessarily confined to those cases alone where there were intervening encumbrances. No reasons have been given by the learned Judges for coming to a contrary decision and we have, to some extent, discussed the cases on which their opinion was based. The only case to which we have not made any reference so far was that in 9 Cal. 961,[13] where it was held by the Judicial Committee that the question whether a mortgage which was paid off was kept alive or was extinguished depended upon the intention of the parties and the mere fact that it had been paid off could not decide the question whether it was or was not extinguished. In coming to that decision, their Lordships had referred to (1877) 5 Ch. D. 634,[14] where it was held that the question "whether a mortgage which was paid off was kept alive or extinguished depended on the intention of the parties" and since in that case no intention to the contrary was expressed or could be deduced, it was held that the person who made the payment and claimed to be the owner of the estate must be taken to have intended that the money was to be applied in extinguishing the charge. While stating the rule on the subject their Lordships referred to the following observations made by the Master of the Rolls in that case:

"In a Court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance; for, although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate, in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it."

This would show as we have ventured to point out before, that the existence of another incumbrance was only one of the reasons which could have led a person who acquired an absolute title to the property or a charge or an incumbrance as the case may be, to keep the charge or encumbrance alive and not the sole reason for its continuance. This case cannot thus be said to be an authority for the proposition that a mortgagee or an owner of an absolute estate can be held to have kept the previous charge alive only when there are intervening incumbrances in existence. It is unnecessary in the present case to go into the second reason given by the learned Judges of the Lahore High Court to hold that S. 101 was not applicable. We refer to what was observed by them in regard to the merger of a lesser estate taking place in a greater estate as distinguished from a merger of a lower in a higher security. They were apparently adverting to a distinction between what they called an estate and security. The other Lahore case was that in 12 Lah. L. J. 56[15] where the following observations were made by the learned Judges:

"If there is a mesne mortgage, then it is conceivable that the prior mortgagee who acquires full proprietary rights may keep alive his prior mortgage and use it as a shield if occasion arises. In the present case, there was no occasion whatsoever for the mortgagee joint family represented by Pratap Singh to keep alive three mortgages. It was a straight dealing between the mortgagee on the one side and the mortgagor on the other whereby the mortgagee obtained the sale deed of the equity of redemption from the mortgagor and thus acquired full ownership, the result of the transaction being the confluence of the interests of the mortgagor and

8. ('74) 7 M. H. C. R. 229, Ramu Naikan v. Subbaraya Mudali.
9. ('36) 23 A. I. R. 1936 Mad. 61 : 160 I. C. 757 : 59 Mad. 44 : 69 M. L. J. 903, Pollayya Dora v. Ananta Patro.
10. ('36) 23 A.I.R. 1936 Mad. 814 : 163 I. C. 704 : 59 Mad. 1042 : 70 M.L.J. 719, Arumugha Bathan v. Semba Goundan.
11. ('17) 4 A.I.R. 1917 Mad. 536 : 35 I.C. 224 : 30 M. L. J. 391, Raja of Kalahasti v. Prayag Dosjee Varu.
12. ('24) 11 A. I. R. 1924 Lah. 377 : 73 I. C. 764, Gobind Sarup v. Kuldeep Singh.
13. ('83) 9 Cal. 961 : 10 I. A. 62 : 13 C. L. R. 221 (P. C.), Mohesh Lal v. Bawan Das.
14. (1877) 5 Ch. D. 634 : 48 L. J. Ch. 352 : 36 L. T. 334, Adams v. Angell.
15. ('30) 17 A. I. R. 1930 Lah. 620 : 128 I. C. 296 : 12 L. L. J. 56 : 31 P. L. R. 446, Lakhmi Chand v. Bhai Santokh Singh.

the purchaser of the equity of redemption. Thus the doctrine of merger fully came into operation."

With great deference to the learned Judges who decided that case, we do not find ourselves in agreement with the proposition as enunciated by them. According to the learned Judges, it is only when a mesne mortgage existed that it would be possible for a prior mortgagee of a property who acquired full proprietary rights in that property to keep his prior mortgage alive and that also by using them merely as a shield and not by way of attack. This, we have already tried to show, cannot be legitimately inferred either from the words of the section which we are called upon to construe or from the cases decided by their Lordships of the Privy Council to which reference has already been made. According to the learned Judes, in a straight dealing between the mortgagee on the one side and the mortgagor on the other, it is not possible for the mortgagee to keep his mortgage alive and distinct from the equity of redemption which he acquires subsequently. We cannot, with great respect, assent to that statement in the way in which it was stated. It would be so however if there was no reason for the mortgagee to keep his mortgage alive at the time when he acquired the equity of redemption or in other words when the keeping of these two rights separately was not to his advantage or when there was no express or implied declaration by him to that effect. Our attention was then drawn by the learned counsel for the respondent to another decision of their Lordships in 47 Mad. 190[16] in which their Lordships observed that where there were several mortgages on a property, the owner of the property might by paying off his earlier charge treat himself as buying it and standing in the same position as that of his vendor or, to put it in another way, he may keep the encumbrance alive for his benefit and thus come in before a later mortgagee. This is not different from what we have understood the rule to be but learned counsel obviously wished to rely on the exception stated by their Lordships that this rule would not apply if the owner of the property had covenanted to pay the later mortgage debt. This limitation was mentioned by their Lordships for the obvious reason that if a person was under a liability to pay, he must be, when paying his debt, held to have discharged his own liability and as it would thus follow as a necessary conclusion that the security which depended upon the existence of the debt was extinguished as soon as the debt itself was paid off and ceased to exist. This is however a different matter and has nothing to do with the case which we are now called upon to decide. Here Timma had never agreed to become personally liable for the debts incurred by his predecessor, Akkappa and the case could not therefore fall within the exception enunciated by their Lordships of the Judicial Committee. It might be however useful that even in this decision, 47 Mad. 190,[16] their Lordships observed as follows :

"It is further to be presumed and indeed the Transfer of Property Act, S. 101 so enacts, that if there is no indication to the contrary the owner has intended to keep alive the previous charge if it would be for his benefit."

This, in our opinion, clinches the matter and puts an end to the contention raised by Mr. Narasimhachar. It is true that there is an observation in the Law of Mortgages by Dr. Ghose that, "a merger can take place only when a security comes into immediate contact, so to speak, with the ownership, or in other words, when they unite without any outstanding interest in a third person." But we believe that the learned author was contemplating the ordinary case where a puisne mortgagee acquires an absolute interest subsequently and happens to find no intervening encumbrances existing at the time. It was however urged that since Akkappa was liable to pay the debt and if he had paid the debt, the security would have been extinguished, his heir and legal representative Timma should similarly be, as being so to say a continuation of Akkappa's person held liable to pay and if he paid or otherwise became the owner of the mortgagee's rights, the debt should be held to have been paid and the security extinguished. This is really the same argument put in other words to which reference has already been made. An heir is not personally liable for the debts of the person of whom he is the representative and there is no warrant for the statement that Timma had made any covenant that he would be personally liable to pay the debts of the person to whose rights he had succeeded.

On behalf of the appellant Mr. Satyanarayana Rao referred to several cases, two of which 29 Cal. 154,[17] I.L.R. (1939) Mad. 600[18] were cited to show that the existence of mesne encumbrances was not the only reason which could prevent merger from taking effect. Both of these were cases where property was found to have been mortgaged at the time when it was attached and the subsequent mortgage in one case or sale in the other were effected by the mortgagors with the object of paying off the prior incumbrances. After the prior incumbrances were paid off the persons who had paid these amounts when faced with the attachments effected on the property before the dates of their payments but after the dates on which prior encumbrances were created, claimed to be subrogated to the rights of prior charge holders and urged that the mortgagor's liabilities under the prior encumbrances were not extinguished. It was held that the intention of the parties in the circumstances was that the earlier mortgages when paid off should not be extinguished but kept alive for the benefit of the charge holders who had paid for the encumbrances created before the attachment although actually paid after the attachment had been effected. The decisions might have been, if we were otherwise satisfied as to the soundness of the contention put forward by Mr. Narasimhachar capable of being distinguished on the ground that the rights created by the attachments were very similar to those created by mesne incumbrances and had to be governed by the same principle. These cases cannot thus support the appellant's contention. The third case referred to us was that in A.I.R. 1922 P. C. 94.[19] The facts of this case were that one Mathuranath Ghosh who was a proprietor of a Mausa granted a Mukarrari lease respecting Jadua patti in favour of two persons *D* and *N* of a Tewari family. Sometime later the proprietor of the Mausa granted a patni lease of the whole Mausa to two other persons *T* and *K* of the same Tewari family. Shortly after this *T* sold

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16. ('24) 11 A.I.R. 1924 P. C. 36 : 79 I. C. 592 : 47 Mad. 190 : 51 I.A. 140 (P.C.), Malireddi Ayyareddi v. Gopalakrishnayya.

17. ('02) 29 Cal. 154 : 29 I. A. 9 : 6 C. W. N. 209 (P.C.), Dinobundhu Shaw v. Jogmaya Dasi.

18. ('39) 26 A. I. R. 1939 Mad. 393 : 189 I.C. 17 : I. L. R. (1939) Mad. 600 : (1939) 2 M. L. J. 72, Mahalakshmi v. Somaraju.

19. ('22) 9 A. I. R. 1922 P.C. 94 : 66 I.C. 551 : 48 I. A. 485 (P. C.), Dulhin Lacchanabati Kumari v. Bodh Nath Tiwari.

his share of the patni lease to *K*. It was contended in this case that *D* and *N* who had acquired the Mukarrari lease of the patti in the first instance and *T* and *K* who took the patni lease of the whole Mausa later were members of a joint family and inasmuch as these rights were acquired by members of the same family, they should be held to have merged. It was denied that *D* and *N* on the one hand and *T* and *K* on the other were members of a joint Hindu family. In holding that there was no merger their Lordships of the Judicial Committee assumed for the sake of argument that these persons were members of a joint family and observed as follows :

"But, if the doctrine of merger is appealed to, that doctrine may be taken as it stands. Merger is not a thing which occurs ipso jure upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons — conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others — in the course of which the expediency of avoiding the coalesence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalesence of right meant to be accomplished as to extinguish that separation of title which the records contain? This is in accord with settled law, of which two recent instances may be given: namely (1903) 1 Ch. D. 631[20] and especially the judgment of Farwell J. in (1900) 2 Ch. D. 368.[21]

"The doctrine of merger being thus applied to the present case, it is found, on an examination of the circumstances, that they show with great clearness that instead of the mukarrari lease having been extinguished by merger, it was, on the contrary, kept up, as upon the one hand the source of right to the cultivators proceeding from the mukarridars and upon the other, the separate grant of subsisting right to the mukarraridars by their lease in respect of which the payment into the patni exchequer of the specific Rs. 66, specified in the mukarrari lease, continued to be made. The argument of Mr. Kenworthy Browne, upon the documents made this clear. It is not, however, necessary to enter upon the details thereof, for both the Courts in India, after full investigation, are satisfied in that particular. Had there been a true merger in fact, and in intention, the whole of such transactions would, in all probability, have taken a different shape, and in particular no more would have been heard of the mukarrari rent.

" This raises the last question in the case and it is one of importance. It was strongly argued by the appellants' counsel that it was sufficient for his purpose to show that mukarraridars and patnidars were of the same joint family, and that the difference of name of the one set of persons from the other person was of no account.

" Their Lordships are not of this opinion. The difference of name, it is not going too far to say, may be at least an element, and an important element, in the question whether merger was ever truly intended. There may, under the law of England, be complete fundamental identity of right between the holder under one title and the holder under another, but a convenient method of indicating intention on the subject is to create, for the purpose of keeping up the separation of title, a trust by which merger in the legal sense is clearly avoided. In short, although the same person is truly and comprehensively the owner of all the rights which might have coalesced, the substance of separation is preserved by the form of title having been allowed to merge into one name.

" To apply this doctrine to the Indian joint family, when a joint family interest might be said to cover rights acquired to property by several individuals belonging to the family, but when the rights, which might otherwise be merged, are conferred by titles taken in the names of different members of the family, and thereby the means of articulate differentiation is continued as effectively as by the artifice employed in England of setting up of a trust ad hoc, then it appears to their Lordships that these circumstances are elements for consideration."

It must be admitted that their Lordships were considering the rights created under the Mukarrari and patni leases in this case while we are concerned here with a mortgagee's rights who had succeeded to his mortgagor's estate but since their Lordships were dealing with the principles underlying the law of merger and also referred to the devices adopted by people in England as a convenient method of indicating intention and for the purpose of keeping up the separation of title when there is a fusion of two kinds of rights in one person we have quoted extensively from this judgment. These observations would be of great help to us when we are considering the effect of Timma's action in making a transfer of his rights to his wife Chinnammarao. Two other decisions were cited by Mr. Satyanarayana Rao in this connexion. There are observations at pp. 543 and 544 in one of them (1939) 2 M. L. J. 533,[22] which go to support this contention. It is true that they are obiter and were not, as it was a case of conventional subrogation, necessary for the decision of that case. But since they were made by our esteemed brother Venkataramana Rao J. and were based on a consideration of a large number of cases, they are entitled to great respect. The last case on which reliance was placed was a decision by their Lordships of the Privy Council in 16 Pat. 1,[23] where in holding that the interest of a Khorposhdar in the land granted to him for maintenance by the holder of an impartible estate did not merge in the estate on its subsequent purchase by the grantor, Sir Shadi Lal who delivered the judgment of the Board observed at p. 7 as follows :

" There is neither a statutory provision in India nor any rule of common law which can be cited in support of merger in a case of this character. Nor can merger be established on the doctrine of justice, equity and good conscience. Even in cases where a lesser interest vests in a person who holds the greater interest, merger would depend upon the intention of that person. If no intention is expressed or implied, or the party is incapable of expressing his intention, the Court has to consider what is beneficial to him."

It is true that this was not a case to which S. 101 could in terms be held to be applicable ; but the observations make it clear that the language of

20. (1903) 1 Ch. D. 631 : 72 L.J.Ch. 336 : 88 L.T. 255 : 51 W. R. 470 : 19 T. L. R. 280, Capital and Counties Bank v. Rhodes.

21. (1900) 2 Ch.D. 368 : 69 L.J.Ch. 618 : 83 L. T. 155 : 48 W.R. 684, Ingle v. Jenkins.

22. ('39) 26 A.I.R. 1939 Mad. 949 : 189 I. C. 435: (1939) 2 M. L. J. 533, Subbarayadu v. Lakshminarasamma.

23. ('36) 23 A.I.R. 1936 P. C. 332 : 165 I. C. 347: 63 I. A. 441 : 16 Pat. 1 (P.C.), Someswari Prasad v. Maheshwari Prasad.

a S. 101, T. P. Act, and, in any case, the principles underlying it were taken by their Lordships into consideration. The same result was arrived at by the House of Lords in (1898) A. C. 321[24] when reversing the decision of the Court of Appeal that in the absence of any evidence in the deed or the circumstances of any intention to extinguish the charge and when it was for the purchaser's benefit to keep it alive, the assignment of a charge upon the property to a person who had purchased its equity of redemption was not extinguished, (1898) A. C. 321.[24] Our conclusion, thus, is that even if it be assumed for the sake of argument that Timma became absolutely entitled to the villages mortgaged to him by Akkappa during his lifetime, there would be no merger under S. 101, T. P. Act, and the provisos or exceptions to the section would prevent the subsequent rights from being merged in the b encumbrance which he held previous to his succession to the impartible estate.

There is, however, another difficulty in the respondents' way in this connexion which seems to us to be insurmountable. It would be remembered that Timma succeeded to the impartible estate in 1905. Whatever the legal position of the impartible estate holders before the Impartible Estates Act came into being was, there is no doubt that they could not after that enactment be regarded as absolute owners of the estate, their powers of disposal to a large extent being limited by virtue of S. 4 of that Act. This enactment reduced the status of these estate holders to be that of merely qualified owners. If that be so, even the first portion of S. 101 would not be applicable to the facts of the present case and c the encumbrances held by Timma before he succeeded to the impartible estate would not merge in the equity of redemption for the simple reason that he could not be held to have become an absolute owner of the property on Akkappa's death. Ghose in his Law of Mortgage (Vol. 1, page 524, Edn. 5) states the proposition thus :

"But I believe the expression 'absolutely entitled' which occurs in the section does not imply the absence of intervening charges but has reference only to the nature of the estate and is used for the purpose of designating what English lawyers call the fee simple as opposed to a limited estate.

If I am right in this view no question of merger can arise in the case of a person who becomes entitled only to a qualified estate in the property . . . ."

d To the same effect was the decision in 57 Cal. 473[24] to which we had referred in another connexion. Subrawardy J. who delivered the judgment in that case observed as follows :

"Where the full interest and the limited interest coalesce, the limited interest is extinguished. But in the present case, there was no combination of the two interests. The word 'absolutely' is used in the section to indicate that the interest in which the encumbrance should merge must be the absolute interest and not a limited one. And the incumbrancer must become entitled to the absolute interest."

If this reason is sufficient to prevent the extinction of liability and to avoid a merger, it would be unnecessary to go into the question of intention or that of benefit. But since we have discussed the questions of intention and of benefit in some detail already it would be better if we record our conclusions in that respect as well. The impartible estate, as we have already stated in the beginning was heavily encumbered during Akkappa's lifetime (Exs. Z-1 and Z-2) with the result that it was taken over by the Court of Wards some time in 1900 and continued to be administered by them for about three months even after Akkappa's death in 1905. Shortly after Timma's succession to the estate, however, the Court of Wards must have considered the task of administration of such an encumbered estate to be hopeless and decided to discontinue their own administration and delivered possession of the estate to Timma. Timma, thus succeeded to the impartible estate at the time when it was heavily encumbered and it would have been obviously to his benefit to keep the encumbrances which were already executed in his favour alive and distinct from the impartible estate which had devolved on him subsequently. This by itself would be enough to hold that the liability under the mortgage Ex. F-1 was not extinguished ; but Timma's conduct almost from the time that he succeeded to the impartible estate, also leads to the same conclusion. It was admitted in para. 10 of the amended written statement of defendant 1 that a sum of Rs. 21,045-2-3 was received by Timma between June 1906 and September 1908 in regard to his mortgage. This payment is supported by Ex. 1-C printed at p. 175 and Ex. AA-1 printed at p. 151 of the records. This would clearly show Timma's intention to keep it separate from the equity of redemption to which he succeeded in 1905. We also find that he received three more payments in 1914 and 1916 towards Ex. RR (Exs. 16, 17 and 18) aggregating to Rs. 1900. But before this Timma attempted to transfer the mortgage Ex. F-1 to his wife Chinnamma Rao in 1912 (Ex. PP-1) under legal advice and then having split up the amount due under that deed into two, executed two mortgage deeds Exs. QQ and RR apparently in his capacity as a representative of Akkappa—the mortgagor. Exhibit QQ was a usufructuary mortgage for Rs. 50,000 and Ex. RR a simple mortgage for the balance of Rs. 63,630 which was according to him due at the time as regards the mortgage Ex. F-1. The property covered by Ex. RR, it may be remembered, was new and did not form a part of the mortgage executed in 1899.

The criticism by Mr. Narasimhachar in regard to this conduct relates first of all to the time when this intention might be taken to have been expressed by Timma. His contention is that Timma h should have declared either expressly or by necessary implication on the date on which he succeeded to the impartible estate in 1905 that he would keep the mortgages executed by Akkappa in his favour alive and distinct from the rights which he acquired to the estate on Akkappa's death. There is no doubt that the relevant date, in order to ascertain Timma's benefit was when he succeeded Akkappa. We have already shown how the merger of the encumbrances which he held with the equity of redemption would not have been for his benefit. As for the intention, the contention that the owner of a charge or encumbrance must simultaneously with his succeeding to the equity of redemption declare his intention to keep the charge or encumbrance alive expressly or by necessary implication and if he fails to do that, the liability must be held to be extinguished is not sound. It would be enough in our opinion for him to do so within a reasonable time at least although the rule deducible from (1855) 20 Beav. 453 = 52

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24. (1898) 1898 A. C. 321 : 67 L. J. Ch. 251 : 78 L. T. 329 : 46 W. R. 589 : 14 T. L. R. 295, Liquidation Estates Purchase Co. Ltd. v. Sir John Christopher Willoughby.

E.R. 678[25] appears to be as referred to in Halsbury' Vol. 13, para. 173 and as stated in Vol. 23, para. 767 (Hailsham) that his conduct during the remainder of his life would be relevant unless of course, he has already said or done something which would show that he has decided not to keep his previous encumbrance or charge distinct from his subsequently acquired rights. Akkappa died in May 1905. Timma could not however get the impartible estate from the Court of Wards until August 1905 and the receipt of money due under the mortgage deed Ex. F-1 in June 1906 was not more than ten months after he succeeded to the estate. In the absence of any other conduct to the contrary, Timma's conduct in receiving the money towards his mortgage (Ex. F-1) in 1906 coupled with his subsequent conduct in trying to convey the security to his wife, leave no doubt in our minds as to his intention and the expression of that intention from 1906 onwards must be held in the circumstances to be sufficient.

This is, however, not all. It was argued by Mr. Satyanarayana Rao that the mortgage Ex. F-1 was Timma's joint family property and since he and his son, the present plaintiff, were members of a coparcenary, the rights acquired by Timma under Ex. F-1 could not possibly merge with the rights which he acquired in his personal capacity as a successor of the impartible estate and that inasmuch as the capacities in both these cases were different, there could be no merger. In view of our decision that there could be no merger of the mortgagee's rights acquired by Timma with those which he acquired on his accession to the impartible estate under S. 101 either on account of the fact that he had not become absolutely entitled to the estate in 1905 or that the merger was not for his benefit and that he had been expressing his intention to the contrary from the time it was possible for him to do so, it seems to us really unnecessary to go into this question at this stage although it may be necessary to do so in connexion with the gift which Timma is said to have made in favour of his wife Chinnamma-Rao. We will not therefore discuss this question here but reserve it to be discussed, if necessary, later.

Learned counsel for the respondent then urged that even if the encumbrance be held not to have been extinguished under S. 101, T. P. Act, it must be held to have been so independently of that section as a person cannot be, on general principles of law, held to occupy the position of both a creditor and a debtor in regard to the same debt. The contention is that S. 101 is not exhaustive and does not provide for every case of extinction of liability. When a secured debt for instance, it was argued, ceases to exist by virtue of a payment, liability to discharge the debt would cease and the security for the debt must in consequence be found to have come to an end. No exception can be taken to this statement so far as it goes; but it is in our opinion entirely useless to the respondent. Security in a case such as suggested by the learned counsel for the respondent, would be extinguished by the acts of parties as soon as the mortgagor has paid the mortgage money after it became due and got the mortgaged property re-transferred or got an acknowledgment in writing (registered in cases where the mortgage deed was registered) to the effect that the mortgagee's rights have ceased to exist or that all the rights in derogation of the mortgagor's interest have been extinguished. It may also be extinguished by other acts of parties such as a remission or a gift or by operation of law, e. g., a decree for foreclosure. There is then no difficulty in agreeing with the contention that the term "extinction of liability" is more general than that of "merger" and the latter provides for only one of the methods by which liability is extinguished. But the learned counsel goes wrong, in our opinion, when he adds that as soon as there is an identity of *jural persona* of a secured creditor with that of his debtor, the liability for the debt must be held to have been extinguished and the security for the debt discharged. It must be borne in mind that we are not dealing here with cases where a person under a personal covenant to discharge the debt comes to occupy the position of a creditor. Cases of that type would be governed by decisions such as contained in 47 Mad. 190,[16] to which we have already referred. But where there in no such covenant, the effect of agreeing to this contention would be really to amend S. 101, T. P. Act. It cannot be denied that the case of a secured creditor who is or becomes absolutely entitled to the immovable property over which he had a charge or incumbrance would be covered by Part 1 of S. 101. In Mr. Narasimhachar's words there would be an identity in such a case of *jural persona* of the secured creditor with that of the debter who is or becomes entitled to the immovable property. If this is correct, there should be an extinction of liability according to the learned counsel for the respondent. But the section contains two provisos or exceptions—which we must ignore if (we) are to get the result desired by Mr. Narasimhachar and this, it is obvious, we cannot do. The fact is that the present case falls within the ambit of S. 101 and as long as it falls within the provisions of that section, it would be impossible for us to go beyond its terms, however plausibly the argument may be put.

Two English cases were cited by the learned counsel for the respondent in this connexion. The decision in (1904) 2 Ch. D. 474[26] is governed by the same principle on which the decision of their Lordships of the Privy Council in 47 Mad. 190[16] was based. A limited company which had issued certain debentures and had thus agreed to pay the debts for which the debentures were issued purchased some 16 debentures itself, subsequently. It was held that the result of the purchase of the debentures by the company was that in each case the debt was absolutely gone and the security had therefore also ceased to exist. Inasmuch as Timma had neither raised the loan as was done by the limited company nor had he, unlike the company, undertaken any personal liability for the same, this case can render no assistance to the respondent. The second case was that in (1910) 1 Ch. D 529[27] where a covenant to which some of the covenantor and covenantees were common was held void. This is not the plea raised in the present case. The contention just now is that the mortgagee's rights were extinguished as soon as they came to vest in a person who happened to become a representative of the mortgagor subsequently and this case is no authority for that contention. Moreover, as we have observed more than once in the course of this judgment that if we find a case covered by a provision contained in the statute law of this country, it will be our duty to apply it regardless of any consideration as to what the law in any other country is.

25. (1855) 20 Beav. 453 : 52 E. R 678 : 109 R. R. 494, Hatch v. Skelton.

26. (1904) 2 Ch.D. 474 : 73 L.J. Ch. 843 : 91 L.T. 288 : 53 W. R. 44, Hummel v. George Routlege & Sons Ltd.

27. (1910) 1 Ch.D. 529 : 79 L.J.Ch. 291 : 102 L.T. 417 : 54 S. J. 307, Ellis v. Kerr.

Since the present section 101, T. P. Act, after its amendment in 1929, would not apply to the facts of the present case, it was contended by Mr. Narasimhachar towards the close of his arguments on this point that the section after its amendment by Act 20 of 1929 must be held to be retrospective in its operation and the present law must be held to have been in existence even before the Amending Act was passed. In support of this contention, he relied on a Full Bench decision of the Allahabad High Court in 54 All. 897.[28] Under general principles of construction, retrospective effect cannot be given to a statute unless an intention to that effect is expressed therein in plain and unambiguous language or at least unless such an interpretation arises by necessary implication: *See also* A.I.R 1938 Mad. 779.[29] There is nothing in the Amending Act 20 of 1929 which may lead us to construe that Act in that manner. It is impossible to hold that the other sections of the enactment were retrospective in character simply because only some of the sections were stated not to have any retrospective effect. This, as observed by Varadachariar J. in the Full Bench case in 59 Mad. 359,[30] "may well be a provision inserted *ex majore cautela*." Nor is it possible for us to apply the principles underlying the amended section on the ground that it would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of the Act 20 of 1929. This would be virtually holding the section to be retrospective in effect and to ignore that the Legislature must have intended to amend or alter the law from what it was before the Amending Act was passed, although the change in the language clearly points to the conclusion that the Legislature intended to amend the law. A Division Bench of this Court in 56 Mad. 169[31] also takes the view that the Amending Act of 1929 cannot be held to be retrospective in its operation. We have, thus, no hesitation in repelling the contention raised by Mr. Narasimhachar that the amended section or the principles embodied in the amended section should be held applicable to a suit which was started two years earlier. Nor is it possible to hold that the Amending Act of 1929 was purely declaratory and was merely reproducing the law as it existed prior to that date. A comparison of the various sections on the old Act with the provisions contained in the Amending Act would show at once that such a contention is unjustified. For the above reasons we must hold that the rights under the mortgage deed, Ex. F-1, were not extinguished when Timma happened to succeed to Akkappa.

The next important question which we have been called upon to decide in this case relates to the nature of the transactions covered by the deed of gift dated 19th August 1912 (Ex. PP-1) by Timma favouring his wife Chinnammarao of the mortgage which was executed by Akkappa in his favour on 1st April 1899 (Ex. F-1) and by the two subsequent mortgage deeds which Timma executed as the holder of the impartible estate on 2nd January 1913. The sum of Rs. 50,000 for which the mortgage was executed in 1899 had, according to Timma, swelled to Rs. 1,13,630 by January 1913 when the two mortgage deeds were executed. This debt was, as stated before, divided into the two bits, one of which was covered by the usufructuary mortgage Ex. QQ and the other by the simple mortgage Ex. RR which forms the basis of the present suit. The plaintiff's case is that the transfer of title under the deed of gift, Ex. PP-1 and the execution of deeds of mortgage Exs. QQ and RR were effected under legal advice to prevent a merger—the use of Chinnamma Rao's name being really benami for Timma. It is true that the plea raised in the plaint was not happily worded and the plea of benami which was attempted to be made out at the hearing in the trial Court and before this Court was not expressly taken; but the user of the expression that the transaction was nominal seems to have been really intended to convey that Chinnamma Rao's name was benami and that Timma did not intend to part with the mortgagee's rights at all. As is well known, pleadings in India are not up till now, drafted with as much care and precision as they should be, and it would not be proper or conducive to justice to interpret them very rigidly. Mr. Narasimhachar took some pains before us to distinguish between a nominal and benami nature of a transaction and although we entirely agree with him that there is considerable difference between the two, we think that the case put forward in the plaint was not really different from what was attempted to be made out at the hearing. We have, therefore, to decide whether the gift by Timma in favour of his wife Chinnamma Rao was a real gift or was benami in character and merely intended to be for his own benefit. If the gift was real, the suit must fail as the mortgage then could not be enforced by the plaintiff who is Timma's son but by Rangamma as the daughter of Chinnammarao and on her, i.e., Rangamma's demise, by her son, defendant 5 in the suit. Mr. Narasimhachar also attempted to argue the question that if the gift in favour of Chinnammarao was not real but was merely nominal or benami the mortgage deed Ex. RR in favour of Chinnammarao would be, as no money could then be said to have been due to her by the impartible estate, without consideration. Lastly it was contended that Timma was not entitled to effect the mortgage in view of the limitations placed on holders of impartible estate by Act 2 of 1904.

To take up the question as to the nature of the gift first. It was pointed out to us by Mr. Satyanarayana Rao that the device to introduce Chinnammarao's name was resorted to by Timma with the object of keeping his capacity as a mortgagor distinct from his capacity as a mortgagee and even if legal title be assumed to be vesting in her, there would be a resulting trust in Timma's favour and would be enforceable on his death by his son, the present plaintiff. In order to determine the nature of this deed of gift it is necessary to take the position of parties, their relationship to each other, the surrounding circumstances, the motives which could govern their actions and their subsequent conduct into consideration.

As for the position of the parties to the deed of gift, Ex. PP-1, the gift was made by a husband in favour of his wife. Ordinarily, if a transfer is effected as between a husband and wife, the presumption, in the absence of any other circumstance to the contrary, would be that the transferee holds the property for the benefit of the transferor. The cir-

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28. ('32) 19 A. I. R. 1932 All. 489 : 139 I. C. 107 : 54 All. 897 : 1932 A.L.J. 627 (F. B.), Totaram v. Ramlal.
29. ('38) 25 A.I.R. 1938 Mad. 779 : 182 I. C. 937, Srinivasalu Naidu v. Damodarasami Naidu.
30. ('36) 23 A.I.R. 1936 Mad. 171 : 160 I. C. 137 : 59 Mad. 359 : 70 M.L.J. 1 (F.B.), Lakshmi Amma v. Sankaranarayana Menon.
31. ('32) 19 A.I.R. 1932 Mad. 734 : 139 I. C. 870 : 56 Mad. 169 : 63 M. L. J. 587, Kanjee & Mulji Bros. v. Shunmugham Pillai.

a cumstances which were prevailing at the time when this document was executed by Timma, if considered along with the oral evidence, point to the conclusion that the object of this so called gift was to improvise a scheme by which the mortgage Ex. F-1 may be enforced. The Kalahasti estate, as shown by Exs. Z-1 and Z-2 was heavily encumbered and Timma could not, even after his succession to that estate, do very much to reduce that burden. This would be clear from the fact that he had himself executed a mortgage deed on 4th August 1908 for no less than a sum of rupees six lakhs. Since Timma had succeeded to the estate of Kalahasti when it was so heavily burdened, he must have realized the difficulty of recovering the debt due to him under the mortgage deed Ex. F-1. The statement made by Mr. Srinivasachari, P. W. 3, who was a lawyer of some standing and who had special b means of knowledge in regard to the facts to which he deposed, is, in our opinion, quite trustworthy and was not, in fact, challenged seriously on behalf of the respondents. It was not disbelieved by the trial Court and we have no doubt that he was a witness of truth. He was a senior member of the Chittoor Bar and retired from practice some three years ago. The statement of P. W. 2 is also more or less to the same effect.

Let us now examine the circumstances and the documents on which Mr. Narasimhachari has placed reliance in order to show that the deed of gift was real. The first circumstance on which he relied was that the donee happened to be Timma's second wife while the plaintiff was the son of the first wife Chellamma who had died before Timma married for the second time. Chellamma and Chinnamma c were sisters. It was alleged that there was misunderstanding between the plaintiff and his father Timma at the time when the latter made the gift in favour of his wife, and that the son had instituted a suit against his father (O. S. No. 30 of 1910) alleging mismanagement and praying for the appointment of a receiver. This would have been of some assistance to Mr. Narasimhachar's clients but unfortunately for them we find that this suit was not fought out to the end and was withdrawn. Mr. Narasimhachar has been unable to show anything on the record which would lead us to presume that the suit was withdrawn because the plaintiff thought that it could not be successfully prosecuted against his father and not on account of some understanding having been arrived at between them. There is no reliable evidence on the record to show that there was any misunderstanding between the father d and son on the date when the deed of gift was executed. The defence witness D. W. 3 who deposed to ill-feelings between the plaintiff and his father during the cross-examination by defendants 1, 3 and 5 had to admit in the cross-examination by the plaintiff that they became friendly a year after the suit had been disposed of and continued to do so until the father's death. D. W. 4 who was a more reliable witness does not say anything beyond the fact that the relations between the father and son were not friendly for some time from 1910. The statement by P. W. 3 goes no further. On the other hand the statement by P. W. 5 who is an old man and being as he says a physician for both Timma and plaintiff to the effect that they began to live together after the suit was withdrawn, points to a different conclusion.

Our attention was next invited to a number of letters written by Timma to his counsel P. W. 3 in the case and letters written by P. W. 3 to Timma. As to the latter, we find the letters by P. W. 3 to Timma were not put to P. W. 3 in cross-examination although his statement, if true, would go to show that the deed of mortgage was transferred by Timma to his wife for his own benefit and simply because he could not bring a suit on the deed himself. The letters written by Timma to this witness, such as Exs. FFF, FFF-3 and GGG-4 are not very material for deciding the question whether the transfer by Timma was real. Since documents were executed by Timma first in his capacity of a mortgagee and subsequently in the capacity of being a holder of an impartible estate it is only natural that in his correspondence with P. W. 3 he would keep up the fiction and write to him in regard to the money due under the mortgage Ex. QQ in the name of his wife. But when the money in regard to Ex. QQ was received, and this is extremely important, it appears to have been credited to Timma in Timma's accounts (Ex. EEE). This document was f challenged before us by Mr. Narasimhachari as a forgery. It happens to be in the handwriting of one P. Govindu and is signed in the end by one M. Pulliah, the cashier, both of whom died in 1938. It is proved by the statements of P. Ws. 1 and 2 who swore before the Court that they could identify their handwriting and signatures. The Court seal on this document shows it was originally produced in the Chittoor Sub-Court in 1922 in O. S. No. 15 of 1922. This suit was disposed of in 1927 but before it was decided, the plaintiff instituted another suit (O. S. No. 1 of 1926) against Rangamma for the recovery of the Rs. 50,000 in regard to Ex. QQ. But when it was discovered that this money had been received by Timma himself and was duly entered in the Chittas which were produced by the plaintiff in 1922 in O. S. No. 15 of 1922 the second g suit had to be withdrawn. Had the document been forged in 1922 at the instance of the plaintiff, it is impossible to believe that he would have forgotten this fact in 1925 and brought a suit for the recovery of Rs. 50,000 against his step-sister. We have seen the document ourselves and it appeared to us to be genuine. The lower Court does not consider it safe to rely upon the solitary entry in this document as it does not contain Timma's initials and signatures but we consider it to be hardly likely that Timma, the Rajah of Kalahasti, as he was then, would initial or sign the chittas himself. The fact that it was filed after Timma's death does not detract from its value. It could not have been produced in Court obviously before a litigation started and there was no litigation in regard to this matter till December 1919 when Timma died. It may be, that the document is in one person's hand, but if a h person continues to be an accountant for a number of years as Govindu was, the fact that the whole of the document was in his hand, would not create any suspicion. To say that the whole document was written in one ink and what appears to be an innundo underlying therein, at one time does not seem to us to be correct and is not, in any case, borne out by anything on the record. The appearance of the document and the evidence of these witnesses unrebutted as it is, leads us to hold that the document was a genuine one and the money was received by Timma himself and credited in his account. If the money due under Ex. QQ was actually received by Timma himself as we find it was, it would throw considerable light on the nature of the deed of gift Ex. PP-1 and of the mortgage deeds Exs. QQ and RR. Similarly when certain monies were received by Timma by sale of certain villages covered by Ex. F-1 from D. W. 1 and for which sale deeds Exs. XVI, XVII and XVIII

were executed in his favour, they find a place in Ex. EEE. The statements contained to these sale deeds that the sales were effected with the object of paying off Chinnamma Rao and on account of Ex. QQ or Ex. RR show the reason for the sale but do not lead us to conclude, in the absence of any other evidence, that the money was actually received by Chinnamma Rao and not by Timma himself as shown to have been entered in Ex. EEE. Nor do certain claim petitions in Chinnamma Rao's name carry the case any further. It was Timma who was writing to his lawyer and since the deed of gift was executed in favour of Chinnamma Rao in order to enable him to recover the mortgage amount originally due under Ex. F-1 and this fact was known to his lawyer, there is nothing surprising in the petitions being made in Chinnamma Rao's name.

It was then argued that the plaintiff has made certain admissions and since he has not gone into the witness box to explain them, they should be taken to be more or less conclusive against him. These admissions are said to be contained in Exs. III and V. It must be remembered, however, that these statements appear to have been made not in regard to Ex. RR which forms the basis of the present suit but in regard to Ex. QQ which has been discharged already. Moreover the original document, Ex. III, does not say, as the translation at page 209 of the printed records does, that a sum of Rs. 50,000 was 'due' to the Rani Garu. The word "due" does not appear in the original although there is no doubt that after the sum of Rs. 50,000 the word Rani Garu does appear in the original. Whether it was intended to be conveyed that the money was due to her or only that the money was payable in her name is not clear. The second document on which reliance is placed is a copy of the plaint in O. S. No. 1 of 1925 (Ex. V). This suit, as observed before, was instituted by the plaintiff against his step-sister Rangamma and the plaint contained the plaintiff's allegation in para. 8 that his father was executing nominal deeds of sale and gift in favour of his wife Rani Chinnammarao and an assertion in para. 9 that the said deed of gift was void in law and passed no interest to his mother and that his father was not competent in law to make the gift. Then follows the statement in para. 12 on which stress was laid on behalf of the respondent that Rani Chinnamma Rao was put in possession of the properties. This might have been so but we cannot overlook the fact that the suit was for the recovery of the Rs. 50,000 which she was stated to have realised in regard to the mortgage Ex. QQ without any right or authority. The suit was withdrawn apparently because it was found to be based on a misapprehension and the statement even if taken to be an admission, cannot be in view of the plaintiff's discovery that it was wrong, regarded to be of any value. But even if it be not so, it contains no admission which can be of any assistance to the respondent. The plaint has to be read as a whole and it is impossible to tear a sentence out of the context and read it regardless of what was said there both before and after. If read as a whole, it cannot be construed to say that the plaintiff ever admitted that Chinnamma Rao was the sole owner of the money due under the mortgages Exs. QQ and RR.

Lastly, it was alleged that in the suit O. S. No. 1 of 1917 (a suit for redemption by defendants 1, 2 and father of defendant 3 against Raja Narasingh Girji) which was finally disposed of by their Lordships of the Privy Council and is reported in 47 Mad. 729,[2] Timma although a party did not raise any plea that any money was due to him under the mortgage—Ex. F-1 or its successors Ex. QQ and Ex. RR. This, it was contended, would show that the gift to Chinnamma by Timma was real. But no copy of Timma's written statement has been produced in this case, and in the absence of any evidence on the record, it is impossible to hold that Timma had raised no such plea. In this connection, the defendants filed a civil miscellaneous petition in this Court No. 5980 of 1939 with the object of producing certain documentary evidence on the record. The application is extremely belated. When the suit was remanded by the High Court in 1938, the defendants were authorised to file an additional written statement and produce such further documents, as they considered necessary. They did file an additional written statement and produced documents. But no reference to the execution petition in E. P. No. 29 of 1921 in O. S. No. 9 of 1910 or to the counter affidavit in E. P. No. 29 of 1921 was made by them. Moreover, it would be useless for us to permit certified copies of documents to be produced at this stage as we find that they are not being admitted by the other side. We are not satisfied that copies of an execution petition or of a counter affidavit are public documents, and do not require to be proved before they are admitted in evidence. Had we therefore been inclined to accept these documents it would have been necessary for us to permit additional evidence to be recorded. This in the circumstances we would not have permitted. The result is that C. M. P. No. 5980 of 1939 is dismissed.

The only other point which was urged by Mr. Narasimhachar to prove the reality of the gift was that Rangamma received a sum of Rs. 8000 from defendant 2 in 1924. Bearing in mind her relationship to defendant 1, we are not inclined to attach any importance to this fact. Timma died in 1919 and two suits at least were brought after his death by the present plaintiff, the latter being, as we have said before, O. S. No. 1 of 1925 against Rangamma herself. There is no doubt that the contesting defendants were, to a large extent, favouring Rangamma and this is borne out even by the position taken on behalf of defendant 5 in the present suit. Having considered all the circumstances and documents which were referred to us by Mr. Narasimhachari we are of opinion that the deed of gift Ex. PP-1 was not a real gift and was executed by Timma benami for his own benefit and that in executing Ex. RR Timma conferred rights on Chinnamma Rao only with the object of her being able to realise the money for him. We have also no doubt that the devices of first making a gift and then executing Ex. RR were resorted to by Timma in order to enable him to save his mortgage Ex. F-1 from the hands of the creditors of Kalahasti estate and to be able to recover his money through Chinnamma Rao's agency. We have already quoted extensively from the judgment of their Lordships of the Judicial Committee in A.I.R. 1922 P.C. 94[19] which would show that what could be done in England by the creation of a trust for the purpose of keeping up the separation of title was attempted to be done by Timma under legal advice by the benami transfer of the mortgage to his wife Chinnamma Rao to avoid the complication which had come into existence on account of Timma's accession to the impartible estate and thus to save the money from being lost. Since we have come to the decision that the gift and the mortgage made by Timma were benami for himself and not nominal, it is unnecessary for us to consider any further if the mortgage

Ex. RR was without any consideration at all. The contingency could have arisen only if we were of opinion that the transfers under Ex. PP-1, Ex. QQ or Ex. RR were nominal only. Nor is it necessary for us to consider the question as to what result would have followed if we had found in favour of the reality of gift and transfers.

The only contention raised by the learned counsel for the respondent, if we arrived at the conclusion that the transfers Ex. RR were benami, was that even if the mortgage deed (Ex. F-1) executed by Akkappa was found to be binding on the Kalahasti estate, a fresh security could not be, after Act 2 of 1904 had come into existence, created by Timma and the mortgage deed Ex. RR cannot therefore be enforced. The only restrictions placed on the proprietor of an impartible estate in regard to the alienation of such estates are to be found in S. 4 of that Act ; and after reading the section the only question which emerges for decision on this point is whether under the circumstances existing in this case Timma would have been as a managing member of a joint Hindu family (not being the father or grandfather of the other coparceners) entitled to make an alienation of the joint property in such a manner as to be binding on shares of other coparceners independently of their consent. This resolves itself into the question whether the alienation by Timma, Ex. RR, was made either for legal necessity or for the benefit of the estate. There is no doubt that Akkappa had executed Ex. F-1 in 1899 as he owed money which he was liable to pay under the promissory note, Ex. G, and for the balance of what had still remained unpaid out of the decree in O. S. No. 12 of 1890. These Akkappa was bound to discharge as long as he was alive. This is however not enough. We must find if Timma's act could be justified on the ground of benefit or necessity to the estate. Since there can be no doubt that Akkappa would have been bound to maintain the members of his family out of the impartible estate in his possession, if the same be regarded for this purpose as joint family property and inasmuch as the decree in O. S. No. 12 of 1890 was passed against him in respect of the arrears of maintenance and some of these had remained unpaid and the promissory note Ex. G was executed by him partly in respect of interest which was payable by him towards the mortgage deed Ex. M and partly in discharge of the debt which he owed to one Mr. Sesha Ayyar, a Vakil of Tirupati under a promissory note dated 30th April 1898 which was transferred to Timma and for the maintenance allowance due to Timma for three months the mortgage deed Ex. F-1 in 1899 must be held to have been executed by Akkappa for necessity and to discharge antecedent debts. If the alienation by Akkappa is found to be one for necessity and binding on the estate, a renewal of the same by his successor in 1913 must also be held to be effective and of a nature which Timma as a managing member of a joint Hindu family would have been entitled to make.

It was contended on behalf of the appellant that Timma was in any case incompetent to make a gift of the mortgage, Ex. F-1, in favour of his wife Chinnamma Rao on the ground that it consisted of a joint family property and could not be bequeathed after the plaintiff had been born as he undoubtedly was. The contention is that inasmuch as the will executed by the C. S. I. Rajah in 1881 (Ex. A) created the maintenance and other property given to Timma under the will as joint family property and formed a kind of nucleus out of which the mortgage Ex. F-1 was taken, it must be held to be joint family property. It was also urged that as under the Razinama dated 1st August 1892 in O. S. No. 12 of 1890, Ex. C, the decree passed thereon, Ex. C-1, and the agreement dated 14th October 1896, Ex. D, the amount of maintenance which was agreed to be given first by Muddu Venkatappa and then by Akkappa was not only for Timma's maintenance but was intended to be made also for the plaintiff, the mortgage which was taken by Timma must therefore be held to be the joint family property of the father, i.e., Timma and of his son — the present plaintiff. Mr. Satyanarayana Rao argued that if it could be shown that Timma had sufficient nucleus out of which the mortgage Ex. F-1 could have been secured by him the onus must lie on the respondents to show that the money belonged to Timma personally and was not that of the joint family. It was submitted that not only was the maintenance granted by Akkappa to be regarded as belonging to the joint family but that the income of the village received by Timma under his father's will along with jewels and other immovable property of high value which the former had received from the latter must be held to be joint family property—the possession of these properties being by itself sufficient to raise a presumption as to the joint family character of the money due under the mortgage, Ex. 1.

It would be remembered that although O. S. No. 12 of 1890 was instituted not only by Timma but on behalf of the present plaintiff also yet the allowance that was fixed in the compromise Ex. C was for Timma alone, and the plaintiff's name was not even mentioned. The words "and his male descendants" used in paras. 1 and 4 of the agreement Ex. D, do not in our opinion convey the idea suggested by Mr. Satyanarayana Rao that the maintenance was being granted to Timma and his descendants jointly. We take them to mean on the other hand that it was granted to him from generation to generation and could be claimed by his descendants only after his death. The question whether the right of a member of an impartible estate holder's family to maintenance arises as a result of his co-ownership in the joint family property which the impartible zamindari is considered to be or is wholly inconsistent with the zamindar's interest in the property does not call for a decision in this suit. There are two recent conflicting decisions on this point in this Court for which *see* I.L.R. (1939) Mad. 622[32] and (1939) 1 M.L.J. Short Notes 39,[33] to which one of us was a party. Based as both of them are on certain Privy Council decisions, we have no doubt that the difference would be authoritatively settled in due course. But whatever the basis of the right of maintenance may be there is no doubt that Mudu Venkatappa, who took the impartible estates or even Timma who, so far as the maintenance and the village given to him under the will are concerned, took portions thereof under his father's will must be taken to have done so in accordance with the Privy Council decision in I.L.R. (1939) Mad. 443,[34] as self-acquired property;

32. ('39) 26 A.I.R. 1939 Mad. 614 : 189 I. C. 123 : I. L. R. (1939) Mad. 622 : (1939) 1 M. L. J. 831, Maharajah of Venkatagiri v. Rajeswararao.
33. (1939) 1 M. L. J. (N. R. C.) 39, Obla Kondama Naicker Aiyan v. Raja Venugopalaswami Orala Kondama Naicker Aiyan.
34. ('39) 26 A.I.R. 1939 P. C. 95 : 180 I. C. 773 : I.L.R. (1939) Kar. P. C. 192 : I.L.R. (1939) Mad. 443: 66 I.A. 134 (P.C.), Perumal v. Subbulakshmi.

and in the absence of any custom to that effect, the claim to maintenance at all events made by Timma in O. S. No. 12 of 1890 from his brother Mudu Venkatappa, although based on their father's will must be held to have been, in consequence of the compromise, Ex. C, and according to the decision in I.L.R. (1937) Mad. 42,[35] made or granted not as of right but only by way of grace. It may be that the maintenance was granted by Mudu Venkatappa to all his brothers—but this did not mean that the grant was made to the head of each branch of the family as such and even if each brother's descendant is held entitled to sue subsequently, it would be on the basis of the agreement arrived at originally between Mudu Venkatappa and his brothers as modified by other agreements and not because they had any right to be maintained out of the estate independently of any custom or agreement. The village granted to Timma by his father C. S. I. Rajah under his will may be in view of certain decisions of this Court, 24 Mad. 429,[36] 10 M. L. W. 498,[37] 48 Mad. 827[38] and A.I.R. 1937 Mad. 631[39] regarded as ancestral property but when we find that this village was (together with other villages mentioned in the will) continued to be enjoyed in spite of the will by the holder of the impartible estate (for which see para. 6 in Ex. C) and was agreed to be given up by Timma at the time of the compromise the contention loses all its force. It is true that Timma was in possession of family jewels of some value which were given to him under his father's will but there is no evidence in this case that they were ever sold by him and being unproductive of any income cannot be assumed to have formed a nucleus for or the means of acquiring the various items contained in the mortgage, Ex. F-1 even if the same is regarded to be immovable property.

In these circumstances, the presumption that the mortgage deed was joint family property would not arise in our opinion. It is interesting to observe that the plaintiff alleged in his plaint against his step sister Rangamma, Ex. DDD, that all the jewels (presumably those which are now alleged to have formed the nucleus) were taken away by her. This takes us to issue 5. As to the first portion of the issue it is sufficient to say that nothing has been said by the learned counsel for the respondent, in spite of his elaborate arguments, to indicate that the mortgage deed Ex. RR was not true or invalid. As for the question of this deed being without consideration, the only argument put forward was based on the assumption that the deed of gift in favour of Chinnamma Rao (Ex. PP-1) was nominal or fictitious. It was conceded that if the transfer by Timma under the deed were found to be benami and not nominal, there would be no force in this contention. Since we have already arrived at the conclusion that the transfer by Timma under the deed of gift Ex. PP-1 was really benami, this part of the issue must be decided against the defendants. The money under Ex. F-1 was undoubtedly due and would form a good and valuable consideration for the mortgage, Ex. RR.

The present suit was dismissed by the trial Court in the first instance, as observed before, in consequence of its finding on the second part of this issue. This portion of the issue reads as if it was intended to cover the objection regarding the plaintiff's locus standi to maintain the action on the ground of his father Timma being the mortgagor himself rather than the objection that Timma could not, if the transaction represented by the deed of gift, Ex. PP-1 was merely benami for himself, execute the mortgage Ex. RR in his own favour. Since the point raised by Mr. Narasimhachar was that of law, and we were not quite certain that this aspect of the question was not intended to be covered by the objection raised on behalf of the contesting defendants and it was actually considered and decided by the trial Court, we allowed it to be argued here as well.

It would be remembered that the liability under Ex. F-1 was split up by Timma in January 1913 and two mortgage deeds Ex. QQ and Ex. RR were executed by him, as the holder of the Kalahasti estate in favour of his wife, Chinnamma Rao. We have already held that the gift Ex. PP-1 was not real and was effected to avoid a merger and intended to be for his (i. e., Timma's) own benefit. The argument advanced by the learned counsel for the respondents in this connexion was that if the gift in favour of Chinnamma Rao be not held to be real, the execution of the mortgage deeds Ex. QQ and Ex. RR by Timma as a mortgagor (in his capacity of being Akkappa's representative) in favour of his wife as a benamidar for Timma the mortgagee would be wholly invalid on the ground that a person could not execute a deed of mortgage in his own favour or in other words, a debtor could not make a covenant with himself and thus become his own creditor. As observed elsewhere in this judgment, Ex. QQ was satisfied in Timma's lifetime and thus passed out of the controversy long ago. It must not be also overlooked that in view of the endorsement made on Ex. F-1 on 1st August 1904 by the Court of Wards (Ex. F-7) the liability under the mortgage deed Ex. F-1 was not barred by limitation. Moreover, the mortgage deed, Ex. RR, executed by Timma even if benami and made for his own benefit, was nevertheless, a transfer made with the object of clothing Chinnamma Rao with the legal ownership in the mortgage, 45 Cal. 909,[40] and 46 Cal. 566,[41] although in view of the deed of gift Ex. PP-1 being benami in character there was to be a resulting trust in Timma's favour with the result that if she had succeeded in recovering any money due under the mortgage deed, she would have had to hold it for his benefit and repay it to him—*vide* S. 88, Trusts Act. Since Timma succeeded to Akkappa as the holder of the impartible estate, he would be entitled to renew the mortgage Ex. F-1; but this would be in his capacity as mortgagor's representative only. Timma's position could not be worse than if the money under the mortgage deed Ex. F-1 was paid on behalf of the mortgagor's estate to Chinnamma Rao who had the legal title to recover the mortgage money.

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35. ('36) 23 A.I.R. 1936 Mad. 828 : 167 I. C. 92 : I.L.R. (1937) Mad. 42 : 71 M. L. J. 568, Subbayya Thevar v. Marudappa Pandian.

36. ('01) 24 Mad. 429 : 11 M.L.J. 210, Nagalingam Pillai v. Ramachandra Tevar.

37. ('20) 7 A.I.R. 1920 Mad. 20 : 54 I. C. 146 : 10 M. L. W. 498, Indoji Jithaji v. Kothapalli Ramacharlu.

38. ('26) 13 A. I. R. 1926 Mad. 51 : 90 I. C. 829 : 48 Mad. 827 : 49 M. L. J. 341, Salaksh Ammal v. Doraimanika Nadan.

39. ('39) 24 A.I.R. 1937 Mad. 631 : 172 I. C. 666, Kasi Visweswara Rao v. Varahanarasimham.

40. ('18) 5 A. I. R. 1918 P. C. 35: 45 I. C. 770: 45 Cal. 909:45 I. A. 97 (P.C.), Raja of Deo v. Syed Abdullah.

41. ('18) 5 A.I.R. 1918 P.C. 140: 49 I.C. 1 : 46 Cal. 566: 46 I.A. 1 (P.C.), Gur Narayan v. Sheolal Singh.

a Although the mortgage deed was undoubtedly to enure for his (i. e., Timma's) benefit ultimately, yet for the time being it was being made by Timma in favour of Chinnammarao who was a different person and since it was for Timma's benefit, there could be no objection to the plaintiff suing as Timma's heir for the recovery of that benefit, particularly as we find that the mortgagor's rights had passed to defendants 1-2 and the father of defendant 3 in the action. We do not think that there is any force in the contention that the document was invalid on account of the fact that Timma was executing it in favour of himself. It was not so ex facie and the same devise which English lawyers adopt to keep two estates distinct by the creation of a trust was being resorted to by Timma himself to keep the mortgage Ex. F-1 in his own favour alive and enforceable.

b It was not disputed before us that in the absence of a merger it might have been possible for Timma the mortgagee to enforce the liability under the document Ex. F-1 even after he had succeeded to the impartible estate ; but this, it was alleged, was due to the fact that there was a pre-existing liability which the Kalahasti estate was bound to discharge. If the pre-existing liability could have been enforced by Timma even after he had succeeded to Akkappa, no objection could be lawfully raised to Timma, the mortgagor, executing a deed of mortgage in favour of Chinnamma Rao although she might have been then really a trustee for the benefit of Timma, the mortgagee. It may at times happen that a person may come to occupy two capacities and may hold rights in one capacity against himself in another capacity. But it would not necessarily follow that c his rights and duties are on account of that incident extinguished. A manager or karta of a joint Hindu family may, in his capacity as a karta, legitimately sell a joint family property for joint family necessity or benefit to one of the members of the family or even to himself in his individual capacity as long as the transaction is not fraudulent or he does not take any undue advantage of his position. He cannot be said in a case like this to be contracting with himself. He has really a dual capacity.

Similarly, after his succession to the impartible estate Timma occupied two capacities and was in possession of two kinds of property. He was a mortgagee to start with and became a representative of his mortgagor independently of his will. Moreover, his personal property, even if it was not ancestral, would devolve on his widow and other heirs in ac- d cordance with the rules of Mitakshara while the impartible estate would not be taken by his heirs but by one who would be entitled to succeed in accordance with the rules of lineal primogeniture. To such a case, decisions in A. I. R. 1929 Bom. 24,[42] (1894) A. C. 150,[43] (1903) 1 Ch. D 836[44] and (1889) 40 Ch. D. 395[45] would have no application. In the first case, i. e. A. I. R. 1929 Bom. 24,[42] certain mortgagees, who were authorised by their mortgage deeds to sell the mortgaged property on default by the mortgagor, sold it by auction to a benamidar or a trustee for themselves and it was held that the transaction did not affect the relations between the e mortgagor and the mortgagees and the sale was void and unenforceable. This case was so decided as first of all the mortgagees were held to have been merely authorized to sell the property and not to purchase it themselves which if allowed would have put them in a position where there would have been a conflict of duty and interest (their duty being to sell to the best advantage of the mortgagor and their interest being to purchase to the best advantage for themselves) and secondly as the mortgagees' capacities were not different and continued to remain the same throughout. They worked as mortgagees all along and could not sell the property to themselves.

The second case is that of 1894 A. C. 150.[43] The facts of this case were that Miss Astwood conveyed her property in a wharf at Kingston known as Astwood Wharf to one Davies by way of a mortgage. f The deed contained a power of sale in the event of interest being in arrears. After a notice by Davies the mortgaged premises were put to auction and purchased by one Cobbold, who was the son-in-law of Davies, the mortgagee. Cobbold was acting on behalf of Davies and no money had passed. Davies however executed a conveyance to Cobbold who in his turn signed an undertaking at the same time to convey the property to Davies when called upon to do so. After the auction Davies treated himself to be the owner. He remained in possession, improved the property and carried on business in his own name and on his own behalf. Davies subsequently agreed to sell Astwood Wharf to the defendant Henderson. In regard to the auction sale that was held at Davies's instance, Lord Macnaghten in delivering the judgment of their Lordships of the g Privy Council observed as follows :

"The so-called sale was of course inoperative. A man cannot contract with himself. A man cannot sell to himself, either in his own person or in the person of another. But such a transaction is not necessarily a fraud or evidence of fraud."

Learned counsel for the respondent has relied on this passage. The main facts of the case are very similar to those in A. I. R. 1929 Bom. 24.[42] The mortgagee in this case also acted in one capacity throughout and having been authorized to sell in certain circumstances sold the property really to himself. This case would not be an authority for the proposition that the representative of a mortgagor would not be, after he came to occupy that position, competent to renew a mortgage or execute a conveyance in favour of the representative of a mortgagee who had held a mortgage before he came to h occupy the position of the mortgagor's representative. It is unnecessary for us to go into the cases covered by S. 101, T. P. Act, again. But independently of S. 101, these cases do not seem to be any authority for the proposition contended for.

The third case is that of (1903) 1 Ch. D. 836.[44] In this case, a tenant for life had granted lease of premises consisting of a dwelling house and a soda water factory to himself, his son and a stranger. In holding that such a covenant was bad in law, Farwell J. observed at p. 843 as follows :

"Then there only remains the last point, which is one of very considerable interest. If there is one doctrine better settled than another in a Court of equity it is that a man shall not put himself in such a position that his interest conflicts with his duty. A man cannot be both buyer and seller, or lessor and lessee. Now to that principle there is said to be one exception, that under powers of leasing, the donee of the power can lease to a

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42. ('29) 16 A.I.R. 1929 Bom. 24: 113 I.C. 313: 30 Bom. L. R. 1519, Vallabhdas Mulji v. Pranshankar Narbheshankar.

43. (1894) 1894 A.C. 150: 6 R. 450, Henderson v. Astwood.

44. (1903) 1 Ch. D. 836: 72 L.J. Ch. 547: 88 L.T. 344: 51 W. R. 424, Boyce v. Edbrook.

45. (1889) 40 Ch. D. 395: 58 L.J.Ch. 185: 60 L.T. 121: 37 W.R. 196, Farrar v. Farrars Ltd.

trustee for himself. Assume that it is so. It is a perfect anomaly. It is an exception which owes its existence to authority, and not, with all respect, to common sense. There is no possible ground for it that I can see, and I should decline to extend it one hair's breadth. But it is clear to my mind that there is no authority, and no ground for saying, that the donee of a power of leasing could lease to himself, either alone or jointly with others, without the interposition of a trustee. Assume for a moment that he can lease to a trustee; that must be because you get a perfectly good contract at law, with covenants at law which can be sued upon and recovered on; and it may be that the fact that the trustee has a right to indemnity over against the lessor may be disregarded. However that may be, there is no authority to shew that the donee with a power of leasing can lease to himself, and I am clearly of opinion that he cannot."

Here, as in A.I.R. 1922 P.C. 94,[19] it was assumed that the lease could have been possible with the interposition of a trustee. Is Chinnamma Rao's position in the present case not that of a trustee? If it is, and we are of opinion that it is not different from that of a trustee, there would be no difficulty in holding that the general principle stated in (1903) 1 Ch. D. 836[44] has no application to the present case.

The last case brought to our notice in this connexion was that of (1889) 40 Ch.D. 395.[45] The facts of this case were that a sale was made by certain mortgagees under powers to sell for an incorporated company Farrars Ltd. It was impeached on two grounds, the first of which is not relevant in this case. But the second was that the defendant John Riley Farrar who was one of the three mortgagees was personally interested in the purchase being at the time of the sale the holder of certain shares in the company. The sale was not set aside by Chitty J. and on appeal being preferred Lindley JJ. observed as follows :

"A sale by a person to himself is no sale at all and a power of sale does not authorise the donee of the power to take the property subject to it at a price fixed by himself, even although such price be the full value of the property."

Then follow the words on which particular reliance was placed by Mr. Narasimhachar :

"Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction."

Relying on these words, learned counsel for the respondent contended that the interposition of Chinnamma Rao in this case would not affect the substance of the transaction although it might have helped him in getting over the difficulty so far as the form was concerned. We must however remember that in this case Lindley L. J. was, if we understand him correctly, laying down the rule that the interposition of a trustee would not affect the substance of the transaction as he was of opinion that the power of sale did not originally authorize the donee of the power to take the property himself and that he could not be permitted to get round the want of authority and thus commit a breach of faith by employing an intermediary or a trustee and thus achieve the object which he could not otherwise have. This would not be so in the present case. There can be no breach of faith and no conflict of interest and duty in the present case. Moreover, Lindley L. J. observed a little later in that case as follows :

"A mortgagee with a power of sale, though often called a trustee, is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty."

This would show the distinction pointed out by the noble Lord between the mortgagee with a power of sale who was not permitted to employ a trustee to carry out a fraud or breach of faith and do what he was not authorized to do by the contract, that is, to purchase the property himself and the trustee for sale (or for mortgage as Chinnamma Rao was) who has no business to place himself in such a position as to give rise to a conflict of interest and duty. By means of the deed of gift, Ex. PP-1, Chinnamma Rao was placed in a position to recover the mortgage money under Ex. F-1, which the mortgagee intended to keep distinct from his other rights to which he had become subsequently entitled on account of Akkappa's death. There was nothing in that transfer to Chinnamma Rao to which exception could be taken on any known principle of law. If we remember that Timma the mortgagee came to occupy a different capacity on his succeeding to the impartible estate of Kalahasti and it was possible for him in one capacity to have rights or duties against or in respect of the capacity to which he succeeded later, the case would not present that difficulty as it seems prima facie to do. That a person may have rights in one capacity against himself in another capacity is also clear from the following passage in Salmond's Jurisprudence (Edn. 9) at page 424 :

"It often happens that a single human being possesses a double personality. He is one man, but two persons, *unus homo*, it is said, *plures personas sustinet*. In one capacity or in one right as English lawyers say, he may have legal relations with himself in his other capacity or right. He may contract with himself, or owe money to himself, or transfer property to himself. Every contract, debt, obligation or assignment requires two persons; but those two persons may be the same human being. This double personality exists chiefly in the case of trusteeship. A trustee is, as we have seen, a person in whom the property of another is nominally vested, to the intent that he may represent that other in the management and protection of it. A trustee therefore is for many purposes two persons in the eye of the law. In right of his beneficiary he is one person, and in his own right he is another. In the one capacity he may owe money to himself in the other. In the one capacity he may own an encumbrance over property which belongs to himself in the other. He may be his own creditor, or his own landlord; as where a testator appoints one of his creditors as his executor, or makes one of his tenants the trustee of his land. In all such cases, were it not for the recognition of double personality the obligation or encumbrance would be destroyed by merger, *or confusio*, as the Romans called it, for two persons at least are requisite for the existence of a legal relation. No man can in his own right be under any obligation to himself, or own any encumbrance over his own property : *nulli res sua servit*"

In view of the facts that the mortgage deed Ex. F-1 was not extinguished by merger and was enforceable in 1913, Timma was competent, in our opinion, to make a transfer in favour of his wife Chinnammarao (although benami for himself) and since Chinnamma Rao was a separate person for this purpose, the mortgage, Ex. RR by Timma as a

holder of the Kalahasti estate and in his capacity of Akkappa's representative cannot be held to be infructuous on the ground that the two capacities of the mortgagor and the mortgagee happened to continue in Timma at one time and can be enforced by the present plaintiff as an heir to Timma the mortgagee against the person who had purchased the equity of redemption subject to Timma's mortgage. Mr. Narasimhachar wanted us towards the end of his arguments, to permit him to argue the question of subrogation and priority particularly as it was considered by the lower Court in its finding submitted to this Court after the order of remand. This point was being raised on the allegation that a large sum of money was paid by the first, the second and the father of the third defendants to Raja Narasingirji whose original mortgage was prior in point of time (1893) to that taken by Timma in 1899. It was conceded by the learned counsel for the respondent that no such plea was raised either in his client's written statement or in the written statements of those who had purchased the equity of redemption along with defendant 1. He alleged however that this question was raised by defendant 4 in his written statement and an issue (issue 11) was framed for that purpose. It might be stated here that the Rajah of Venkatagiri (defendant 4) was impleaded as a defendant in the suit as he was admitted by the plaintiff to be a subsequent mortgagee of the property in suit and thus interested in the equity of redemption (plaint para. 13). It was alleged on behalf of defendant 1 that the money was paid by him, defendant 2 and the father of defendant 3 to Raja Narasingirji by raising a loan from the Rajah of Venkatagiri and that a major portion of this amount has been repaid by them during the pendency of this suit.

The plea of priority raised on behalf of the Rajah of Venkatagiri was in respect of the transaction covered by Ex. 15, i. e., the mortgage deed executed by defendant 1 and his brother in 1919. No such plea was raised on behalf of defendants 1 to 3. It was apparently not raised as it was considered by them that the Rajah of Venkatagiri who had advanced the whole of the money which went to pay off Raja Narasingirji had raised it himself. It may be that these defendants paid a little over four lakhs of rupees to the Rajah of Venkatagiri or his heirs subsequently and balance of about Rs. 1,50,000 only or thereabouts remained to be paid to them in respect of the mortgage Ex. 15. But we cannot forget the fact that when the case was remanded by the High Court in 1938, the defendants were permitted to put in additional written statements and although they had by then according to their allegations paid large sums of money to the Rajah of Venkatagiri or his heirs who appear to have instituted a suit against them separately yet they failed to raise any plea of subrogation or priority. While the case was proceeding, a compromise was arrived at between the plaintiff and the Rajah of Venkatagiri's heirs under which the plaintiff accepted or conceded that they (i. e., the Raja of Venkatagiri's heirs) would have priority for the sum actually due to them and agreed in addition to forego his own (i. e., the plaintiff's) rights to recover any money from some 32 villages which the Rajah of Venkatagiri's heirs had purchased from these defendants. This was done while the defendants were present in Court and without any objection or demur on their behalf. This would mean that the plaintiff was permitted to change his position to his detriment in consequence of his compromise with defendants 8 to 10 and nothing was said on behalf of defendants (1 to 3) which may have led the plaintiffs to think that any such plea would be raised on their behalf subsequently. The compromise cannot now be annulled and the Rajah of Venkatagiri has not naturally after the compromise taken care to be represented before us. We failed to see how the lower Court in view of these facts, could permit defendants 1 to 3 to take advantage of the issue framed in consequence of the objection raised by the Rajah of Venkatagiri. But this the Court happened to do. After hearing his arguments, we told Mr. Narasimhachar that the lower Court was not, in our opinion, justified to permit his client to take advantage of issue 11 and he might, if he was so advised, make an application for an amendment of his written statement. This application was made by him and was rejected by us for the reasons which we have mentioned in our order on C. M. P. No. 3448 of 1940. Even after his petition was rejected, Mr. Narasimhachar wanted us to decide the question whether the attitude taken up by the trial Court, in this connexion, was correct. We have already stated our reasons for holding that it was not so and we say so in this judgment in accordance with the learned counsel's wishes.

The only question that now remains to be disposed of is that of payments. The lower Court has, while disposing of issue 19 held that payments were made by defendant 1 to the extent of Rs. 2650. It did not apparently read the entire documents Exs. 16 and 18 or it would not have fallen into this error. The payment referred to in Ex. 16 towards the mortgage was for Rs. 1100 and not for Rs. 1450. Similarly, the payment referred to in Ex. 18 was for Rs. 800 and not for Rs. 1200. This would reduce the amount of Rs. 2650 to Rs. 1900 only.

As to the payment by defendant 2 to Rangamma, the matter has been discussed by the trial Court under issue 8. Chinnammarao was the mortgagee under Ex. RR and even if the mortgage Ex. RR was benami as we have found it to be, she was still entitled to represent Timma and give a complete discharge. After Chinnammarao's death, Rangamma would be her heir and was entitled to do the same. Defendant 2 was, therefore, justified in making a payment of Rs. 8000 to her. It may be that the plaintiff is entitled to recover this amount from Rangamma or her heir in requisite proceedings, but so far as defendant 2 is concerned, it would not be possible for the plaintiff to make him liable for the same amount twice over. The defendants are therefore entitled to receive a credit for this amount. The receipt Ex. 2 acknowledging this payment is, however, an unregistered document and could not effect the release of defendant 2's share from the mortgage without registration which it purports to do. Defendant 2 is not thus legally entitled to ask for a release of his share and this his learned counsel conceded before us. What he urged was that the plaintiff should be in the event of a decree being passed in his favour, directed first to proceed against the share of defendants 1 and 3 and to proceed against the share of defendant 2 only if any portion of his decree remained unsatisfied. This request was not opposed by the other contesting defendants except to a small extent on behalf of defendant 3, who made a similar prayer in regard to the property which appears to have fallen to his share in some private partition. We propose to consider these prayers towards the end of this judgment.

As for the sum of Rs. 21,045 the respondents' contention was that a credit for the amount should be granted to him. The details for this amount are to be found in para. 10 of the amended written statement of defendant 1. These payments were

alleged to have been received by Timma long before he executed the deed of gift or Ex. RR and we agree with the lower Court that these items must have been taken into consideration by Timma before he executed the mortgage Ex. RR. If interest was calculated in accordance with the terms of the mortgage deed, it would have come to much more and this shows that these payments must have been taken by Timma into account. As for the sum of Rs. 12,283-5-10, the details of which are also given in the same paragraph of the same written statement, we find that the matter was discussed by the trial Court in paras. 58 to 61 of its judgment. These amounts appear to have been paid to Timma and the only reasons which the lower Court has given to disallow them to the defendants are that they could not have been appropriated towards Ex. RR and that Ex. RR. cannot be reopened now at the instance of the defendants. The defendants were no parties to Ex. RR and if any payments were made by them which were not taken into account, they would be entitled to get that done. We must therefore allow these items (of a total of Rs. 12,283-5-10) mentioned in para. 10 of the amended written statement of defendant 1 and hold that they were received on the dates stated therein. The plaintiff has produced Ex. KKK which would show that if the sum of Rs. 12,283-5-10 be given credit to the defendants on the dates on which the various items comprising this amount were received by Timma, a sum of Rs. 1,09,898-2-0 would be due in January 1913 in respect of Ex. F-1 and not the sum of Rs. 1,13,630 as represented by Exs. QQ and RR. Since Ex. QQ was a usufructuary mortgage for a sum of Rupees 50,000 only, the balance in regard to Ex. RR would have to be taken, as shown in Ex. KKK to be Rs. 59,898-2-0 on 2nd January 1913 instead of the sum of Rs. 63,630 which is to be found in Ex. RR. Mr. Narasimhachar's contention that Timma must be presumed to have foregone a sum of Rs. 11,000 independently of these items did not appeal to us. If these items were not to be taken into consideration, something like Rs. 1,24,000 would have been due on 2nd January 1913 in respect of Ex. F-1 while according to Timma's accounts it came to a sum of Rs. 1,13,898. The difference between this amount and the amount of Rs. 1,09,898-2-0 appears to have been mainly due to the calculation of interest from the dates on which these amounts were received. We have no reason to assume Timma's generosity in relinquishing an amount of something like Rs. 12,000 on the one hand and dishonesty in refusing to allow credit to the items of Rs. 12,283-5-10 received by him on the other. We are prepared to do neither and must therefore agree with the account given in Ex. KKK and hold that Ex. RR should have been for Rs. 59,898-2-0 only and not for Rs. 63,630.

As for the requests made on behalf of defendants 2 and 3 that their shares of the properties which have been allotted to them in some private partition or compromise may be sold only if the decree passed in favour of the plaintiff remains unsatisfied from the properties which have fallen to defendant 1's share. Since no objection has been raised to this on behalf of defendant 1 there appears to be no objection to accede to these prayers so far as the defendants inter se are concerned but the plaintiff was no party to any arrangement and it is only equitable that the order should not affect him adversely. We would, therefore, order that in realising his decree the plaintiff shall proceed against the properties allotted to defendant 1 and it is only when he finds that the whole of the decretal amount would not be realised from out of the mortgaged properties which have fallen to defendant 1's share that he may proceed against the other properties which have been allotted to defendants 2 and 3. It does not, however, mean that if any dilatory tactics are adopted by or on behalf of defendant 1 that the plaintiff would be disabled from proceeding against the properties which have fallen to the shares of defendants 2 and 3. We have acceded to the prayers made on behalf of defendants 2 and 3 purely for the sake of their convenience; but if the plaintiff finds that he is being inconvenienced by these conditions, he would be entitled to proceed against their properties simultaneously with those of the properties belonging to defendant 1 as well. As between defendants 2 and 3, the plaintiff may, subject to what we have said, proceed against the properties which have fallen to defendant 2's share before he proceeds against the properties belonging to defendant 3. Learned counsel for defendant 2 was agreeable to this course. For the foregoing reasons, the decree passed by the trial Court, and finding on the issues after remand are vacated and a preliminary decree is passed in favour of the plaintiff with costs of this and the trial Court both before and after remand. We have already observed the amount due under Ex. RR would be taken to be Rs. 59,898-2-0 and not Rs. 63,630. The plaintiff would be entitled to the contractual rate of interest upto the time of this decree and to six per cent. from the date of the decree upto the date of realisation. Time for payment six months. The compromise arrived at between the plaintiff and defendants 8 to 10 may be recorded and embodied in the decree. The long pendency of this appeal from 1931 to 1938 has attracted our serious attention and we have felt compelled to have the matter closely examined with a view to prevent similar delays in future.

C.R.K./K.S. *Order accordingly.*

A. I. R. (29) 1942 Madras 578

LEACH C. J. AND KUPPUSWAMI AYYAR J.

Madura Mills Co., Ltd. through its Managers, Messrs. A. and F. Harvey, Madura — Appellant

v.

Madura Sri Minakshi Sundareswaral, etc., Devasthanam represented by Executive Officer, R. S. Nayudu — Respondent.

Appeal No. 248 of 1939, Decided on 2nd December 1941, against decree of Sub-Judge, Madura, in O. S. No. 2 of 1938.

Madras Religious Endowments Act (2 of 1927), S. 44B—Inam of land granted in time of Karnatic Rajas—Inamdars to guard Sikaram of temple by four men night and day—Annual income of inam land not more than Rs. 136 — Grant not produced—Inamdars in statement to Inam Commission alleging "this land was given to our ancestors by the Rajas of Karnatic for watching tower of aforesaid temple" — Inamdars held entitled both to melvaram and Kudivaram rights in land—Contrary statements in mortgage deeds executed by inamdars held immaterial.

The inam was granted in the time of the Karnatic Rajas and the service to be performed was the guarding of the Sikaram of a temple. The inamdars

were required to provide four men as watchers throughout day and night. The grant had not been produced and the evidence with regard to it consisted of the statement made on behalf of the inamdars at the time the Inam Commission was sitting, the inam register and certain deeds of mortgage. The relevant portion of the entry contained in the statement to the Inam Commission was as follows : "This land was given to us by the Rajas of Karnatic for watching the tower of the aforesaid temple":

Held that (1) the words implied a gift of the soil to the Inamdars who became entitled to both the melvaram and the kudivaram : ('24) 11 A. I. R. 1924 Mad. 833, *Disting.* [P 579 C 2]

(2) the fact that the total income from the lands granted was small namely no more than Rs. 136 per annum also indicated that the inamdars were entitled to both the melvaram and the kudivaram; [P 580 C 1]

(3) the recitals by the inamdars in certain mortgage deeds executed by them that the land mortgaged was their ancestral property in which four-fifths of the kist had been remitted in their favour as remuneration for the performance of the Sikaram kaval service at the temple were merely "self serving" and no importance could be attached to them in view of the entry in the statement to the Inam Commission. [P 579 C 2]

King and Partridge — for Appellant.

K. Rajah Ayyar and T. A. Ramaswami Reddy — for Respondent.

LEACH C. J.—This is an appeal from a decree passed by the Subordinate Judge of Madura in a suit filed by the respondent under the provisions of S. 44 (B), Madras Religious Endowments Act, 1926 for a declaration that two parcels of land situate in the villages of Anuppanadi and Ponmeni were granted in respect of the Sikaram kaval service at the Shri Minakshi Sundareswaral temple, Madura, and that the lands were liable to resumption as the result of the failure of the grantees to perform the service. The appellants bought one of the parcels of land and the appeal is confined to the area which they purchased. It measures 5.9 acres. Sub-section (1) of S. 44 (B) provides that a sale of the whole or a portion of an inam granted for the performance of a charity or service connected with a math or temple and made, confirmed or recognized by the British Government, shall be null and void. Sub-s. (2) states that the Collector may resume the whole or any part of an inam of this nature if it has been sold, or the holder has failed to perform the service, or the math or temple has ceased to exist, or the charity or service in question has become impossible of performance. Any party aggrieved by an order of the Collector may appeal to the District Collector and if the District Collector's decision is against him he may file a suit in a civil Court for determining whether the inam comprises both the melvaram and the kudivaram or only the melvaram.

In this case it is common ground that the inam was granted in the time of the Karnatic Rajas and the service to be performed was the guarding of the Sikaram of this temple. The inamdars were required to provide four men as watchers throughout the day and night. The grant has not been produced and the evidence with regard to it consists of the statement made on behalf of the inamdars at the time the Inam Commission was sitting. the inam register and certain deeds of mortgage. In 1936 the Deputy Collector, at the instance of the Devasthanam, inquired into the question whether there had been a failure on the part of the inamdars to perform the service required of them and in the course of the inquiry he went into the question whether the inamdars were entitled to both the melvaram and the kudivaram. His conclusion was that the inam did not confer upon the grantees both the varams, but only the melvaram. On this basis he passed an order resuming the melvaram and re-granted it to the Devasthanam. The trustee of the Devasthanam appealed to the Collector, who confirmed the Deputy Collector's order. The result was the institution of the present suit. The Subordinate Judge held that the inam comprised both the varams. Consequently he granted a declaration that the lands themselves constituted the inam attached to the Sikaram kaval service at this temple. The appellants say that the Collector came to the correct conclusion and as the purchasers of the land they are entitled to the kudivaram. The statement presented to the Inam Commission contains in col. 4 this entry :

" This land was given to our ancestors by the Rajas of Karnatic for watching the tower of the aforesaid temple and they were watching the tower of the said Meenakshi Amman's temple and enjoying the said manyam land and now we are watching the tower of the said Meenakshi Amman temple and enjoying the inam land."

The land apparently was not then assessed, but if it had been it would have been assessed at the figure Rs. 43-2-9. On the basis of this statement, which has been marked as Ex. B, the Deputy Collector recommended that there should be a jodi of Rs. 8-10-2 per annum and this recommendation was accepted by the Inam Commission. In holding that the inam included both the varams the Subordinate Judge relied on the entry in col. 4 of the Ex. B. There is there the plain statement that the land was "given" to ancestors of the inamdars by the Rajas of the Karnatic for watching the tower. The words used imply a gift of the soil to the inamdars, and consequently the Subordinate Judge was right in holding that they became entitled to both the melvaram and the kudivaram. It has been suggested by the learned advocate for the appellants that the judgment of Venkatasubba Rao J. in 47 M. L. J. 598,[1] reads the word "land" in an inam grant in a different sense. It is clear from the judgment in that case that the learned Judge was merely interpreting the word in the light of the context. The grant in that case has nothing in common with the statement in Ex. B. For the appellants it is said that the statement made in Ex. B should be rejected because in a mortgage deed executed in 1899 and in subsequent deeds of similar nature the mortgagors stated that the land mortgaged was their ancestral property in which four-fifths of the kist had been remitted in their favour as remuneration for the performance of the Sikaram kaval service at the temple. We do not attach the same importance to these recitals as to the statement in Ex. B. There would naturally be difficulty in mortgaging the lands if it was confessed that both the varams belonged to the mortgagors on terms of service. The Subordinate Judge has described the recitals in the mortgage deeds as "self serving" and in view of the statement in Ex. B this may very well be the case.

There is another factor which supports the conclusion of the Subordinate Judge and that is that

1. ('24) 11 A.I.R. 1924 Mad. 833 : 79 I. C. 619 : 47 M. L. J. 598, Chidambaram Gurukkal v. Sundaram Pillai.

the total income from the lands granted was small. At the time of the inam settlement the total income of both the parcels of land amounted to no more than Rs. 136 per annum. Assuming the melvaram to be a half of the total income this meant Rs. 68 for the services of four men continuously on duty night and day for three hundred and sixty five days in the year. It works out at less than Re. 1-8-0 per man per month. It is true that the temple authorities have provided watchers with their meals, but even taking this into consideration the remuneration would be very small indeed. We consider that they must have got more than the melvaram for the services agreed upon. The Subordinate Judge has carefully considered all the factors in the case and we can see no reason to disturb his decision. Consequently the appeal will be dismissed with costs.

C.R.K./R.K. *Appeal dismissed.*

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* A. I. R. (29) 1942 Madras 580

LEACH C. J. AND BYERS J.

Kathersa Rowther — Appellant

v.

Abdul Rahim Sahib and others — Respondents.

Letters Patent Appeal No. 12 of 1941, Decided on 2nd March 1942, against decree of Abdur Rahman J., in S. A. No. 226 of 1939.

*** Civil P. C. (1908), O. 8, R. 6 and O. 2. R. 2 — Defendant who pleads set off is bound by O. 2, R. 2.**

A defendant who pleads a set off under O. 8, R. 6 is bound by O. 2, R. 2 and is to be deemed to be a plaintiff within the meaning of O. 2, R. 2 and consequently has to suffer the consequences of an omission. Therefore, if he omits to include part of his claim to set off which he is entitled to make, he has for ever lost his right to the part of the claim omitted and a subsequent suit in respect of it is barred: 32 Cal. 654, *Rel. on*; (1885) 54 L. J. Q. B. 236, *Disting.* [P 580 C 1; P 581 C 1, 2]

C. P. C.—

('40) Chitaley, O. 2, R. 2, N. 28 Pt. 1; O. 8, R. 6, N. 13 Pt. 2.

('41) Mulla, Page 527 N. "(5) Set-off."

T. V. Muthukrishna Ayyar and K. S. Ramamoorthy — for Appellant.

B. Somanatha Rao and T. M. Krishnaswami Ayyar — for Respondents.

LEACH C. J.—The question which arises here is whether the defendant who pleads a set off under O. 8, R. 6, Civil P. C., is to be deemed to be a plaintiff within the meaning of O. 2, R. 2 and consequently has to suffer the consequences of an omission. Although the point of law can be stated shortly, the facts of the case are somewhat complicated and it is necessary in order to appreciate the position to refer to them at some length. Seeni Rowther, the father of defendants 1 and 2, had four sons, the other two being named Mohammad Abdulla and Abdul Rahiman respectively. The father died on 4th January 1922, and in the following year the sons decided to partition the assets before discharging the debts due by the estate. Each of the brothers was allotted specific properties and he undertook to discharge specified debts. The terms of the partition were set out in a deed dated 1st August 1923. Each brother agreed that if he did not discharge the debts for which he undertook responsibility, any brother called upon to pay could claim against the defaulting brother a charge on the properties allotted to him. In O. S. No. 522 of 1915 of the Court of the Town Munsif of Madura, a money decree was obtained against the father. He failed to pay the decretal amount and when the sons partitioned the estate there was due under this decree a sum of Rs. 2548 which defendant 1 undertook to pay. In O. S. No. 105 of 1914 in the Court of the Subordinate Judge of Madura a mortgage decree had been passed against the father, and on 1st August 1923 the amount due to the decree-holder was a sum of Rs. 36,000. Under the terms of the partition, defendant 1 was required to pay Rs. 10,795 of this sum, defendant 2 Rs. 10,090, Mohomed Abdulla Rs. 13,495 and Abdul Rahiman Rs. 1620.

Defendant 1 failed to pay the amount due to the decree-holder in O. S. No. 522 of 1915. The result was that the decree-holder attached property which had been allocated in the partition to defendant 2. On 12th September 1925 the attached property was sold and the purchaser obtained possession. The value of the property was Rs. 3000. Defendant 2 and Mohamed Abdulla failed to pay their shares of the decree obtained against the father in O. S. No. 105 of 1914 and in order to avoid a sale of the properties which had been allotted to defendant 1 and Abdul Rahiman, they were compelled to pay what was outstanding. In this connection defendant 1 had to expend Rs. 2691-5-4. In O. S. No. 26 of 1931 of the Court of the District Munsif of Palni defendant 1 sued to recover from defendant 2 and Mohamed Abdulla the Rs. 2691-5-4. Defendant 2 pleaded that he was only responsible for Rs. 1151-6-3 of this amount and that he was entitled to recover from defendant 1 a sum in excess of the pecuniary jurisdiction of the Court, namely in excess of Rs. 3000, by reason of the default which defendant 1 had made in paying the amount due to the decree-holder in O. S. No. 522 of 1915. By this plea of set off he sought to defeat defendant 1's suit and at the same time leave himself free to bring a suit for any balance which might be due to him. The District Munsif held that defendant 2 was indebted to the plaintiff, the present defendant 1, in the sum of Rs. 1151-6-3 as claimed by defendant 1 but that more than this sum was due by defendant 1 to defendant 2 and on this basis he dismissed the suit. On appeal the learned Subordinate Judge, Dindigul, agreed with this decision, as did Abdur Rahman J. on second appeal to this Court.

On 13th November 1935, defendant 2 assigned to the present appellant the balance of the amount owing to him by defendant 1, after giving credit for the Rs. 1151-6-3. On 2nd September 1936 the appellant instituted in the Court of the Subordinate Judge of Dindigul the present suit to recover from defendant 1 the balance of his indebtedness to defendant 2. The pleas raised by way of defence included the contention that the suit was barred by reason of the provisions of O. 2, R. 2, Civil P. C., and that all that the appellant had received was a mere assignment of a right to sue which meant that the suit could not be maintained. The Subordinate Judge held that the suit was not barred by reason of O. 2, R. 2, but he upheld the contention that the assignment was the assignment of a mere right to sue and therefore the suit was bad. On appeal the District Judge of Madura disagreed with the Subordinate Judge that there had been an assignment of a mere right to sue and also disagreed with him on the question of the applicability of O. 2, R. 2.

The District Judge considered the provisions of that rule were fatal to the suit. The appellant then appealed to this Court and his appeal was heard by Abdur Rahman J. who agreed with the District Judge that O. 2, R. 2 was a bar. The present appeal is from the judgment of Abdur Rahman J. under Cl. 15, Letters Patent, the learned Judge having given the requisite certificate.

Order 8, R. 6 (1) states that where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand an ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as in the plaintiff's suit the defendant may present a written statement containing the particulars of the debt sought to be set off. Sub-rule (2) says that this written statement shall have the same effect as a plaint in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set off. Therefore the defendant who pleads a set off is in the position of a plaintiff. Moreover his written statement has to be stamped according to the value of the relief he claims. Order 2, R. 2 (1) says that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but he may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Sub-rule (2) says that when a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished. Sub-rule (3) states that when a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any relief, but if he omits any, except with the leave of the Court, he shall not be allowed to sue later for the relief omitted. This rule makes it quite clear that a cause of action cannot be split up although reliefs may be if the Court agrees. If the plaintiff omits part of the claim which he is entitled to make in respect of the cause of action, he has for ever lost his right to the part of the claim omitted.

The question whether the defendant who pleads a set off is bound by O. 2, R. 2 was discussed by a Bench of the Calcutta High Court in 32 Cal. 654[1] and it was held that he was. The position is discussed at length by Mookerjee J. whose judgment Abdur Rahman J. accepted as embodying a correct statement of the law. We agree. Order 8, R. 6 (2) requires the written statement put in by a defendant pleading a set off to be such as to enable the Court to pronounce a final judgment both in respect of the plaintiff's claim and of the defendant's claim.

On behalf of the appellant, Mr. T. V. Muthukrishna Iyer says that the District Munsif who tried O. S. No. 26 of 1931 was content to proceed with the case on the lines of defendant 2's written statement and therefore, his client, who stands in the shoes of defendant 2, should be allowed to adopt the case which was indicated in the written statement. It is manifest that defendant 2 ought not to have been allowed to rest his plea of set off on the written statement which he filed. His claim against defendant 1 was for Rs. 3000 and interest from 12th September 1925, which therefore was in excess of the jurisdiction of the Disirict Munsif's Court. There were two courses open to defendant 2 when defendant 1 sued him. He could either set up his own claim by way of set off and confine it to the sum of Rs. 3000, the limit of the pecuniary jurisdiction of the Court, or he could file a separate suit in the Court of the Subordinate Judge and ask the Subordinate Judge to transfer defendant 1's suit to his Court and try the two suits together. He adopted neither course and merely stamped his written statement to the value of Rs. 1151-6-3. The fact that defendant 2 succeeded in persuading the District Munsif to dispose of defendant 1's suit on the lines indicated by defendant 2, does not mean that he is now outside O. 2, R. 2. For the reasons given in 32 Cal. 654,[1] we consider that O. 2, R. 2 has application, and this means that the appellant cannot carry the matter further.

Before us, as before Abdur Rahman J. the appellant laid great stress on the decision of Mathew J. in (1885) 54 L. J. Q. B. 236.[2] That case had reference to the practice in County Courts in England in 1885 when there was no right of counter claim. The defendant could plead a set off, but merely in bar of the suit. He could not ask for a decree in his favour for any balance that might be due. Abdur Rahman J. considered that this case had no application and we again agree. The position is now very different in England because a defendant can bring a counter claim, and under the provisions of O. 19, R. 3 of the Rules of the Supreme Court, the Court has power to pronounce a final judgment in the same action both on the original and on the cross claim. We are bound by the provisions of the Civil Procedure Code and our reading of O. 8, R. 6 in conjunction with O. 2, R. 2 is that the appellant was precluded by the course taken by defendant 2 in the former suit from bringing this present action. Consequently the appeal fails and will be dismissed with costs of respondent 1.

We trust that this decision will see an end to litigation in connexion with the estate of Seeni Rowther. It is now over 20 years since he died and the attitude adopted by defendants 1 and 2 with regard to their liability to pay their shares of the debts of the estate does not redound to their credit. The sons got possession of all the assets, but some of the creditors were kept out of their money for a long time. The present suit was instituted some six years ago and has been pressed in four Courts with the same result in each of them.

C.R.K./K.S. *Appeal dismissed.*

1. ('05) 32 Cal. 654 : 1 C. L. J. 364, Nawbut Pattak v. Mahesh Narayun Lal.

2. (1885) 54 L. J. Q. B. 236:1 Cab. & E. 471, Webstor v. Armstrong.

A. I. R. (29) 1942 Madras 581

KING J.

Gopal Naicker—Appellant

v.

Alagirisami Naicker—Respondent.

Second Appeal No. 629 of 1940, Decided on 26th February 1942, against decree of Sub-Judge, Tuticorin, in A. S. No. 136 of 1938.

(a) Limitation Act (1908), Art. 181—Preliminary mortgage decree directing payment by instalments — Decree-holder on any default entitled at his option to sell mortgage property for instalments remaining unpaid—New cause of action accrues on every fresh default.

Where a preliminary mortgage decree provides for the payment of the mortgage money in instalments and in the case of default in the payment of

a any instalment entitles the decree-holder at his option to proceed to sell the mortgage property for the whole of the amount of the instalments still remaining unpaid together with the sum which he had provisionally relinquished, a new cause of action accrues under Art. 181 on every fresh default and not only once on the occurrence of the first default: 16 All. 237; ('21) 8 A.I.R. 1921 Lah. 42 and ('27) 14 A.I.R. 1927 P.C. 146, *Rel. on*; ('18) 5 A.I.R. 1918 Bom. 163 and ('34) 21 A. I. R. 1934 All. 534, *Dissent.* [P 582 C 1, 2]

Limitation Act —

('42) Chitaley, Art. 182, N. 136.

('38) Rustomji, Page 1813 Pt. 2.

(b) Limitation Act (1908), S. 19 — Mortgage —Preliminary instalment decree — Payment of instalment does not amount to acknowledgment.

b A payment of an instalment under a preliminary mortgage decree directing payment of mortgage money by instalments cannot, in any sense, amount to a recognition of the right of the decree-holder to apply for a final decree. It is merely a payment under the preliminary decree and is no more an acknowledgment of anything than a prompt payment would have been. [P 582 C 2]

T. L. Venkatarama Iyer—for Appellant.

A. Swaminatha Iyer and S. Thyagaraja Iyer — for Respondent.

JUDGMENT. — This appeal arises out of a mortgage suit in which a preliminary decree was passed in June 1933. It provided for the payment of the mortgage money in seven annual instalments of Rs. 115 each in June of each year; and also that if there were default in the payment of any instal- c ment the decree-holder might then proceed to sell the mortgaged property for the whole of the amount of the instalments still remaining unpaid, and also for the sum of Rs. 262 which he had provisionally relinquished. No instalment was in fact paid in either 1934, 1935, 1936 or 1937. On 22nd June 1938, before the 1938 instalment had become due, the decree-holder applied for a final decree, conceding however that though the first instalment had not been paid he could not claim it as still due. The judgment-debtor contended that the application was barred by limitation. This view was accepted by the learned District Munsif of Koilpatti, but on appeal a final decree was granted by the learned Sub-Judge of Tuticorin. This is a second appeal by the first judgment-debtor. It is common ground that the article in the Limitation Act which applies to this d case is 181, and that time begins to run when "the right to apply accrues." The essential point at issue is whether that right accrues only once on the occurrence of the first default, or as often as any default occurs. The appellant's learned advocate relies in the first place upon the language of the compromise decree itself. No doubt the language of the translation runs that in default of payment . . . such and such amounts "shall be collected by the plaintiff" but I am satisfied that there is nothing at all in the original Tamil to connote the idea of compulsion, and it is clear from the judgment of the learned Subordinate Judge that it must have been practically the agreed background of the discussion before him that the respondent was given by the decree an option to enforce its penalties or to refrain from doing so. It would certainly require the most explicit language before one could accept the interpretation that a creditor who has agreed to make a concession should bind himself to withdraw it the moment any default should occur.

The authorities which have been brought to my notice in this matter of the interpretation of Art. 181 e where periodical payments have to be made are almost equally divided. There is none in Madras which is binding upon me. 16 All. 237[1] and 2 Lah. 155[2] lay it down that every fresh default gives rise to a new cause of action, and in my opinion the ante-penultimate paragraph in the judgment of the Privy Council reported in 5 Rang. 422[3] (*see* p. 426) is to the same effect. On the other hand 42 Bom. 728[4] and 56 All. 921[5] are very definitely to the contrary. It is the former of these two views which very emphatically commends itself to me. 42 Bom. 728[4] is mainly based upon the principle that provisions for payment in instalments are intended to benefit not the creditor but the debtor; but I am unable with respect, to see why such a principle should continue to be applied when the debtor refuses to carry out those provisions, going even so f far as—in the Bombay case—refusing to make any payment for six years. In 56 All. 921[5] it is pointed out with undoubted force that the right to apply has certainly accrued whenever a first default occurs but the learned Chief Judge does not say why this fact should prevent a second right to apply from accruing when a second default occurs, and with respect I cannot understand what Mukherji J. means when he says "A right to apply may accrue on several occasions but for the purposes of limitation the first occasion when the right to apply accrues must be taken as the crucial date." The limitation Act does not specifically use the word "first" in Art. 181 as it does, e.g., in Art. 130 or Art. 131. And it seems to me that to read the word "first" into Art. 181 in a case like the present is to nullify the real significance of the decree which g provides that the enforcement of the penalty may follow upon any default, and, as I read it, that the decree-holder is at no time bound to enforce the penalty.

It seems to me further that if the view contended for by appellant's learned advocate be accepted limitation must begin to run as soon as the first default occurs, and nothing can stop it running. Let me take a hypothetical case, and suppose that the 1934 instalment, instead of not having been paid at all, had been paid a month late, then the instalments for 1935 and 1936, had been paid punctually, and finally there had been a fresh default in 1937. It is argued for the appellant that the tardy payment in 1934 would serve as an acknowledgment under S. 19, but I am quite unable to see how such a payment could in any sense amount to a recognition of the right of the decree-holder to apply for a final decree. h It is merely a payment under the preliminary decree and is no more an acknowledgment of anything than a prompt payment would have been. It seems therefore that the intervening payments could not prevent the period of limitation which had commenced

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1. ('94) 16 All. 237 : 1894 A.W.N. 61, Muhammad Islam v. Muhammad Ahsan.
2. ('21) 8 A. I. R. 1921 Lah. 42 : 63 I. C. 664 : 2 Lah. 155 : 80 P. L. R. 1921, Har Gopal v. Ram Rachpal.
3. ('27) 14 A.I.R. 1927 P.C. 146 : 101 I. C. 736 : 5 Rang. 422 : 54 I. A. 272 (P. C.), Maung Sing v. Ma Tok.
4. ('18) 5 A.I.R. 1918 Bom. 163 : 47 I. C. 313 : 42 Bom. 728 : 20 Bom.L.R. 773, Raichand Motichand v. Dhondo Laxman.
5. ('34) 21 A.I.R. 1934 All. 534 : 149 I.C. 598 : 56 All. 921 : 1934 A. L. J. 772, Ramprasad Ram v. Jadunandan Upadhia.

In 1934 from continuing to run, so that in the circumstances which I have supposed to exist, the decree-holder, because of his clemency in accepting the first instalment one month late, would be prevented from taking advantage of the subsequent default. Such a result would certainly seem to me to frustrate the clear intentions of the parties to the agreement. I am accordingly of opinion that the view of the learned Subordinate Judge is right and must be upheld. The appeal is dismissed with costs. Appellant must pay the court-fee to Government. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 583

SOMAYYA J.

Kannoli Narayan's wife Janaki — *Appellant*

v.

Kaiprath Sreedevi Amma's son Kanaru Ambalavasi and others — *Respondents.*

Second Appeal No. 1160 of 1940, Decided on 11th December 1941, against decree of Court of Sub-Judge, South Malabar at Calicut, in A. S. No. 85 of 1940.

Transfer of Property Act (1882), S. 55 (5) (b)— "Contract to the contrary"—Property sold free from encumbrance—Buyer's right to retain out of purchase money amount of encumbrance—Vendee to pay off creditor of vendor — Vendor undertaking in sale to pay off mortgage not doing so—Vendee is entitled to retain that sum —Neither direction to vendee to pay off creditor nor undertaking by mortgagor vendor to pay off mortgage or allowing vendee to pay it off and recover from him held contract to contrary.

Part of the sale consideration of a property was reserved with the vendee for payment to a simple money creditor of the vendor. As part of the same sale transaction the vendor undertook to pay a mortgage existing on the property sold and to free the property from encumbrance. In case the vendor failed to do it, the vendee was to pay it off himself and entitled to recover the same from the vendor. The vendor failed to pay off the mortgage whereupon the vendee did not pay the simple money creditor but sought to retain the money reserved :

Held that the sale was free from encumbrances and that neither the direction given to the vendee in the sale deed that the amount reserved was to be paid to the creditor nor the mortgagor's undertaking to pay the mortgage and giving liberty to the vendee to pay that sum in case the vendor did not pay and to recover it from him was a contract to the contrary within the meaning of S. 55 and hence the vendee was not precluded from retaining the sum reserved for payment to the simple creditor: Appeal No. 48 of 1940, *Foll.*; ('35) 22 A. I. R. 1935 All. 463, *Rel.on.* [P 583 C 1, 2; P 584 C 1, 2; P 585 C 1]

T. P. Act—

('36) Mulla, Page 307, Note "Free from incumbrances."

('34) Mitra, Page 280, N. 314.

Y. G. Krishnamurthy and P. Suryanarayana (amicus curiæ).

JUDGMENT. — This appeal involves the question whether an undertaking by a vendee to pay a creditor of the vendor precludes the vendee from retaining that sum when the mortgagor who undertook as part of the same contract of sale to pay off a mortgage on the property did not do so. Defendant 20 was the owner of the property, and he sold it to defendant 1 under a sale deed Ex. I, dated 20th June 1935. The consideration for the sale deed was a sum of Rs. 1935-15-1 out of which a sum of Rs. 302-12-4 was reserved with the vendee for payment to the plaintiff, who is a simple money creditor of the vendor. As part of the same sale transaction the vendor undertook to pay a mortgage existing on this and other properties and to free the property from that encumbrance as well. The wording is :

" The properties in the A schedule are included in the simple mortgage executed in favour of M. A. Subramania Iyer of Chakkirar Matam being document No. 1397 of 1934. That amount will be discharged without any delay, but if it is not so done and if the properties therein are sold and if there is any balance due for which you are made liable, then you can pay the same and be entitled to recover."

Finding that defendant 20 did not pay the mortgage due to Subramania Iyer, defendant 1 declined to pay the amount of Rs. 302-12-4 to the plaintiff. Thereupon defendant 20 assigned his right to recover this sum of Rs. 302-12-4 treating it as unpaid purchase money together with his vendor's lien to the plaintiff. The plaintiff as the assignee of the right of defendant 20 to recover this sum as unpaid purchase money filed this suit to enforce recovery thereof by sale of the property covered by the charge. Both the Courts rejected the plaintiff's claim and the plaintiff appeals. His learned advocate urges that in this case there is a contract that the vendee should pay this sum of Rs. 302-12-4 to the plaintiff and that there is also a contract by which the vendor himself was to pay and discharge the mortgage debt due to Subramania Iyer and that therefore the provisions of S. 55, T. P. Act, do not apply because that section begins by saying, "in the absence of a contract to the contrary." The learned advocate urges that the right given to the vendee to retain the unpaid purchase money in case the mortgages on the property are not discharged by a vendor in the case of a sale free from encumbrances is taken away in this case, because there is a contract to the contrary. Section 55, cl. 5 (b) runs thus :

" The buyer is bound to pay or tender, at the time and place of completing the sale, the purchase money to the seller or such person as he directs ; provided that, where the property is sold free from encumbrances, the buyer may retain, out of the purchase money, the amount of any incumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto."

This section expressly gives to the buyer a right to retain out of the purchase money the amount of any encumbrances on the property existing on the date of the sale, where the property is sold free from encumbrances. In this case it is undoubted that the property was sold free from all encumbrances in favour of Subramania Iyer. There is an express contract that the mortgagor shall pay that mortgage himself and he undertakes to do that without any delay. So the condition that the sale should be free from encumbrances is satisfied. So, the buyer may retain the amount of that encumbrance if the vendor does not discharge that encumbrance. In this case the vendor undertook to discharge it immediately; he did not do so; and the vendee prima facie is entitled to retain out of the purchase

money enough to pay the encumbrance in favour of Subramania Iyer. In this case the sum retained is admittedly much less than the sum due to Subramania Iyer. What is said is that the right given under S. 55, cl. 5 (b) is subject to a contract to the contrary and that the contract to the contrary is found in the direction given in the sale deed that the amount is to be paid to the plaintiff. He, as I said before, was and continues to be a simple money creditor of the vendor. Is this a contract to the contrary is the question. And again, is the mortgagor's undertaking to pay Subramania Iyer's mortgage and giving liberty to the vendee to pay that sum in case the vendor did not pay and to recover it from him a contract to the contrary?

A very similar case arose for decision before a Bench of this Court in Appeal No. 48 of 1940[1] which is an unreported case the judgment having been delivered only on 6th November 1941. It is enough to refer to one sale deed in that case for a sum of Rs. 2500 out of which Rs. 1300 was directed to be paid to a simple money creditor of the vendor. There was also an undertaking by the mortgagor to discharge other named encumbrances which were existing on the property. The prior mortgages which were existing on the property and which the vendor had to discharge were not discharged till June 1937. The vendee did not pay amongst other things the sum of Rs. 1300 to the creditor as directed by the sale deed. The vendors conveyed to the plaintiff the right to recover from the vendee the unpaid purchase money and also the right to recover the sum by enforcing the unpaid vendor's charge. The plaintiff to whom this right was assigned paid off the encumbrances which the vendor had to pay and brought the suit out of which the appeal arose for recovering the purchase money from the vendee. By the time of the suit the properties were free from the mortgages which had existed on the date of the sale. The vendee who was defendant 1 in the action paid the amount of Rs. 1300 into Court soon after the plaint was filed. Among other questions, one question was whether the vendee was liable to pay interest from the date of the mortgage or only from the date when the encumbrances existing on the date of the sale were cleared. After setting out the terms of S. 55, cl. (5) (b) the learned Judges discuss the question whether there was a contract to the contrary which would preclude the vendee from taking advantage of the right given in that section, and they say, "With regard to the sum of Rs. 1300 it is argued for the appellant that there is a contract to the contrary. Section 55, cl. 5 (b) of course applies only in case there is no contract to the contrary as is mentioned in the very opening clause of S. 55. That contract to the contrary, he states, is the undertaking of the vendors themselves to discharge the two mortgages Exs. B and C. The fact that they have undertaken to discharge Exs. B and C makes this a sale free from these particular encumbrances and therefore if there is no contract to the contrary, S. 55, cl. 5 (b) must apply. We are unable to see how the covenant by the vendors that they will themselves discharge Exs. B and C can be called a contract to the contrary. Exhibits B and C were mortgages undoubtedly existing upon the land which was sold and S. 55, cl. 1 (g) lays it down that, in the absence of any contract to the contrary, it is the vendors who must discharge those mortgages. The specific contract therefore entered into by the vendors in this sale deed that they would discharge Exs. B and C is a contract which is only in the fullest accordance with the general law as to the rights of buyer and seller enunciated in S. 55, and in no sense whatever can it be called a contract which is contrary to any such provision of law. Section 55, cl. 5 (b), therefore, can be put forward by defendant 1 in this case in support of his claim that he had a right to retain purchase money because the sale to him was free from encumbrances and his vendors did not in fact discharge the encumbrances."

It is true that in this case the learned Judges did not expressly deal with the question whether the direction in the sale deed to pay Rs. 1300 to the simple money creditor was a contract to the contrary; but it is clear that they did not regard it as such. It is difficult to see how this amounts to a contract to the contrary. It is only a case of the mortgagee retaining this amount as the agent of the mortgagor and would be bound to obey the mortgagor's directions as regards the disposal of that amount. Under the sale deed the vendor directs him to pay it to a particular creditor of his. There is nothing in law in such cases to prevent a vendor from varying that direction and to direct the vendee to pay it to himself or to any other person. In this case no doubt the sale deed contained a direction that the vendee should pay this amount of rupees 302-12-4 to the plaintiff who is a simple money creditor of the vendor.

The case of the plaintiff is that soon afterwards seeing that the vendee did not pay the plaintiff, the vendor called upon the vendee to pay that amount to himself and finding that he would not pay it assigned his right to recover that amount together with a charge for the unpaid purchase money to the plaintiff by a separate deed. At any rate therefore as soon as the original direction in the sale deed was varied by a request to the vendee to pay the amount to the vendor himself, the position is that of an ordinary sale where there is some amount left with the vendee which would ordinarily be payable to the vendor himself but which might be retained by the vendee under S. 55, cl. 5 (b) in case the sale is free from encumbrances and that to the extent of the money required to pay off the earlier encumbrance. In this view there is no point in the argument based upon this direction to pay the plaintiff. That is evidently why the learned Judges did not think it necessary to deal specifically with this aspect of the case. But it is undoubted that the case before the Bench is on all fours with the present case and that this case is indistinguishable from that case. I am therefore bound by the decision of the Bench. Mr. Y. G. Krishnamoorthi whom I requested to help me as amicus curiae as the respondents do not appear drew my attention to the above decision as well as to a few other decisions of the Allahabad and Calcutta High Courts. One decision reported in A.I.R. 1935 All. 463[2] may be referred to as it appears to me to have some bearing on this question. There the vendor undertook to deliver possession to the vendee and there was a direction that the vendee should pay a part of the purchase money left with him to a third party, a creditor of the vendor. The money was not paid. But the vendor did not deliver possession to the vendee. Finding that the vendee did not pay the amount to the named creditor the vendor filed the suit out of

1. Appeal No. 48 of 1940, Kota Veerabhadrayya v. Pangam Subbarao.

2. ('35) 22 A.I.R. 1935 All. 463 : 154 I. C. 305 : 1935 A.L.J. 255, Abdul Wahid v. Sher Muhammed Khan.

which the appeal arose for recovery of that amount by enforcing the vendor's lien.

The defence was that the vendor was under a duty to deliver possession and that until the vendor delivered possession he was not entitled to call upon the vendee to pay the purchase money. Under S. 55, cl. 1 (f) the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits. The vendor did not deliver possession on being required to do so by the vendee. But the vendor wanted that the money which was left with the vendee with a direction that it should be paid over to a creditor of his should be paid to him as unpaid purchase money. It was held that the vendee was entitled to put forward non-delivery of possession as a valid defence. It would be noticed that the obligation under S. 55, cl. 1 (f) as well as the right under cl. 5 (b) are all subject to the words "contract to the contrary" which are contained in the opening portion of the section. The direction to pay the purchase money to a third party and the undertaking by the vendee to do so were not obviously treated as a contract to the contrary. This decision might not be directly in point, but the principle of it seems to me to apply to this case. But in any way the decision of King and Lakshmana Rao JJ. in Appeal No. 48 of 1940[1] is directly in point and following it I dismiss this appeal. As the respondents do not appear in this case, I requested Messrs. Y. G. Krishnamoorthy and P. Suryanarayana to help me and I am very much indebted to them for the assistance that they have rendered. Leave refused.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 585

CHANDRASEKHARA AYYAR J.

Ratnavelu Pillai and another — *Petitioners*

v.

Varadaraja Pillai and another — *Respondents.*

Civil Revn. Petn. No. 838 of 1940, Decided on 22nd August 1941, to revise order of Dist. Munsif, Tiruvadi, D/- 5th March 1940.

(a) Civil P. C. (1908), Ss. 149 and 115—Order directing plaintiff to pay additional court-fee—Revision lies.

An order directing the plaintiff to pay additional court-fee can be the subject of interference under S. 115. Wherever a Court calls upon a plaintiff to pay additional court-fee and adjourns the suit to a later date for that purpose, it does refuse to proceed with the suit until the proper sum is put into Court. A specific order refusing to proceed with the suit is not contemplated by the Code. If the order directing payment of additional court-fee is not complied with, it is followed by an order dismissing the suit, and once there is such a dismissal, there can be no revision because the remedy is by way of an appeal against a decree : ('28) 15 A. I. R. 1928 Mad. 416, *Rel. on*; ('39) 26 A. I. R. 1939 Mad. 380, *Not foll.* [P 585 C 2]

C. P. C.—

('40) Chitaley, S. 115, N. 27-b Pt. 1; S. 149 N. 14 Pt. 2; O. 7 R. 11 N. 12.

('41) Mulla, Page 427 Pt. (a); Page 474 Pt. (m); Page 614 Pt. (d).

(b) Court-fees Act (1870), S. 7 (v) (c) — Words "net profits" in S. 7 (v) (c)—Meaning.

The words "net profits" in S. 7 (v) (c) must be construed to mean the net income or yield from the land after deducting from the gross yield the charges of labour and cultivation and not profits to the holder or owner of the land. [P 586 C 1]

V. Ramaswamy Iyer — for Petitioners.

S. Narasimha Iyengar — for Respondents.

ORDER. — A preliminary objection is taken that no revision lies against the order directing the plaintiffs to give the market value of the land and pay court-fees thereon. The plaintiffs paid court-fees on the basis of the net profits from the land for the previous year claiming to come within S. 7, cl. (4) (c), Court-fees Act, and the proviso to the Madras Act which brings in the method of court-fee calculation provided in S. 7, cl. (v). Kumaraswami Sastri and Wallace JJ. in 51 Mad. 664[1] overruled the preliminary objection and held on a consideration of the authorities that such an order can be the subject of interference under S. 115, Civil P. C. My attention has been drawn to the decision by Sir Sidney Burn J. in (1939) 1 M. L. J. 317[2] to the contrary where 51 Mad. 664[1] was considered. Apart from the fact that the Bench decision is binding on me, it must also be pointed out that the facts in (1939) 1 M. L. J. 317[2] could not really be distinguished from those in 51 Mad. 664[1] on the ground mentioned, namely, the Judge refusing to proceed with the suit until the proper court-fee is paid. Wherever a Court calls upon a plaintiff to pay additional court-fee and adjourns the suit to a later date for that purpose, it does refuse to proceed with the suit until the proper sum is put into Court. It is only in this sense that the Bench in 51 Mad. 664[1] appear to have thought that there was a refusal. It does not look as though there was a specific order refusing to proceed with the suit. As a matter of fact, no such order is contemplated by the Code. If the order directing payment of additional court-fee is not complied with, it is followed by an order dismissing the suit, and once there is such a dismissal, there can be no revision because the remedy is by way of an appeal against a decree. I overrule the preliminary objection on the strength of the Bench decision.

On the merits I think that the District Munsif gave a wrong meaning to the words "net profits" occurring in S. 7 cl. (v) (c), Court-fees Act. If a land pays revenue, the valuation of court-fees is either under cl. (a) if the revenue is permanently settled, or under cl. (b) if it is not so settled. If the land pays no revenue, or has been partially exempted from such payment or is charged with any fixed payment in lieu of such revenue, it is provided that the calculation is to be on 15 times the net profits that arose from the land during the year next before the date of presenting the plaint, or on the value of the land, if no such net profits have arisen. Having regard to the distinction made in the sub-clause between cases of land subject to payment of revenue and cases of land not subject to payment of revenue but which had yielded net profits, it is legitimate to hold that the term has been used to mean net income or yield from the land and not profits to the

1. ('28) 15 A. I. R. 1928 Mad. 416: 108 I. C. 539: 51 Mad. 664: 55 M. L. J. 345, Kulandavelu Nachiar v. Ramaswami Pandia Thalavan.
2. ('39) 26 A. I. R. 1939 Mad. 380: 186 I. C. 153: (1939) 1 M. L. J. 317, Manaithunainatha Desikar v. Gopala Chettiar.

holder or the owner of the land. Profits ordinarily mean excess of returns over outlay. In Wharton's Law Lexicon, the word is stated to mean "the advantages which land yields in the shape of rent, issues, or other emoluments." In the context in which the words "net profits" are used in the Court-fees Act they mean the net income from the land after deducting from the gross yield the charges of labour and cultivation. It is only if we take into account the fact that melwaram was due and payable on this land that we arrive at the result reached by the District Munsif, namely, that far from there having been any profits, the position was really the other way round, the liability far exceeding the income. But if we understand net profits in the sense in which I think they have been used in the Court-fees Act there is no such difficulty. It is common ground that in the year preceding the filing of the plaint the net realization from these lands was Rs. 106. I allow the revision petition and set aside the order of the lower Court. Costs here will be costs in the cause.

C.R.K./G.N. *Petition allowed.*

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* A. I. R. (29) 1942 Madras 586

KRISHNASWAMI AYYANGAR J.

In re T. A. Balakrishna Odayar — Insolvent.

Insolvency Petition No. 552 of 1927, Decided on 29th August 1941.

• (a) Presidency Towns Insolvency Act (1909), S. 68 — Settlement by Official Assignee with creditor of insolvent without leave of Court is not invalid.

The omission of the Official Assignee to seek and obtain the leave of the Court does not render the acts of the Official Assignee under cls. (c) to (i) of S. 68 (1) invalid or inoperative; only the Official Assignee will lose the benefit of a protection he would have got for himself had he obtained the leave. Therefore, a settlement entered into by the Official Assignee and a creditor of the insolvent is valid and binding on the parties, even though the Official Assignee has done so without applying for and obtaining leave of the Court : *English and Indian cases referred.* [P 586 C 2; P 588 C 2]

(b) Presidency Towns Insolvency Act (1909), S. 68 (1) (h) — Scope.

Clause (h) of S. 68 (1) does not make any distinction between compromises of claims in suits already instituted and those in respect of claims not brought before the Court. [P 586 C 2]

V. Thyagarajan, Official Assignee, in person.

R. Gopalaswami Ayyangar — for Insolvent.

ORDER. — This is an application taken out by the Official Assignee with respect to a settlement made by his predecessor in office, of a claim to preferential payment made by the respondent. By that settlement the then Official Assignee had agreed to pay to the respondent a sum of Rs. 12,000 against a claim of Rs. 24,000 or thereabouts. In pursuance of the settlement, he paid a sum of Rs. 6000 and there still remains a balance of Rs. 6000 to be paid on foot of the settlement. The Official Assignee who entered into this settlement did so without applying for and obtaining leave of the Court under S. 68, Presidency Towns Insolvency Act (3 of 1909). The present Official Assignee has very properly placed the matter before the Court with the request that the Court may either give its approval to the settlement or give such other directions as the Court may consider it proper. The question thus raised by the present application is one of considerable importance likely to recur frequently and it is desirable that I should take this opportunity to lay down the correct rule for guidance in future. Section 68, Presidency Towns Insolvency Act, enacts as follows :

"(1) Subject to the provisions of this Act, the Official Assignee shall, with all convenient speed, realise the property of the insolvent, and for that purpose may—(a) sell all or any part of the property of the insolvent; (b) give receipts for any money received by him; and may by leave of the Court, do all or any of the following things, namely: (c) carry on the business of the insolvent so far as may be necessary for the beneficial winding up of the same; (d) institute, defend or continue any suit or other legal proceeding relating to the property of the insolvent; (e) employ a legal practitioner or other agent to take any proceedings or do any business which may be sanctioned by the Court; (f) accept as the consideration for the sale of any property of the insolvent a sum of money payable at a future time or fully paid shares, debentures or debenture stock in any limited company, subject to such stipulations as to security and otherwise as the Court thinks fit; (g) mortgage or pledge any part of the property of the insolvent for the purpose of raising money for the payment of his debts or for the purpose of carrying on the business; (h) refer any dispute to arbitration, and compromise all debts, claims and liabilities, on such terms as may be agreed upon; (i) divide in its existing form amongst the creditors according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot readily or advantageously be sold.

(2) The Official Assignee shall account to the Court and pay over all moneys and deal with all securities in such manner as is prescribed or as the Court directs."

The powers and duties of the Official Assignee fall into two categories. Those in sub-s. (1), cls. (a) and (b) can be exercised without the Official Assignee seeking the leave of the Court. But in regard to the others described in cls. (c) to (i) the section says that he may do all or any of them by leave of the Court. The point that arises for consideration is whether and how far the omission of the Official Assignee to seek and obtain the leave of the Court affects the validity of acts done by the Official Assignee under cls. (c) to (i) aforesaid, more particularly the question of the validity of compromises entered into by him without leave of Court. It may at once be mentioned that cl. (h) does not make any distinction between compromises of claims in suits already instituted and those in respect of claims not brought before the Court. The contention of the respondent is that the absence of leave does not render the act of the Official Assignee invalid or inoperative; only the Official Assignee will lose the benefit of a protection he would have got for himself had he obtained the leave. At first sight the proposition may seem, as it did seem to me, to run counter to the language of the section. But a consideration of the history of the section and of the principle underlying it, as explained by the Bankruptcy Court in England in cases which have come before it on similar provisions in the English Bankruptcy Acts, has convinced me that the respondent is right.

a In (1857) 2 C. B. (N. S.) 1 = 140 E. R. 310,[1] the Court had to consider the effect of S. 153, Bankruptcy Act, 1849—12 and 13 Victoria, Chap. 106, which enacted that the assignees with the leave of the Court upon application to such Court, but not otherwise, may commence, prosecute or defend any action at law or any suit in equity which the bankrupt might have commenced, prosecuted or defended and in such cases the costs to which they may be put in respect of such suit or action shall be allowed out of the proceeds of the estate of the bankrupt. The action was one brought in the name of the Official Assignee for the recovery of a debt due from the defendants to the bankrupt and had been commenced without obtaining the leave of the Court. The defendants moved for a rule calling upon the plaintiff tc show cause why all proceedings in the case should not be stayed on the ground that the b action had been brought without first obtaining the leave of the Court pursuant to S. 153, Bankruptcy Act, aforesaid. It was urged that the object of the section manifestly was to prevent the estate of the bankrupt from being squandered by bringing reckless actions. For the plaintiff it was answered that the section merely enacted a provision for the internal management of the bankruptcy and the only persons who could complain of a breach were the creditors and such breach could not be made the ground of objection by the defendants. The point being a new one, the Court took time to consider it but in the end pronounced its judgment discharging the rule. Williams J. who delivered the judgment of the Court, conceded that the language of the section at first sight appeared strongly to support the rule. But on consideration c the learned Judge was of opinion, "..... ..... that the statute intended to make the obtaining of the requisite leave a matter only between the assignees and the Court of bankruptcy, and not at all between the assignees and the other party to the suit. The enactment, it must be observed, extends to the defence by the assignees of actions which the bankrupt might have defended, as well as to the commencement and prosecution of actions which he might have commenced and prosecuted. And, if the assignees were to defend such an action without having obtained the leave of the Court of bankruptcy, it is difficult, if not impossible to suggest how the Court of common law in which the action was pending could interfere with the defendants' proceedings."

The learned Judge also explained that the neg- d lect of the Official Assignee to obtain the requisite leave would only result in his not being allowed his costs out of the bankrupt's estate and might also subject him to the disciplinary jurisdiction of the Court. (1879) 13 Ch. D. 123[2] is a case in which the Court had to construe the effect of S. 27, Bankruptcy Act of 1869—32 and 33 Victoria, Chap. 71—which ran as follows :

"The Trustee may, with the sanction of the committee of inspection, do all or any of the following things: (1) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts; (2) Refer any dispute to arbitration, compromise all debts, claims, and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any debtor or person who may have incurred any liability to the bankrupt, upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon; (3) Make such compromise or other agreement as may be thought expedient with creditors, or persons claiming to be creditors in respect of any debts provable under the bankruptcy; (4) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person; (5) To divide in its existing form amongst the creditors, according to its estimated value, any property which from its peculiar nature or other special circumstances cannot advantageously be realised by the sale. The sanction given f for the purposes of this section may be a general permission to do all or any of the abovementioned things, or a permission to do all or any of them in any specified case or cases."

In this case the trustee in bankruptcy brought an action for the recovery of a sum of money due on a policy of insurance effected on the life of the bankrupt. The defendants to the action were the insurance company and also another person who claimed a portion of the insurance amount on a mortgage alleged to have been executed by the bankrupt. The action was settled on a compromise by which the trustee agreed to the payment of a part of the policy amount to the claimant. The trustee having resigned his office, was succeeded by another trustee who refused to be bound by the settlement on the ground that neither the consent of the committee of inspection nor of the Court of bankruptcy g had been obtained for the arrangement, and accordingly commenced the action for the recovery of the money paid to the claimant. The defendant having demurred Jessel M. R. upheld the demurrer on the ground that the power conferred by the section was a power for the trustee to do certain things so as to bind the creditors of the bankrupt and the creditors only, and that the case was not dissimilar to a compromise made by him out of Court in which case a person taking under the compromise would not be entitled to say that the trustee made it without the consent of the committee. To some extent the decision is complicated by a reference to S. 83 of the Act of 1869 which conferred a power on the trustee to sue and be sued without the consent of the committee and by the further circumstance that there was an order of Court made on consent h in the way. But I do not think that this affects the correctness of the principle which underlies the decision. This is made clear by the decision in (1914) 2 K. B. 701[3] in which the Court had before it "an application by the trustee for an order that the debtor's solicitors should deliver up to him all books, papers, and documents in their possession belonging to the bankrupt together with a full cash account showing the dealings" with him. The sanction of the committee of inspection had not been obtained at the time when the motion was commenced, indeed no committee of inspection had been appointed at the time, but the defect was made good later, and the question resolved itself into a question of costs as the defendants expressed their readiness to comply with the motion. Section 57,

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1. (1857) 2 C. B. (N.S.) 1 : 26 L.J.C.P. 151 : 3 Jur. (N.S.) 156 : 5 W. R. 487 : 140 E. R. 310, Lee v. Sangster.
2. (1879) 13 Ch. D. 123:48 L. J. Ch. 737: 28 W.R. 338, Leeming v. Lady Murray.
3. (1914) 2 K. B. 701: 83 L. J. K. B. 1316: 110 L. T. 940:58 S.J. 416, In re Branson; ex parte the Trustee.

Bankruptcy Act of 1883, 46 and 47 Victoria, Chap. 52—contained the following provision :

"The trustee may, with the permission of the committee of inspection, do all or any of the following things : (1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding up of the same; (2) bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt."

Horridge J. stated the point for decision in the following words :

"The question is whether the obtaining of that sanction is a matter for the protection of the estate so that the trustee may not incur solicitors' costs without getting the sanction of the committee, or whether the section creates a condition precedent to the right of the trustee to take proceedings against any third parties."

The learned Judge's decision was, "that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings."

The effect of these cases is, in my opinion, to lay down the proposition that the want of leave does not vitiate the act of the Official Assignee or render it null and void as between him and third parties, whatever its consequence may be in relation to his right to get his costs, charges and expenses out of the estate. There are also a few Indian decisions to which reference may be made. In 47 Cal. 555[4] at p. 557 the facts were these : The mortgagee under certain mortgages executed by an insolvent brought suits to enforce them, impleading the Official Assignee as a party. The subject-matter of the suits was referred to arbitration with the consent of the Official Assignee and an award came to be passed. The award was attacked on the ground that the Official Assignee had not obtained the leave of the Court before consenting to the reference. Rankin J. as he then was, accepted the principle of the English decisions referred to above and observed :

"The Official Assignee is a person in whom there is vested by law all the property of the bankrupt; it is his property, of course not that he may deal with it for himself, but that he may deal with it as a trustee for the benefit of the creditors, but in law it is his property; and it seems to me to be settled now by the authorities, that those provisions which have come into our Insolvency Act from the English Act, and which require the leave of the Court, are administrative provisions only; they are matters between the Court and the trustee; they are matters which may give creditors personal rights of action against the trustee; they are not matters which can be set up when the trustee as the person in whom the bankrupt's property is vested is meeting his enemy in the gate and is at arm's length with the third party outside the bankruptcy altogether. That seems to be the result of (1857) 2 C.B. (N.S.) 1,[1] the other case which was decided by Sir George Jessel, (1879) 13 Ch.D. 123,[2] and the last case before Horridge J., (1914) 2 K.B. 701.[3] I do not think it is a matter with which the other party to an action has any concern at all, whether the trustee has behaved himself vis-a-vis his Court, vis-a-vis his constituents the creditors, or whether he has done that which he is not strictly entitled to do. They are entitled to look to the trustee just as they would be entitled to look to the insolvent had he never been adjudicated, and I am, therefore, against Mr. Sircar's contention that the Official Assignee having assented to this submission on his own authority the award is invalidated by reason of that fact."

The learned Judge, however, felt bound to set aside the award upon other grounds. An appeal was preferred against the decision of Rankin J. but the point did not arise in the appellate Court and there is therefore nothing said in its judgment on it. In 42 M. L. J. 53,[5] which was a case which proceeded on the language of S. 20, Provincial Insolvency Act 3 of 1907, Spencer and Ramesam JJ. held, following the English decisions referred to above that, where an Official Receiver institutes a suit without the leave of the Insolvency Court, it is not a valid defence to the suit to say that such leave had not been obtained. The obtaining of the leave was held to be a matter between the receiver and the Court whose officer he was, and the want of leave could not be relied on by defendants in a suit, the only result being that the Official Receiver would be prosecuting the suit at his own risk in the matter of costs and cannot charge them on the insolvent's estate if he loses. A contrary note appears to be struck in 17 C.W.N. 578,[6] which was decided by Fletcher J. sitting on the original side. The suit was one by the Official Assignee to recover damages from the defendant company for failure to deliver goods in pursuance of certain forward contracts entered into by the insolvent. After holding that the Official Assignee was in fact carrying on the business of the insolvent in respect of these contracts, the learned Judge doubted whether the Official Assignee had the power to do so without the sanction of the Court. He observed, "that the only two powers that he (the Official Assignee) has got in acting of his own motion are, first of all, to sell the property and, secondly, to give receipts."

But the expression of this opinion was not only obiter, but made without reference to the decided cases on the point. In the light of the decisions referred to above, I am convinced that the settlement arrived at between the Official Assignee and the respondent is valid and binding on the parties and that effect must be given to it. My direction to the Official Assignee is that he is bound to fulfil the terms of the settlement. The Official Assignee will pay the costs of the respondent out of the estate in his hands.

C.R.K./K.S. *Order accordingly.*

4. ('20) 7 A.I.R. 1920 Cal. 113 : 55 I.C. 747 : 47 Cal. 555 : 31 C.L.J. 150 (F.B.), Laduram Nathmull v. Nandalal Karuri.

5. ('22) 9 A.I.R. 1922 Mad. 51 : 69 I.C. 908 : 45 Mad. 167 : 42 M.L.J. 53, Official Receiver, Coimbatore v. D. D. Kanga.

6. ('13) 17 C. W. N. 578 : 18 I.C. 756, C. E. Grey v. Walker, Goward & Co.

A. I. R. (29) 1942 Madras 588

SOMAYYA J.

Venugopala Naidu — Appellant

v.

Valambal Ammal and others — Respondents.

Second Appeal No. 996 of 1939, Decided on 4th December 1941, against decree of Sub-Judge, Trichinopoly, in A. S. No. 131 of 1937.

(a) Administration — Suit for — Court is not bound to make order for administration of estate when question between parties can properly be

a **determined without such order — Creditor obtaining money decree against heir at law to extent of assets of deceased in his hands and filing suit for administration of estate of deceased —Administration order held should be refused as plaintiff could obtain all relief under S. 52 (2), Civil P. C., by application in execution of his decree.**

It is not obligatory upon the Court to order administration of the estate where the question between the parties can be properly determined without an administration order, even though the plaintiff be an infant or though the testator has directed his executors to take proceedings to have the estate administered by the Court: ('36) 23 A.I.R. 1936 Bom. 423, *Rel. on.* [P 589 C 2]

The creditor filed a suit and obtained a decree b against the heir at law to the extent of the assets of the deceased in his hands and instead of proceeding to execute his decree filed a suit for the administration of the estate of the deceased:

Held that the Court was not bound to order an administration in a case where there were no circumstances calling for such action. Since the plaintiff could get under S. 52 (2), Civil P. C., all the remedy that he wanted by merely filing an application in execution of his decree his action for administration must fail. [P 590 C 1]

C. P. C. —

('40) Chitaley, S. 52, Notes 4 and 13 and O. 21, R. 13, N. 2.

('41) Mulla, Page 219, N. "Scope of the Section" and Pages 729-730, N. "Administration Suit."

(b) Civil P. C. (1908), S. 47—Creditor obtaining c money decree against heir at law to extent of assets of deceased in his hands—Suit by creditor for administration of deceased's estate whether barred by S. 47 *(Quære.)*

Where a creditor files a suit and obtains a decree against the heir at law to the extent of the assets of the deceased in his hands it is doubtful whether he is entitled to bring an action for the administration of the estate of the deceased. Section 47 would bar such a suit: 24 Cal. 473, *Approved*; ('28) 15 A.I.R. 1928 Mad. 713 (F.B.), *Ref.* [P 590 C 1]

K. V. Srinivasa Iyer — for Appellant.

S. Amudachari, N. Panchanatha Iyer and N. Suryanarayana — for Respondents.

JUDGMENT. — The appellant filed the suit out of which this appeal arises for the administration d of the estate of one Narayana Iyer who died in 1934, leaving a widow, respondent 1. Soon after the death of Narayana Iyer respondent 1 executed a trust deed in favour of one Srinivasa Iyer, an advocate of Trichinopoly town constituting him a trustee to sell the properties and to clear the debts of the deceased. Respondents 2 to 6 and 11 are some of the alienees either from the trustee or from the widow direct. These alienations are attacked as being nominal and fraudulent transactions and the suit is for the administration of the entire estate by the Court. Both the Courts found that all the alienations complained of were properly effected for a proper price in order to discharge the debts of the husband Narayana Iyer. Both the Courts therefore held that all the alienations are valid and binding on the estate of the deceased Narayana Iyer. There is no reason to differ from the findings of both the lower Courts on these points. The circumstances attending on each alienation are fully set out in the judgment of the trial Court. In appeal the question whether the alienation in favour of respondents 3 to e 6 are binding was practically given up. One alienation in favour of respondent 11 was seriously questioned and the Subordinate Judge found that that alienation was binding as well. Having gone through the findings and the circumstances of each alienation I hold that the various alienations are binding on the estate and on the plaintiff.

The plaintiff is a money decree-holder who filed a suit against defendant 1 in the year 1935. He obtained a decree against the assets of the deceased in the hands of defendant 1. Instead of proceeding to execute the decree he filed the present suit to have the estate administered on the ground that the heir at law is wasting the property and has not administered the property as she ought to have done. Both the lower Courts held that under the circumstances of this case there is no justification for the plaintiff filing this action and that the estate f need not be administered by the Court. It is argued by the appellant that every creditor has got a right of having the estate of an intestate administered by the Court and relies upon a decision of this Court in A. I. R. 1928 Mad. 713=27 M. L. W. 544.[1] Reliance is placed upon the observations of Srinivasa Ayyangar J. in that judgment. The learned Judge pointed out that the creditor of a deceased has two remedies, one to file a suit against the heir at law or the executor for a decree against the assets of the deceased in the hands of the heir at law which is the smaller remedy. It was pointed out that there is also another remedy, that is, by way of an administration action. But the question is, assuming that a creditor has got both the remedies, if he files a suit and obtains a decree against the heir at law to the extent of the assets of the deceased g in his hands, is he entitled to file an administration action and to insist upon the Court administering the estate? In this connection it is to be remembered that the Court is not bound in every case to administer the estate as pointed out in A. I. R. 1936 Bom. 423[2] at p. 429. It is clear on the authority that the Court is not bound to make an order for the administration of the estate when the question between the parties can be properly determined without such an order. The order may be refused even if the testator has directed the executor to take proceedings to have the estate administered by the Court. The law is laid down in these terms in 14 Hailsham 445, 849.

"It is not obligatory upon the Court to order administration of the estate where the question between the parties can be properly determined without an administration order, even though the h plaintiff be an infant or though the testator has directed his executors to take proceedings to have the estate administered by the Court."

In the present case the plaintiff's complaint is that defendant 1, the heir at law against whom he has obtained a decree has wasted several of the properties by effecting alienations of several portions of the estate in favour of near relations which are really not binding on the creditors. As I said before, all these alienations have been found to be valid and binding on the estate. Even apart from this finding, under S. 52 (2), Civil P. C., the plaintiff can get all the remedy that he wants by merely filing an appli-

1. ('28) 15 A.I.R. 1928 Mad. 713 : 109 I.C. 872 : 27 M.L.W. 544 (F.B.), Rajah of Kalahasti v. Venkatappa Nayanim Bahadur.

2. ('36) 23 A. I. R. 1936 Bom. 423 : 167 I.C. 529 : 38 Bom. L. R. 864, Kissondas v. Jivatlal Pratapshi & Co.

cation in execution of his decree. Section 52 (2) specifically provides for the very contingency which is complained of by the appellant. Section 52 (1) and (2) run thus :

"(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally."

Thus, under cl. (2) where no property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied the property of the deceased which is proved to have come into his possession, the decree may be executed against the judgment-debtor personally to the extent to which he has failed to satisfy the Court in the same manner as if the decree had been against him personally. If in execution of his decree the appellant files an application under S. 52 (2) and satisfies the Court that respondent 1 came into possession of some property and respondent 1 fails to satisfy the Court that she administered the estate properly and to account for all the property, the decree may be executed against her personally.

Further it is doubtful whether a creditor who has obtained a decree is entitled to file another action which in substance is really for the recovery of his debt. Though in form an administration action, his object is not so much to benefit the other creditors but to benefit himself and recover his debt in full. He has already filed a suit and obtained a decree—why then should he come to Court by means of another action styled an administration action and seek recovery of his debt in this action ? He has already obtained a decree for the recovery of his debt. He has only to attach a portion of the estate of the deceased and to proceed to sell it. Instead of attaching a sufficient portion of the estate of the deceased which it is his duty to do, if he files a separate suit, it looks as if S. 47 may be a bar. There is authority for this position in the decision of the Calcutta High Court in 24 Cal. 473.[3] But whether it is so or not, I am satisfied that the appellant's action must fail on the other ground that the Court is not bound to order an administration in a case where there are no circumstances calling for such action. In this case the plaintiff could well have attached all the properties immediately after he obtained his decree in 1935. He did nothing of the kind and if instead of proceeding in execution of his decree he chooses to file an administrative action, the Courts are not bound to take up the administration of the estate on their shoulders. In this case both the lower Courts have found that under the circumstances of this case the non-completion of the administration by the trustee was due to the plaintiff's own default in not carrying out the terms of the sale deed under which he purchased some property for which in addition to the amount of his decree he undertook to pay a further sum which he failed to pay. In the result the second appeal fails and is dismissed with costs of the contesting respondents 2 to 6, one set, to be divided among them. No leave.

C.R.K./G.N. *Appeal dismissed.*

3. ('97) 24 Cal. 473, Jogemaya Dasi v. Thackomoni Dasi.

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* A. I. R. (29) 1942 Madras 590

LEACH C. J. AND BELL J.

Sowdra Bai and others — Appellants

v.

Saraswathi Ammal—Respondent.

City Civil Court Appeal No. 43 of 1940, Decided on 6th February 1942, against decree of City Civil Judge, Madras, D/- 13th August 1940.

*** Contract Act (1872), S. 72— Money paid by *R* under influence of mistake that *A* was first mortgagee and *R* second mortgagee of *M* who was represented by *G* as *M* — *R* held entitled to return of amount paid.**

Where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back. There is nothing in S. 72 to suggest that it should only be applied when there is privity between the payer and payee. [Privity held existed between payer and payee.] *English cases discussed.* [P 591 C 1 ; P 592 C 1]

One *G* falsely representing himself to be *M*, the owner of a house and induced *A* to lend to him Rs. 2000 on a mortgage of the property. The real owner had no knowledge of the fraud. Again falsely representing himself to be *M*, *G* induced *R* to advance Rs. 3500 on a second mortgage of the property. *R* was to pay to *A* Rs. 2000 in discharge of the first mortgage. Believing that *G* was *M* and that *A* was first mortgagee of the property *R* paid to *A* the Rs. 2000. When the fraud was discovered *R* instituted suit to recover from *A* the Rs. 2000 as a payment made in mistake of the facts:

Held that *R* was entitled to a decree for the return of Rs. 2000. [P 592 C 1]

C. S. Venkatachariar, S. Rajam Iyengar, P. R. Sundaresan — for Appellants.

K. V. Ramachandra Iyer — for Respondent.

LEACH C. J. — On 7th January 1938, one Gangadara Mudali falsely representing himself to be Govindharaja Mudali the owner of a house and land known as No. 5, Muthia Naicken Street, Purasawalkam, Madras, induced the appellants to lend to him Rs. 2000 on a mortgage of the property. The real owner had no knowledge of the fraud. As Gangadhara Mudali had no interest in the property the mortgage deed of course conferred no title. Again falsely representing himself to be Govindaraja Mudali Gangadhara Mudali induced the respondent on 11th February 1938 to advance Rs. 3500, on a second mortgage of the property. Out of the Rs. 3500 which the respondent agreed to advance she was to pay to the appellants Rs. 2000 in discharge of the first mortgage. V. G. Sambasivamurthi Mudali, the son of Govindaraja Mudali, was a party to this second transaction, but again his father had no knowledge of what was happening. Believing that Gangadhara Mudali was Govindaraja Mudali and that the appellants were first mortgagees of the property the respondent paid to them the Rs. 2000. When the fraud was discovered the respondent instituted the present suit in City Civil Court to recover from the appellants the Rs. 2000

as a payment made in mistake of the facts. The case was tried by the principal Judge of the City Civil Court, who held that the respondent had paid the Rs. 2000 to the appellants under a mistaken belief that the mortgage executed in her favour had been executed by the true owner and it was that mistake which had induced the payment. Consequently he granted the respondent a decree for the return of the payment of Rs. 2000. The appeal is from this decision. Section 72, Contract Act states :

"A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it." There is here no ambiguity. If money is paid to a person by mistake he is bound to repay it. That the Rs. 2000 was paid by the respondent to the appellants in the mistaken belief that they were prior mortgagees is not open to question and if the words used in S. 72 are to be given their ordinary meaning the decree must stand. For the appellants, it is, however, contended that the case falls within the principle laid down in (1856) 1 H. & N. 210=156 E.R. 1180,[1] and that under the English common law a payment made by mistake cannot be recovered unless there is some privity between the payer and the payee. Consequently, it is said that the section should be read subject to the qualifications imposed by the common law. I will discuss these contentions presently but before doing so I consider it desirable to quote the judgment of Parke, B. in (1841) 9 M. & W. 54=152 E.R. 24[2] as it appears to me that S. 72, Contract Act, embodies the principle there stated, a principle which was approved of by the House of Lords in (1926) A. C. 670.[3] In (1841) 9 M. & W. 54[2] Parke, B. said :

"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Bayley J. in (1827) 6 B. & C. 671[4] and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."

In his speech in 1926 A.C. 670[3] Lord Shaw quoted in full the judgment of Parke, B. and it was accepted as governing the case. There a gross fraud had been perpetrated, as in this case. The facts in (1856) 1 H. & N. 210[1] have nothing in common with the facts here. In 1846 one Edwin Carter made a will by which he gave his property to his eight brothers and sisters in equal shares. In 1847 the testator died. In 1850 one of the brothers, George Carter, borrowed £200 from one Francies Short, who died in 1853. The suit was by Short's widow who was the sole executrix of his will. George Carter was also indebted to a bank to which in 1855 he conveyed his interest in the estate of Edwin Carter, subject to charges previously created by him. As security for the loan of £200 obtained from Short George Carter had mortgaged his interest in his brother's estate. After the conveyance to the bank the executrix of the will of Short applied to George Carter for payment of the £200. He referred her to the bank, which thereupon paid her the £200 in accordance with the terms of the conveyance which it had obtained from George Carter. After all this had happened, a later will of Edwin Carter was produced, and under it George Carter merely received an annuity of £100 which was to cease upon his making an assignment. The bank then applied to the executrix for repayment of the £200, and as she refused to comply with the demand a suit was instituted against her. It was held that the bank was not entitled to recover the money. In the course of his judgment Bramwell, B. said :

"In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money."

It is to be borne in mind that George Carter owed £200 to the estate of Francis Short and in paying the executrix the bank was discharging a lawful debt. In the present case both the appellants and the respondent were victims of a gross fraud. The Court of appeal applied (1856) 1 H. & N. 210[1] in (1938) 1 K. B. 49,[5] but Greene, M. R., was disposed to think that the observations of Bramwell, B., in (1856) 1 H. & N. 210[1] could not be taken to be an exhaustive statement of the law. He considered that they must be confined to cases where the only mistake is as to the nature of the transaction. In the course of his argument on behalf of the appellants, Mr. C. S. Venkatachariar referred us to (1864) 5 B. & S. 968=122 E. R. 1090.[6] In that case one Keys chartered a vessel belonging to the defendant, the hire being payable every four weeks in advance. It was a condition of the charter party that in the event of non-payment of the hire, the owner was to be entitled to retake his ship. A sum of £120 was due and Keys applied to the plaintiff to assist him. Thereupon the plaintiff handed Keys a cheque for £60, made payable to the defendant or order, on the understanding that Keys should inform the defendant that the cheque was given on the condition that the vessel should be allowed to proceed on a certain voyage. Keys paid the cheque to the defen-

1. (1856) 1 H. & N. 210 : 25 L. J. Ex. 321 : 108 R. R. 526 : 156 E. R. 1180, Aiken v. Short.
2. (1841) 9 M. & W. 54 : 11 L. J. Ex. 10 : 6 Jur. 107 : 60 R. R. 666 : 152 E. R. 24, Kelly v. Solari.
3. (1926) 1926 A. C. 670 : 95 L. J. K. B. 913 : 135 L. T. 548 : 32 Com. Cas. 8 : 70 S. J. 756 : 42 T. L. R. 644, R. E. Jones & Co. Ltd. v. Waring & Gillow Ltd.
4. (1827) 6 B. & C. 671 : 9 Dowl. & Ry. 731 : 5 L. J. K. B. 239 : 30 R.R. 498, Milnes v. Duncan.
5. (1938) 1 K. B. 49: 106 L.J.K.B. 544 : 157 L. T. 87 : 81 S.J. 477: 53 T.L.R. 786: (1937) 3 All.E.R. 92, Morgan v. Ashcroft.
6. (1864) 5 B. & S. 968 : 122 E. R. 1090 : 34 L. J. Q. B. 93 : 11 L. T. (N.S.) 614 : 13 W.R. 231 : 136 R. R. 832, Watson v. Russell.

dant, but did not tell him of the condition. As the whole of the £120 was not paid, the defendant took possession of his ship. Thereupon, the plaintiff sued the defendant to recover the money. It was held that as defendant received the cheque without notice of any condition and for valuable consideration, the plaintiff was not entitled to recover. It may be mentioned that in (1926) A. C. 670[3] where (1841) 9 M. & W. 54[2] was applied, Lord Shaw observed that (1864) 5 B. & S. 968[6] applied to a different set of circumstances and had no real bearing upon cases depending upon payments having been made under a mistake in fact. The class of case ruled by (1864) 5 B. & S. 968[6] was in his opinion confined solely to that of payments made under a condition not communicated to the receiver, a condition as to the future conduct which it was hoped, expected or stipulated should follow the payment.

It is not necessary to decide whether under Indian law (1856) 1 H. & N. 210[1] and (1864) 5 B. & S. 968[6] would apply in cases where the facts were similar. It is sufficient to say that the facts in the present case are not analogous to the facts in either of those two cases. The observations of Parke B., in (1841) 9 M. & W. 54[2] are directly in point and they fit in with S. 72, Contract Act. In support of the contention that if the respondent is entitled to proceed, she must show some privity between her and the appellants, stress has been laid on this passage in Addison's Law of Contracts (11th Edn., p. 462):

"It is necessary in order to maintain this action, that a certain amount of money belonging to one person should have improperly come into the hands of another and that there should be some privity between them."

This statement is based on (1864) 5 B. & S. 968[6] and (1886) 11 A. C. 84.[7] There is nothing in S. 72 to suggest that it should only be applied when there is privity between the payer and the payee; but assuming that this is essential, I consider that the condition is fulfilled here. The appellants thought that they were the first mortgagees of the property and the respondent thought she was the second mortgagee who was discharging a prior encumbrance. That there is privity between a first and second mortgagee has already been accepted by this Court: *see* 44 Mad. 544[8] and (1940) 2 M. L. J. 513.[9] It is true that the appellants were not mortgagees but they regarded themselves as such. In my judgment there is here sufficient privity, if privity is an essential factor in this action. For these reasons I consider that the decree passed by the trial Court is in accordance with law and I would dismiss the appeal with costs. The respondent has filed a memorandum of cross-objections and the learned trial Judge directed the parties to pay their own costs. As the plaintiff succeeded she should have been given her costs. Therefore the memorandum of cross-objections should be allowed with costs.

C.R.K./R.K. *Appeal dismissed.*

7. (1886) 11 A. C. 84 : 55 L. J. P. C. 14 : 54 L. T. 256 : 34 W. R. 417, Colonial Bank v. Exchange Bank of Novo Scotia.
8. ('21) 8 A.I.R. 1921 Mad. 102 : 62 I. C. 393 : 44 Mad. 544 : 40 M. L. J. 218, Askaran Sowkar v. Venkataswami Naidu.
9. ('41) 28 A. I. R. 1941 Mad. 113 : 195 I.C. 697 : I. L. R. (1941) Mad. 53 : (1940) 2 M. L. J. 513, Periaswami Chettiar v. Ramaswami Goundan.

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* A. I. R. (29) 1942 Madras 592

ABDUR RAHMAN AND SOMAYYA JJ.

L. K. Minakshi Ayyar and another — *Appellants*

v.

Janaki R. Achalier and others — *Respondents.*

Appeals Nos. 328 of 1939 and 372 of 1940, Decided on 3rd March 1942, against decree of Sub-Judge (Principal), Madura, D/- 31st March 1939.

(a) Civil P. C. (1908), O. 34, R. 10—Redemption suit—Mortgagee is entitled to costs unless his conduct disentitles him.

In a suit for redemption, the Court is bound to give the mortgagee his costs of the suit unless the Court is of opinion that his conduct has been such as to disentitle him thereto. [P 593 C 2]

C. P. C. —
('40) Chitaley, O. 34, R. 10, N. 3, Pt. 1.

*** (b) Mortgage — Redemption — Mortgagee should not be made to pay costs of person redeeming unless his conduct has been vexatious or unreasonable.**

A prior mortgagee should not be made to pay the costs of the second mortgagee who wants to redeem the prior mortgage unless the prior mortgagee's conduct has been vexatious or unreasonable. [P 593 C 2]

Before filing a suit for redemption of the prior mortgage by the subsequent mortgagee, the subsequent mortgagee had deposited the amount under S. 83, T. P. Act. The prior mortgagee refused to accept the deposit and wanted the mortgagor to be impleaded as the mortgagor had disputed the right of the subsequent mortgagee:

Held that the conduct of the prior mortgagee in taking that objection was neither vexatious nor unreasonable and that he should not be made to pay the costs of the subsequent mortgagee. [P 593 C 2]

C. P. C. —
('40) Chitaley, O. 34, R. 10, N. 3.

(c) Transfer of Property Act (1882), S. 83 — Mortgagee accepting tender is not entitled to any further relief as against mortgagor or person making deposit.

After the mortgagee accepts the tender under S. 83 he is not entitled to claim any further relief as against the mortgagors or the person making the deposit. He is bound to accept the deposit in full settlement of all his claims. If he is not prepared to do it, then he ought to decline to accept the amount deposited. [P 594 C 1]

T. P. Act —
('36) Mulla, Page 502, Pt. (x).
('34) Mitra, Page 508, N. 508.

(d) Transfer of Property Act (1882), S. 72 (d) — Amount spent by mortgagee in suit for making good his title to property as against mortgagor can be added to mortgage money.

Where the mortgagors did not recognise the right of the mortgagees prior to the suit and the mortgagees were forced to file a suit for making good their own title to the property as against the mortgagors, the case is covered by the language of S. 72 (d). The mortgagees should be allowed to add

the amount which is spent for the suit to the principal money secured by their mortgage and to recover it under the provisions of S. 72 of the Act. [P 594 C 1]

T. P. Act —
('36) Mulla, Page 457, Pt. (a).
('34) Mitra, Page 451, N. 446.

O. V. Baluswami — for Appellants.

D. Ramaswami Ayyangar, V. S. Rangachari and V. Meenakshisundaram—for Respondents.

SOMAYYA J. — There are two appeals, A. S. Nos. 328 of 1939 and 372 of 1940, both arising out of O. S. No. 12 of 1939 which was a suit for redemption of a mortgage executed by defendants 2 to 5 in favour of defendant 1 under Ex. B dated 26th January 1934. Defendants 2 to 5 executed a subsequent mortgage in favour of the plaintiffs under Ex. A, on 27th August 1937 and the plaintiffs filed the suit out of which the appeals arise for redeeming the prior mortgage in favour of defendant 1. Before filing the suit the plaintiffs deposited the amount which they considered to be due under the mortgage Ex. B in O. P. No. 45 of 1938. This was on 29th October 1938. They made the present defendant 1 the prior mortgagee alone a party and asked for the usual reliefs grantable under S. 83, T. P. Act. To this a statement of objections was filed by the respondent and two reasons were given by him for not accepting the amount deposited in Court. One is that the mortgagors who executed Ex. B to him and Ex. A to the plaintiffs (who were the petitioners therein) were disputing the right of the plaintiffs petitioners and therefore it would be unsafe for him to receive the amount and hand over possession in the absence of the mortgagors. Therefore he said that unless the mortgagors were made parties to that petition, it would not be safe for him to receive the amount and to hand over possession to the applicants. It appears that the mortgagors refused to register the mortgage in favour of the plaintiffs and resort was had to proceedings by way of compulsory registration. The document was compulsorily registered in February 1938. The petition under S. 83, T. P. Act, was filed on 29th October 1938 and notice thereof was given to the mortgagee respondent on 18th November 1938. The respondent gave another reason for not accepting the amount and that is that there were crops on the land which he had raised. He said "The property which is under mortgage has been cultivated by the respondent and in a short while crops would be harvested." It is now found by the Subordinate Judge that the crops were five months old at the time of the petition and that they were harvested in February of the next year. As the mortgagor was not made a party to the application the Court passed an order Ex. C dated 29th November 1938 closing the petition on the ground that the respondent was not willing for the reasons stated by him in his counter affidavit to receive the amount and to give up possession. The present suit was filed on 12 January 1939. The prior mortgagee is defendant 1 and the mortgagors are defendants 2 to 5. The lower Court has decreed redemption and to that extent there is no objection by any party. Defendant 1 is the appellant in A. S. No. 328 of 1939 and he objects to the order made by the lower Court as regards costs and as regards mesne profits prior to the date of suit. As regards the costs, the appellant objects to his being made liable to pay the costs of the plaintiffs which is the direction made by the lower Court. Issue 2 was raised regarding the liability of defendant 1 for costs of the suit and on that issue the lower Court states thus :

"As regards costs, since the deposit under S. 83 was good and since defendant 1 refused to receive the money and be redeemed he is liable to pay the costs."

The rule as to costs in a redemption action is laid down in O. 34, R. 10, Civil P. C. :

"In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage money such costs of the suit and other costs . . . ."

So the Court is bound to give the mortgagee his costs of the suit unless the Court is of opinion that his conduct has been such as to disentitle him thereto. The law is stated in Fisher on the "Law of Mortgage" (Edn. 7) at page 752 thus :

"*Rule as to costs of suit.* — The mortgagee is entitled as of right to the costs properly incurred by him in an action of foreclosure, or redemption, and this right extends to an equitable mortgagee, including a mortgagee by deposit whether with or without a memorandum of deposit. But he may forfeit these costs by misconduct, or may even have to pay the costs of such an action in a case where he has acted vexatiously or unreasonably."

The appellant only asks that he should be relieved of the liability to pay costs of the plaintiffs in this action. In the lower Court he no doubt asked for costs of the suit to be paid to him. But in valuing the memorandum of appeal he has confined it to the costs which he was asked to pay the plaintiffs, and we are therefore not concerned with his rights to get costs from the plaintiffs. Hence the only question is whether he has been rightly made to pay the costs of the plaintiffs. We have therefore to see whether his conduct has been vexatious or unreasonable. In this case having regard to the fact that the mortgagors did not submit to registering the document without resort to compulsory registration and to the fact that even after the petition was filed on 29th October 1938 by the present plaintiffs under S. 83, T. P. Act, a notice was issued by the mortgagors under Ex. J dated 14th November 1938 disputing the right of the present plaintiffs, at any rate to get redemption of the prior mortgage unconditionally, we do not think that there was anything unreasonable in the conduct of the mortgagee in insisting upon the mortgagors being made parties to the petition before submitting to redemption. It is unnecessary to consider whether strictly the mortgagors are necessary parties to an application under S. 83 of the Act. What we are concerned with is whether the conduct of the mortgagee in the circumstances of this case is such as to be properly characterised as vexatious or unreasonable. Far from being vexatious or unreasonable, we think there was every justification for him to make the request which he did that the mortgagors should also be made parties before any further orders are passed on that application. Since the plaintiffs did not take any steps to implead the mortgagors, the Court had no option but to pass an order which it did, namely closing the application. The word "closed" is really not proper. The petition should have been formally dismissed. We are clearly of opinion that there is nothing vexatious or unreasonable in the conduct of the mortgagee in refusing to accept the amount in the absence of the mortgagors.

This is enough to dispose of the appeal filed by defendant 1 in so far as it relates to costs. He ought

not to have been made liable to pay the costs of the plaintiffs. The next question is whether the plaintiffs are entitled to any mesne profits prior to the date of suit. The lower Court has found that the mortgagee was entitled to the income from the property upto the date when he got notice of the application under S. 83. This comes to a few hundreds of rupees. The amount which the plaintiffs deposited under S. 83 did not admittedly include this amount. The deposit under S. 83 is therefore open to this objection as well, that the amount which was deposited is not the full amount due under the mortgage. It is argued by the learned advocate for the respondents that the mortgagee may be entitled to a portion of the income from the date of the commencement of the cultivation upto the date of the notice to him, but that his clients, the plaintiffs were bound only to deposit Rs. 5728. His argument is that it is not as a mortgagee that he is entitled to the income during this period. We are unable to accept this contention. After the mortgagee accepts the tender under S. 83, T. P. Act, he is not entitled to claim any further relief as against the mortgagors or the person making the deposit. He is bound to accept the deposit in full settlement of all his claims. If he is not prepared to do it, then he ought to decline to accept the amount deposited, and that is the course which defendant 1 adopted in this case. We think that he adopted the right course. In fact, there was no other alternative for him to pursue. If the lower Court's finding is correct that the prior mortgagee, defendant 1 was entitled to the income upto the date of his receiving the notice of the petition under S. 83 and he was entitled to it only in his character as a mortgagee there being no tender of that amount, the deposit is not proper. We therefore set aside the decree for mesne profits upto the date of the suit. We think however that the plaintiffs are entitled to the mesne profits from the date of suit upto the date when the harvest was completed. The harvest was completed, according to the evidence of D. W. 1, on 23rd February 1939. The plaintiffs will therefore be entitled to mesne profits from 12th January 1939, the date of the plaint, upto 23rd February of that year.

Mr. Ramaswami Ayyangar, the learned advocate for the respondents, then urges that if he is not to get the costs of the action from defendant 1 the prior mortgagee, he is at least entitled to do so from the mortgagors or that he is entitled to add, the costs to his mortgage amount under S. 72 (d), T. P. Act. The mortgagors did not recognize the right of the plaintiffs prior to the suit. They would not register the document which they executed. They issued the notice Ex. J on 14th November 1938. The plaintiffs were therefore justified in filing this suit and the suit is really one for making good their own title to the property as against the mortgagors. The case is therefore covered by the language of S. 72 (d) and we consider that they should be allowed to add the amount which is spent for the suit to the principal money secured by their mortgage and to recover it under the provisions of S. 72 of the Act. But they will not be entitled to so add the costs of this Court.

In A. S. No. 328 of 1939 there is also an objection as to the rate of the mesne profits granted by the lower Court. It is said that during the year in question there was scarcity of water and that defendant 1 did not realise as much as ten bags of paddy per acre from the tenants. The lower Court has pointed out that apart from the interested statement of defendant 1 there is nothing to show that the full amount was not realised by him. We accept the finding of the lower Court on this question. The result is that A. S. No. 328 of 1939 is allowed except as to the quantum of mesne profits and A. S. No. 372 of 1940 also succeeds. In A. S. No. 328 of 1939 the plaintiffs-respondents will pay the costs of the appellant therein. Otherwise the parties will bear their own costs of this appeal. In A. S. No. 372 of 1940 the respondents will pay the costs of the appellants. The amounts paid to the Court guardians in each case will be added to the costs of the appellants in the respective appeals.

C.R.K./K.S. *Order accordingly.*

A. I. R. (29) 1942 Madras 594

HORWILL J.

Arunachala Reddy — Petitioner

v.

Sellamuthu Goundan and others — Respondents.

Criminal Revn. No. 705 and Petn. No. 663 of 1941, Decided on 18th December 1941, to revise order of Second Class Magistrate, Turayur, D/- 28th April 1941.

(a) Criminal P. C. (1898), S. 247—Allegations in complaint constituting warrant case—Magistrate can adopt summons procedure if he comes to conclusion that only minor offence has been committed—Magistrate without giving any reasons ordering complaint filed under S. 427, Penal Code to be taken as under S. 426, Penal Code and acquitting accused under S. 247, Criminal P. C., acts without jurisdiction.

It is open to a Magistrate, who entertains a complaint and records a sworn statement to come to the conclusion that although the complaint allegations constitute an offence triable under the warrant procedure yet in fact a minor offence was committed, that he may adopt a summons procedure if the offence appears to be one to which the summons procedure could be applied, and that he may proceed with the case as if the complaint was one of the minor charge only. But where the Magistrate without giving any reasons orders that a complaint of an offence under S. 427, Penal Code, be taken on file for offence under S. 426, Penal Code, and acquits the accused under S. 247, Criminal P. C., he acts without jurisdiction. [P 595 C 1]

Cr. P. C.—
('41) Chitaley, S. 247, N. 3.
('41) Mitra, Page 876, N. 795A.

(b) Penal Code (1860), Ss. 426 and 427 — Distinction.

The only distinction between an offence punishable under S. 426, and one punishable under S. 427, is the extent of the damage done. [P 595 C 1]

Penal Code —
('36) Ratanlal, Page 1066, Pt. (5).
('36) Gour, Page 1486, Pt. (4).

G. Gopalaswami — for Petitioner.

A. V. Narayanaswami Iyer — for Respondents.

Public Prosecutor — for the Crown.

ORDER. — The petitioner filed a complaint against a number of persons in which he disclosed an offence punishable under S. 427, Penal Code. The Magistrate recorded his sworn statement; but there was nothing in it at variance with the allega-

tions made in the complaint. The Magistrate, without giving any reasons, ordered the petition to be taken on file for an offence under S. 426, Penal Code. When the accused came before the Court, the complainant was absent; and so the Magistrate passed an order, purporting to be under S. 247, Criminal P. C., acquitting the accused. As the offence disclosed was one punishable under S. 427, Penal Code, the case was a warrant case. The question is whether the Magistrate could legally pass an order under S. 247, Criminal P. C., which does not apply to warrant cases.

Mr. Narayanaswami for the accused contends, and I think rightly, that it is open to a Magistrate who entertains a complaint and records a sworn statement to come to the conclusion that although the complaint allegations constitute an offence triable under the warrant procedure yet in fact a minor offence was committed, that he may adopt a summons procedure if the offence appears to be one to which the summons procedure could be applied, and that he may proceed with the case as if the complaint was one of the minor charge only. It does not however appear from the order passed by the Magistrate that he disbelieved any part of the complainant's story. In fact, he was not in a position to judge the extent of the damage caused, and the only distinction between an offence punishable under S. 426, Penal Code and one punishable under S. 427, Penal Code, is the extent of the damage done. It would therefore appear that the Magistrate in issuing processes and mentioning S. 426, Penal Code, acted under a misapprehension and overlooked the facts that if the extent of the damage was greater than Rs. 50 the offence would be one punishable under S. 427, Penal Code and that a warrant procedure would have to be adopted. I therefore think that the Magistrate acted without jurisdiction in acquitting the accused. In view, however, of the fact that the accused were acquitted so long ago as 28th April 1941, I do not think that justice requires that they should be embarrassed any further by a prosecution in a case like the present one. The petition is therefore dismissed.

C.R.K./K.S. *Petition dismissed.*

A. I. R. (29) 1942 Madras 595

KRISHNASWAMI AYYANGAR J.

T. K. Embaru — Applicant

v.

Vedavalli Ammal — Respondent.

C. S. No. 148 of 1936 and Appln. No. 2177 of 1941, Decided on 15th October 1941.

Madras High Court (Original Side Rules), O. 13, R. 19 and O. 18, R. 8—Whether order of Court is judicial or ministerial—Test—Order of Master of High Court refusing or granting leave to bid under O. 18, R. 8 is ministerial and not judicial—No appeal lies under O. 13, R. 19.

The question whether an order of a Court is judicial or ministerial is not to be determined by the nature of the considerations which weigh with the Court in passing that order or the fact that the Court is called upon to exercise a discretion before it makes the order. The Master of the High Court in refusing or granting leave to bid at an auction sale on an application under O. 18, R. 8, acts in a ministerial and not judicial capacity and hence no appeal under O. 13, R. 19 lies from his order : 38 Cal. 717 (P.C.) and ('29) 16 A. I. R. 1929 Mad. 903, *Rel. on.* [P 596 C 1]

V. V. Srinivasa Aiyangar instructed by V. Sundararajan — for Applicant.

N. Panchanatha Aiyer — for Respondent.

JUDGMENT.—A preliminary objection is taken to the maintainability of this appeal which is one against an order of the Master granting to the decree-holder leave to bid at the auction sale of the mortgaged property directed by the decree. On the date of the order there was a sum of over Rs. 16,000 due to the respondent who is the decree-holder. The order of the Master permitted him to bid for the property for the market value which is stated in the proclamation to be Rs. 13,000 an amount much less than the amount due to the decree-holder under the decree. The right of appeal from an order or decision of the Master is granted or recognised in O. 13, R. 19, Original Side Rules. It says :

" Any person affected by any order or decision of the Master or the First Assistant Registrar, Original Side, in respect of all matters judicially dealt with in the exercise of the powers delegated to him by the Honourable the Chief Justice from time to time under O. 40, R. 2 of these rules may appeal therefrom to a Judge."

The ground on which the preliminary objection is founded is that, in giving leave to bid, the Master was not exercising a judicial, but merely an administrative or ministerial function and this rule does not permit an appeal from such an order. The question whether, in giving or refusing leave to bid, the Court exercises a judicial or an administrative function was considered by a Bench of this Court in 122 I. C. 161,[1] and it was held that an order giving or refusing leave to bid is a ministerial order and not a judicial one. That decision was given under O. 21, R. 72, Civil P. C., and it merely followed a ruling of the Privy Council in 38 Cal. 717.[2] Although the present case arises not under the Civil Procedure Code but under the Original Side Rules, it seems to me that I am bound to follow the rulings mentioned above, which determine the character of the order when the Court gives or refuses leave to bid. Order 18, R. 8 of the Original Side Rules relates to applications for leave to bid and it says that " an application for leave to bid at the sale may be made by Master's Summons in Chambers, supported by affidavit setting forth any facts showing that an advantageous sale cannot otherwise be had . . . . ."

This rule is general with regard to sales of property under orders of Court. Order 29 relates to the procedure in regard to suits on mortgages and charges. Rule 6 of this order says :

" A sale of mortgaged property shall be conducted in manner prescribed by O. 18 of these rules. Provided that, if leave to bid is granted to the plaintiff or applicant, and, unless the Court otherwise orders, the sum allowed to be bid shall be not less than the whole amount then due for principal, interest and costs; and in the event of the property being sold in lots, not less than the market value of each lot in respect of which the bid is made."

The general rule is that leave to bid is not to be granted unless the decree-holder is prepared to bid for not less than the amount due to him for principal, interest and costs, and that that course should be followed unless the Court otherwise orders. In the present case the Court (which term includes a

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1. ('29) 16 A. I. R. 1929 Mad. 903 : 122 I. C. 161, Ulaganatha Mudaliar v. M. Alagappa Mudaliar.
2. ('11) 38 Cal. 717 : 11 I. C. 545 : 38 I. A. 126 : 6 L. B. R. 26 : 15 C. W. N. 862 : 14 C. L. J. 241 (P.C.), Ko Tha Hnyin v. Ma Hnyin I.

Master) has made an order departing from the ordinary practice, which it is of course entitled to do. The question for consideration is whether when the Court "otherwise orders" the Court acts judicially or in an administrative capacity. I quite agree that, before the Court "otherwise orders;" it has to take into account the facts and circumstances of the case. But I am not satisfied that, when a Court in granting or refusing leave to bid is acting in a ministerial capacity the mere fact that certain considerations have to be taken into account before making its order, is a good reason for holding that the order for that reason becomes a judicial one. Even when a Court acts in a ministerial capacity it does not mean that the Court is entitled to act arbitrarily. The question as to the nature of an order is not to be determined by the nature of the considerations which weigh with the Court or the fact that the Court is called upon to exercise a discretion before it makes the order. I am of opinion that the Master in the present case acted in a ministerial capacity and his order therefore is not liable to be appealed against. The preliminary objection succeeds and the appeal is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 596

LEACH C. J. AND BYERS J.

Saith Parasuram Byas — Appellant

v.

Sub-Collector, Rajahmundry and another — Respondents.

Appeal No. 144 of 1940, Decided on 26th March 1942, against decree of Dist. Court, East Godavari at Rajahmundry, D/- 23rd February 1939.

Land Acquisition Act (1894), Ss. 15, 23 and 24 — Lessee of land from East India Company for 99 years — Acquisition of land by Government—Market price of lessee's interest in land is his lessee's interest plus added value of prospect of having land converted into ryotwari tenure at end of lease under Madras Government Order of 28th October 1898 under which lessee cannot as of right have leasehold converted into ryotwari tenure.

Where the land which was leased by the East India Company for 99 years is acquired by the Government under the Act, all that has to be determined under S. 23 is what the value of lessee's interest was in the market when the notification under S. 4 of the Act appeared. The market value must be based on all the rights the lessee had and on his potential rights. Therefore the market price of the lessee's interest in the land acquired is his lessee's interest, plus the added value arising from the prospect of having the land converted into a ryotwari tenure at the end of the lease under the order of the Government of Madras dated 28th October 1898, under which the lessee is not entitled as of right to have the leasehold converted into ryotwari tenure though Government would ordinarily take such course : ('29) 16 A. I. R. 1929 P. C. 112, *Rel. on*; (1872) 7 Q. B. 728, *Expl.*; (1867) 4 Eq. 310, *Ref.* [P 597 C 1]

V. Govindarajachari — for Appellant.

Government Pleader — for Respondents.

JUDGMENT. — This appeal raises an interesting question with regard to the market price of certain land in the town of Rajahmundry acquired by the Government in proceedings instituted under the Land Acquisition Act. When the notification was issued under S. 4 of the Act on 25th January 1937, the appellant and respondent 2 appeared as claimants to the land. The question of the respective interests of the appellant and respondent 2 has not yet been decided, but the appeal can proceed on the footing that the appellant is entitled to the amount awarded in the proceedings. The District Judge of East Godavari has found that on the date of acquisition the market value of the land which measured 11541 square feet was Rs. 1676-13-0, to which was to be added the solatium of 15 per cent. A lease of the land for a term of 99 years was granted to Arbuthnot and Co., by the East India Co., on 4th July 1848 and therefore the term expires on 3rd July 1947. The appellant claims to be the successor in title of Arbuthnot and Co. The figure of Rs. 1676-13-0 represents the free-hold value of the land but the District Judge held that the lessee was only entitled to one eighth of that value, relying on a statement in the Land Acquisition Manual published by the Government of Madras. The appellant does not claim to be entitled to compensation on the basis of full ownership, but he says that under an order of the Government issued on 28th October 1898, he would, if the land had not been acquired, be entitled at the expiry of the lease to hold the land on ryotwari tenure and the fact that there existed this right added to the market value of his interest in the property as the lessee on the date of notification. The order of the Government of Madras dated 28th October 1898, on which the appellant relies, cancelled the orders of the Government previously issued under which leases for 99 years could be converted into permanent holdings with a fixed assessment. The order directed that such leases would be dealt with in future in accordance with the following principles :

"(i) Where the lease has actually expired and the land has legally reverted to the Government, ordinary ryotwari pattas will be issued, the lands being classed as dry or wet in accordance with ordinary settlement principles.

(ii) Where the lease is still running, the leaseholder will ordinarily be given the option of taking an ordinary ryotwari patta subject to periodical revision. If, however, the rent reserved under the lease is higher than the settlement rates, the lease should be allowed to run to its term, a ryotwari patta reserving for the unexpired term an assessment equal to the rent reserved under the lease.

(iii) Where the leased lands are in towns, the rates prescribed for the assessment of town sites should be applied instead of rates calculated in the ordinary settlement principles."

Mr. Govindarajachari contends that the appellant is much in the same position as a lessee whose lease gives to him the right to a renewal, and in this connexion he has referred to the decision in (1867) 4 Eq. 310.[1] Mr. Govindarajachari is putting his case too high when he says that the order of the Government of 28th October 1898 gives him a right to hold the land under the ryotwari tenure. The order does not go to this extent, but it indicates that Government will ordinarily convert such leaseholds into ryotwari tenure and regard the lessee as being entitled to a patta. Although this does not amount to an absolute right, the fact that this is the course which Government ordinarily takes would tend to

1. (1867) 4 Eq. 310 : 36 L. J. Ch. 440 : 16 L. T. 113, Bogg v. Midland Railway Co.

increase the value of the lessee's interest. Section 23, Land Acquisition Act, provides that the market value to be taken is the market value on the date of the notification, which means the market price ruling immediately before the publication of the notification. Therefore the market price of the appellant's interest in the land acquired was his lessee's interest, plus the added value arising from the prospect of having the land converted into a ryotwari tenure at the end of the lease. Mr. D. A. Krishna Variar, who has appeared on behalf of Government, has suggested that the lessee's right to compensation could not be anything more than that based on the unexpired portion of the lease, because the Government having decided to acquire the land would not be prepared to follow the course laid down in its own order of 28th October 1898. But this argument overlooks the fact that all that the Court is concerned with is what the value of the lessee's interest was in the market when the notification appeared and the market value must be based on all the rights which the lessee had and on his potential rights.

In 56 M. L. J. 750[2] the Privy Council held that the value of the land which in itself was worthless, but had a potential use for salt works was the market value of the potentiality. Anticipating the argument that there was not an absolute right in the appellant to have the lease converted into ryotwari tenure, Mr. Govindarajachari referred to the case in (1872) 7 Q. B. 728.[3] There a volunteer corps obtained land on lease for the purpose of using it as a rifle range. There were three blocks. The land at both ends was held by the corps under lease; but the intermediate land was held under a licence which could be terminated at any time. The respondent company acquired the land at one end and the question was what was the principle on which compensation should be awarded. It was suggested on behalf of the respondent company that as the intervening land was held merely under a licence which depended on the will of the owner, the acquisition of the adjoining portion meant no loss in respect of the land held under licence. In this connexion Cockburn C. J. said :

"What matters it that between the two there intervenes a piece of land which does not belong to the parties claiming compensation, except this, that, inasmuch as their right to use that land as part of the range depended on the will or licence obtained from the owner of the land, it was precarious. But inasmuch as there was no reason to suppose he would alter his will in respect of it and change his mind, and give them notice that the licence or permission given should be withdrawn, I see no reason why the jury should not, looking at the whole state of things, come to the conclusion that substantially this was not of so precarious a tenure but that they might infer that the existing state of things would not be altered; and that that which had been used before as an entire rifle range would have been so continued, and, consequently, that the land had a value which it would not have lost but for the the intervention and act of the company; and, therefore, there should be some compensation for this loss."

Before the land acquisition proceedings were instituted here, there was no reason to believe that Government would not grant to the lessee ryotwari tenure at the end of his period or during it if he applied, and if the holding of the land under the ryotwari tenure had a value, that value increased the market price of the lessee's interest. The District Judge has not taken into consideration this factor and the case will be remanded to him to decide in the light of this judgment what the value of the lessee's interest in this land really is. The parties will be at liberty to adduce fresh evidence should they so desire. The appellant is entitled to costs, but we do not think that he should be given full costs because he has stamped his memorandum of appeal on the basis that he is entitled to the full Rs. 1676-13-0. An order for half the usual costs will meet the case. The court-fee will be refunded.

C.R.K./G.N. *Order accordingly.*

2. ('29) 16 A. I. R. 1929 P. C. 112 : 115 I. C. 730 : 56 M.L.J. 750 (P.C.), Vallabhadas Naranji v. The Collector.

3. (1872) 7 Q. B. 728 : 41 L.J.Q.B. 351 : 27 L. T. 442, Holt v. Gas Light and Coke Co.

A. I. R. (29) 1942 Madras 597

WADSWORTH AND PATANJALI SASTRI JJ.

Mattapalli Raju and others — *Appellants*

v.

Challe Mahalakshmamma and another — *Respondents.*

Appeal No. 48 of 1941, (converted into an appeal A. A. O. No. 609 of 1940), and Civil Misc. Petn. No. 483 of 1941, Decided on 6th April 1942, against order of Sub-Judge, Cocanada, D/- 31st August 1940.

Madras Agriculturists Relief Act (4 of 1938), S. 19 — Decree — Application to scale down — Uncertified payments can be proved.

If for the purpose of scaling down a debt embodied in a decree, the Court finds it necessary to ascertain what payments have been made towards that decree, the bar in O. 21, R. 2, Civil P. C., would not prohibit the proof of payments which have not been certified: ('41) 28 A. I. R. 1941 Mad. 56, *Expl.* [P 598 C 1,2]

V. Viyanna — for Appellants.

K. Mangachary — for Respondents.

WADSWORTH J. — This appeal arises out of an application under S. 19 of Madras Act 4 of 1938 seeking to scale down a compromise decree. The appellants here who are the legal representatives of the deceased defendant 1, applied to the lower Court alleging in general terms that the decree obtained by respondent 2 and transferred by him to respondent 1, had been satisfied by the payments made if the benefit of Act 4 were given to the applicants who were agriculturists. The counter affidavit filed by respondent 1 alleged that a substantial amount is still due under the decree and denied that the applicants were entitled to the benefits of the Act. When the case came on before the lower Court, the right of the applicants to the benefits of the Act was established and the contentions urged centred round certain specific allegations relating to consideration and interest. We are now only concerned with the allegation of the appellants that the interest due upto 1930 had been satisfied. The rights of plaintiff-respondent 2 here were assigned under Ex. A in November 1929. The deed of transfer says nothing about outstanding interest. It is alleged that in the lower Court the appellants filed certain receipts establishing the payment of the interest due for 1930 and that these receipts were not exhibited owing to an error or misunderstanding in the lower Court. The memorandum of calculations filed on behalf of the appellants clearly

assumes that all interest upto the beginning of 1930 was discharged and that interest had to be paid for the subsequent years. The memorandum of calculations filed on behalf of the decree-holder assumes that interest due for the year 1929-30 had not been paid and this interest was treated as contributing to the amount claimed by the decree-holder. The lower Court in its judgment says nothing about any contention regarding the interest for 1929-30 but proceeds to discuss a contention that interest was not payable for the three subsequent years. Quite clearly this discussion is due to a misunderstanding, for the appellants in their memorandum of calculations concede that interest for the years 1931 to 1933 was payable. It is suggested for the respondents that the lower Court has not considered the question of these uncertified payments towards the interest of 1929-30 because of the implications of a decision of ours in the case of 1940-2 M. L. J. 293.[1] In that case we were concerned with the scaling down of a decree under S. 8 (1) and S. 19 of the Act. We dealt with the contention that the petitioner could not prove uncertified payments made towards the decree because of the terms of O. 21, R. 2, Civil P. C. We pointed out that S. 19 was merely concerned with the amendment of the decree in accordance with the terms of Act 4 of 1938 and with the addition of a power to the Court to enter satisfaction when the scaling down process under the Act resulted in the extinction of the decree. Then after pointing out that the section is not concerned with execution we proceeded to deal with the proviso which relates to payments made in respect of the decree and provides that they shall first be applied in payment of all costs as originally decreed and we pointed out that in making these appropriations the trial Court is not acting as an executing Court and that consequently the provisions of O. 21, R. 2, Civil P. C., do not bar the petitioner from proving payments which have not been certified in the manner necessary for establishing them in an executing Court and we held that the judgment-debtor can prove payments which have not been certified for the purpose of satisfying the decree regarding costs. Then follows the sentence :

"For any other purpose, there is no express provision allowing the petitioner to prove payments made after the decree and not recorded by the Court and it seems to follow that he would have to establish those payments in the ordinary way by getting them certified in Court if he wants them to be taken into consideration as payments towards the decree."

This sentence is not part of the decision itself and is an observation which perhaps goes further than was necessary for the case or was justified by the view taken on the effect of the statutory provisions. No doubt S. 19 of the Act necessitates the taking into account of all payments made towards the decree, whether certified or not, which affect the scaling down process under the Act. For instance, in order to apply S. 8 (2) and S. 8 (3) of the Act to a decree debt it is necessary to know what payments have been made and the Court conducting this enquiry under S. 19 of the Act, not being an executing Court would not be subject to the prohibition in O. 21, R. 2, Civil P. C. We are clearly of opinion that if for the purpose of scaling down a debt embodied in a decree, the Court finds it necessary to ascertain what payments have been made towards that decree, the bar in O. 21, R. 2, Civil P. C., would not prohibit the proof of payments which have not been certified. To the extent to which the decision quoted seems to suggest any other view we wish to make it clear that that was not our intention.

The appellant has filed a petition to admit in appeal documents relating to those alleged uncertified payments. It is not clear to us that this evidence was positively tendered and rejected in the lower Court. But what is clear is that the lower Court has not correctly understood the nature of the contention before it regarding the discharge of interest for the year 1929-30. Unfortunately the pleadings did not bring out clearly the points really at issue between the parties in this respect and it is probably the fault of those responsible for presenting the appellants' case in the trial Court that the Court misunderstood the nature of the real contention. This is not in our opinion a proper case for admitting this evidence in appeal, but it is a proper case for sending the matter back to the trial Court in order that a finding may be recorded on the question whether any amount was due for interest for 1929-30 having regard to the evidence of payments, whether certified or not which was available.

We allow the appeal, but, having regard to the way in which the case was apparently presented before the lower Court we think it proper that the appellants should pay the respondents' costs in this Court. The application is remanded to the lower Court for fresh disposal in the light of this judgment after recording a finding on the question relating to the interest for 1929-30. Both parties will be permitted to file fresh evidence on this question. The costs in the lower Court to abide by the result. We regret that under the rules we are obliged to allow a refund of the court-fee paid on the memorandum of appeal. The petition to admit fresh documents in appeal is dismissed.

C.R.K./R.K. *Case remanded.*

[1] ('41) 28 A. I. R. 1941 Mad. 56 : 195 I. C. 752 : I. L. R. (1940) Mad. 947 : (1940) 2 M. L. J. 293, Ramamurti v. Sitaramayya.

A. I. R. (29) 1942 Madras 598

WADSWORTH J.

Titti Krishnamurthi — Petitioner

v.

Sri Jagannadhapadhi Khadanga and another — Respondents.

Civil Revn. Petn. No. 2151 of 1940, Decided on 23rd March 1942, to revise decree of Special Deputy Collector, Chicacole Division, D/- 16th June 1940.

Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii), Proviso (b)—Assessment to property tax under Madras Local Boards Act not challenged in appeal within time—Sch. 4 of aforesaid Act does not empower President or Panchayat to cancel assessment — Expunction of assessee's name from registers by Panchayat cannot affect assessee's legal position — Assessee must be deemed to be assessed within S. 3 (ii), Proviso (b) Madras Act 4 of 1938 — Under S. 3 (ii), Proviso (b) Madras Act 4 of 1938 Court cannot question legality of assessment.

Schedule 4 of Madras Local Boards Act does not empower the President or the Panchayat to cancel an assessment which has once been made and has not been challenged in appeal within the time allowed. It is open to the Panchayat to write off a tax as irrecoverable or as an administrative act,

instead of writing off the tax to expunge the name of the person assessed from its registers. But this administrative act will not affect the legal position of the person taxed, so as to make a person who has been assessed into one who has not been assessed, and the assessee whose name has been expunged must be deemed to be assessed within S. 3 (ii), Proviso (b) of Act 4 of 1938. It is certainly not open to the Court dealing with a matter under S. 3 (ii), Proviso (b) of Act 4 of 1938 to go into the question whether a person who has in fact been assessed, has been assessed legally or illegally. [P 599 C 1]

B. Jagannadha Das — for Petitioner.

Kasturi Seshagiri Rao — for Respondents.

ORDER. — The only question in this revision petition is whether the petitioner is excluded from the definition of agriculturist on the ground that he paid profession tax for two years preceding 1st October 1937 so as to come within proviso (b) to S. 3 (ii) of the Madras Act 4 of 1938. The facts are clearly established. The petitioner was assessed to profession tax for four years from 1933 to 1937. Apparently he made a protest in 1937, but there was no appeal filed in respect of any tax for any of these four years. In 1938 when the arrears of tax were demanded he objected that he had no property within the limits of the Panchayat Board and did not carry on any trade within those limits. Thereupon the President took legal advice and on being advised that the tax was not properly payable, he requested the orders of the Inspector of Local Boards whether he should enforce the collection of the tax or write it off as irrecoverable. The Inspector advised the Panchayat Board that the demand was illegal, and that it should not be written off, but should be expunged from the tax register. These proceedings were in March 1939 and it is reasonable to assume that when this reference to the Inspector of Local Boards was made, everyone was aware that the importance of assessment to profession tax was in the light of Act 4 of 1938 something more than the actual liability to tax.

The learned Deputy Collector has held that the cancellation of the assessment by the President on the order of the Inspector of Local Boards was invalid and will not affect the assessment so far as proviso (b) is concerned. It seems to me that this view is correct. The rules in Sch. 4 to the Local Boards Act 14 of 1920 give a right of appeal against the imposition of the tax and a right to the Panchayat to cancel or modify any order passed by the President reducing or remitting a tax; but in the absence of any appeal it is provided that the assessment or demand of any tax shall be final. No power is conferred either upon the President or upon the Panchayat to cancel an assessment which has once been made and has not been challenged in appeal within the time allowed. It is open to the Panchayat to write off a tax as irrecoverable and no doubt the Panchayat may as an administrative act, instead of writing off the tax, expunge the name of the person assessed from its registers. But this administrative act will not affect the legal position of the person taxed, in order to make a person who has been assessed into one who has not been assessed, and it is certainly not open to the Court dealing with a matter under Act 4 of 1938 to go into the question whether a person who has in fact been assessed, has been assessed legally or illegally. In this view, I dismiss this civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 599

BYERS J.

Province of Madras represented by Collector of Madura — Appellant

v.

O. N. Ramaswami Ayyar, Dewan and authorised agent of Kannivadi Zamindar — Respondent.

Second Appeal No. 963 of 1940, Decided on 6th March 1942, against decree of Dist. Court, Madura, in A. S. No. 183 of 1939.

Madras Estates Land Act (1 of 1908), S. 20A —Appeal to District Judge against proceedings under S. 20A — No second appeal lies from order of District Judge.

The distinction between suits and application is carefully preserved both in the Code of Civil Procedure and also in the Madras Estates Land Act. Hence the decision of the District Judge in an appeal against proceedings under S. 20A, Madras Estates Land Act, although styled as a decree, is only an appellate order and not a decree within the meaning of S. 100, Civil P. C. Consequently no second appeal lies against such an order : ('34) 21 A.I.R. 1934 Mad. 103, *Rel. on*; 11 Mad. 309 (FB), *Disting.* [P 600 C 1]

Government Pleader — for Appellant.

V. Govindarajachari — for Respondent.

JUDGMENT. — This appeal has been brought against a decision of the District Judge of Madura in A. S. No. 183 of 1939 against a decision of the Collector of Madura under S. 20A, Madras Estates Land Act. It is sufficient to state for the purpose of this appeal that an application was filed under S. 20A, Madras Estates Land Act by the Zamindar of Kannivadi in respect of four plots of land which he sought to have converted into ryoti land on the ground that they were "old road" which was no longer required for public purposes. The collector threw the burden of proof on the zamindar to how that the reversionary right did not vest in the Government as the land appeared to have been lakhiraj land. On appeal the learned District Judge held that the burden of proof had been wrongly cast on the zamindar and on the evidence available he came to the conclusion that the reversionary right vested in the landholder. The order of the collector was set aside and the four plots were ordered to be registered as ryoti land. Against this decision this second appeal has been brought. A preliminary objection has been raised by Mr. Govindarajachari on behalf of the respondent that no second appeal lies. This objection is well founded and must be upheld. He contends that proceedings under S. 20A, Madras Estates Land Act, take the form of an application by the landholder, a ryot or any other person interested and the right of appeal regarding suits or applications is provided by S. 189 of the Act. This section refers to Parts A and B of the Schedule which deal separately with the right of appeal in suits and applications. Proceedings under S. 20A of the Act are referred to as serial No. 5 in Part B and a right of appeal to the District Court is provided against an order directing the conversion of the land into Government ryotwari or landholder's ryoti land. So far as the Madras Estates Land Act is concerned, the right of second appeal in the case of applications is limited under S. 190 of the Act to orders passed on appeal by a District Collector

under several specified sections of which S. 20A is not one.

It is conceded that second appeals lie in the case of suits because these result in decrees and the first appellate proceedings before the District Court take the form of decrees also within the meaning of S. 100, Civil P. C. Mr. Govindarajachari relies on S. 104 read with O. 43, R. 1, Civil P. C., and he argues that since the initial proceedings take the form of an application, the order of the collector thereon is an order and not a decree and the appellate order of the District Court is also an appellate order and not a decree. The distinctions between suits and applications and between decrees and orders are clearly recognised in the Code of Civil Procedure and I am unable to see how the learned Government Pleader can contend that an appeal against proceedings under S. 20A, Madras Estates Land Act results in a decree and not merely in an appellate order. He has cited the case of 11 Mad. 309,[1] but that case does not afford much help in deciding this question. That case related to the question whether an order by a Forest Officer under S. 10, Madras Forest Act was subject to second appeal, while in the present case we are concerned with the right of appeal in proceedings under an entirely different statute. The learned Government Pleader has contended that the order of the District Court conclusively determines the rights of the parties and is therefore a decree within the meaning of the definition contained in S. 2, Civil P. C. But this argument overlooks the reference in the definition to a suit. The distinction between suits and applications is carefully preserved both in the Code of Civil Procedure and also in the Madras Estates Land Act. This distinction was discussed at considerable length in the Full Bench decision in 57 Mad. 271.[2] In my opinion, the decision of the District Judge although styled as a decree, was only an appellate order and was not a decree within the meaning of S. 100, Civil P. C. Consequently no second appeal lies and it is ordered to be dismissed with costs. Leave to appeal is refused.

C.R.K./R.K. *Appeal dismissed.*

1. ('88) 11 Mad. 309 (F.B.), Kamaraju v. Secretary of State.
2. ('34) 21 A.I.R. 1934 Mad. 103 : 147 I. C. 614 : 57 Mad. 271 : 66 M. L. J. 43 (F.B.), Rajagopala Chettiar v. Hindu Religious Endowments Board.

A. I. R. (29) 1942 Madras 600

PATANJALI SASTRI J.

Tatikonda Subbarow — Appellant

v.

Malladi Sitarama Lakshmi Narasimham and others — Respondents.

Second Appeal No. 940 of 1941, Decided on 10th April 1942, against decree of Dist. Court, Kistna, in A. S. No. 263 of 1940.

Usurious Loans Act (1918), S. 3 (1) (i) and (ii) — There is no redundancy or overlapping between cls. (i) and (ii) of S. 3 (1)—S. 3 (1) (ii) is not confined to cases where there has been agreement purporting to close previous dealings and creating new obligation.

Section 3 (1) (ii) does not constitute a repetition of S. 3 (1) (i) and envisages a different class of cases. There is no redundancy or overlapping in cls. (i) and (ii) of S. 3 (1). The operation of S. 3 (1) (ii) is not confined to cases where the parties have entered into an agreement purporting to close previous dealings and to create a new obligation. The opening words of S. 3 (1) (ii) make it clear that the Court can exercise the power under S. 3 (1) (ii) although the parties have by agreement closed their previous dealings and created a new obligation: 42 C. W. N. 665, *Rel. on*; ('40) 27 A. I. R. 1940 Cal. 211, *Not foll.* [P 601 C 1]

V. Rangachari — for Appellant.

K. Krishnamurthi — for Respondents.

JUDGMENT. — The only question arising for determination in this second appeal relates to the construction of S. 3, Usurious Loans Act, 1918. The facts are simple and not in dispute. The appellant brought the suit to enforce a mortgage for a sum of Rs. 800 carrying interest at Re. 1-0-6 per cent. per mensem payable annually and in default of such payment compound interest at Re. 1-4-6 per cent. per mensem with yearly rests. On 26th July 1937 there was a payment of Rs. 700 which was endorsed on the bond thus: "Rs. 617 being interest in full due upto this date according to the terms of the bond and Rs. 83 towards the principal of the bond ..... The balance of the principal of the bond is Rs. 717." The suit was for recovery of this balance of Rs. 717, no interest being claimed from 26th July 1937 upto 14th October 1939 when the suit was filed. It was argued in the Court below that the rate of interest provided in case of default was excessive and should be reduced and that the payment already made for interest at the rate stipulated should be re-appropriated on the basis of the reduced rate, under the provisions of the Usurious Loans Act. This argument was accepted by the Court below which reduced the rate to 12-3/8 per cent. per annum compound and adjusting, on this basis, the payment already made passed a decree for Rupees 663-15-0 as payable on the date of suit with proportionate costs. The appellant did not question the finding of the lower Court that the default rate of interest was excessive but he urged that the Court had no power under the Usurious Loans Act in the circumstances of this case to reopen the appropriation of the payment made on 26th July 1937 in terms of the endorsement referred to above. It was contended that S. 3 (1) (ii) which empowers the Court to reopen an appropriation already made applies only to cases where there has been an agreement between the parties purporting to close previous dealings and to create a new obligation, and as there was no such agreement in the present case it had no application here. Clause (ii) of S. 3 (1) so far as it is material here runs as follows:

"The Court may exercise all or any of the following powers, namely, may .....

(ii) notwithstanding any agreement purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be repayable in respect thereof."

The appellant sought to read the words "notwithstanding any agreement purporting to close previous dealings and to create a new obligation" as limiting the application of the provision only to cases where the parties have entered into an agreement purporting to close previous dealings and to create a new obligation. I am unable to accept this construction. The opening words are, in my opinion, inserted in order to make it clear that the Court can exercise the power although the parties have by

agreement closed their previous dealings and created a new obligation and the words cannot have the effect of confining the operation of the provision to cases where there has been such an agreement. It was suggested that unless the operation of the clause is so restricted, there would be a redundancy, as the words "reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest" in cl. (ii) were practically a repetition of cl. (i). I see no force in this suggestion. The words quoted do not constitute a repetition of cl. (i) and they envisage a different class of cases. Clause (i) deals with cases where the parties have entered into no subsequent agreement in relation to the original transaction of loan, and confers upon the Court the power to reopen the transaction and reduce the excessive interest, while cl. (ii) provides for cases where the parties have subsequently made payments, appropriations or adjustments towards the debt on the basis of the stipulated rate of interest, and it empowers the Court in such cases to reopen such appropriations or adjustments with a view to give relief to the debtor by reducing excessive interest and even to direct a refund if any sum is found to be repayable to the debtor on the basis of such reduction. In this view there would be no redundancy or overlapping in cls. (i) and (ii) and it is not necessary on any such ground to restrict the operation of cl. (ii) to cases where the parties have entered into a subsequent agreement purporting to close previous dealings and to create a new obligation. Such a restriction of its scope seems to be unwarranted by the terms of the clause and would deprive it of much of its usefulness. My attention was drawn to the observations of Henderson J. in A. I. R. 1940 Cal. 211[1] where the learned Judge construed cl. (ii) in the manner contended for on behalf of the appellant. The learned Judge observed that he was not prepared to follow an earlier decision of Edgley J. in 42 C. W. N. 665[2] giving a more extended meaning to that clause. But he thought it unnecessary to refer the matter to a Division Bench as he was disposing of the case on another point. The observations relied on are thus obiter and with due respect I am unable to agree with them. The construction placed upon the section by Edgley J. is, to my mind, the correct one and I have no hesitation in agreeing with it. The appeal therefore fails and is dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

1. ('40) 27 A.I.R. 1940 Cal. 211 : 188 I.C. 864 : 44 C.W.N. 253, Audh Behari v. Akshay Kumar.
2. ('38) 42 C. W. N. 665, Ghanasyam Das v. J. Nichols.

A. I. R. (29) 1942 Madras 601

HORWILL J.

P. C. Kandaswamy Pillai—*Petitioner*

v.

Municipal Prosecutor, Palghat — *Respondent.*

Criminal Revn. Case No. 178 of 1942 (Criminal Revn. Petn. No. 165 of 1942), Decided on 1st July 1942, to revise judgment of First Class Bench Magistrates, Palghat, D/- 5th February 1942.

Madras District Municipalities Act (5 of 1920), Ss. 180 and 181 — Word "encroachment" in S. 180—Meaning of—S. 181 deals with windows etc., which in normal open position project over road—Window when fastened back not projecting over road nor when it was shut — Only in process of opening and shutting its panels swinging six inches beyond road — Momentary swinging of panels over portion of road in opening and shutting window held was not encroachment within S. 180—Nor was it hit by Section 181.

A person constructed a window, the panels of which when swung open passed six inches beyond the road boundary. When the window was fastened back it did not project over the road, nor did it when it was shut. It was only in the process of opening and shutting that the panels of the window swung over a small area of the street for a moment or two :

Held that (1) by an encroachment within S. 180 was generally understood something that hung more or less permanently over the road and not something which momentarily passed over some portion of the road. The swinging of the panels over the road for a moment or two in the process of opening and shutting them did not amount to encroachment within S. 180; [P 601 C 2]

(2) Section 181 dealt with windows etc., which in their normal open position projected over the road and since the position of the window when open was almost parallel to the wall it was not hit by Section 181. [P 601 C 2]

S. V. Venkatasubramaniam — for Petitioner.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER.—The petitioner constructed a window, the panels of which when swung open passed six inches beyond the road boundary. He was therefore called upon by the executive authority of the Palghat Municipality under S. 181 (2), District Municipalities Act, to alter the window so that no part of it when open projected over the street. As he did not do so, he has been prosecuted and convicted and ordered to pay a fine of Re. 1. The surveyor reported that when the window was fastened back it did not project over the road, nor did it when it was shut. It was only in the process of opening and shutting that the panels of the window swung over a small area of the street. The question is (1) whether that swinging over the road for a moment or two would amount to an encroachment and (2) whether, more specifically it came within the mischief of S. 181 (2) of the Act. By an encroachment is generally understood something that hangs more or less permanently over the road and not something which momentarily passes over some portion of the road. It also appears from the wording of S. 181 that what is prohibited there is the erecting without licence of a window, door, gate, or bar that, when in its normal open position, projects over the street. The position of the window in question when it is open is parallel to or almost parallel to the wall, and so would appear not to be hit by this section, which deals with windows etc., which in their normal open position project over the road. In allowing this appeal and ordering the fine to be refunded, I leave open the question whether, if it should be subsequently found that the window in question does project over the road longer than is necessary for the opening and shutting of the window, the petitioner would contravene the provisions of the Act.

C.R.K./G.N. *Order accordingly.*

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A. I. R. (29) 1942 Madras 602

WADSWORTH AND PATANJALI SASTRI JJ.

N. Namberumal Chetty — Appellant

v.

P. Ramayya Naidu alias Jayaramakrishna Naidu — Respondent.

Appeal No. 26 of 1941, Decided on 29th January 1942, against order of Mockett J., in Appln. No. 862 of 1941, D/- 2nd May 1941.

Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii) Proviso (c)—Property tax paid by receiver of mortgaged property is on behalf of mortgagor — Mortgagor cannot claim to be agriculturist—Position of receiver explained.

A receiver appointed under O. 40, R. 1 in a b mortgage suit represents whoever may be found ultimately entitled to the property as the result of the suit. When a receiver in such a suit pays property tax on the property, he certainly is not paying that property tax on his own individual account : ('31) 18 A. I. R. 1931 Mad. 626 ; ('33) 20 A. I. R. 1933 Mad. 293 ; ('21) 8 A. I. R. 1921 Mad. 704 and (1864) 11 H. L. C. 115, *Ref.* [P 602 C 2]

The payment of the tax by the receiver is a payment on behalf of and as representative of the mortgagor if he is the true owner and therefore the mortgagor is disqualified by proviso (c) to S. 3 (ii) from claiming to be an agriculturist. The fact that as the result of execution, the whole of the hypotheca has been swallowed up without satisfying the mortgages and that the interest of the nominal owner in the property was negligible does not affect c the question. [P 603 C 1]

G. Ramakrishna Iyer and K. R. Varma — for Appellant.

V. Radhakrishnayya and R. Narasimham — for Respondent.

WADSWORTH J. — This appeal is preferred against the decision of our learned brother Mockett J. on a notice of motion preferred by a judgment-debtor under Ss. 19, 20 and 23 of Madras Act 4 of 1938 praying the Court for reliefs in respect of a decree on mortgages. The decree in question was passed on 3rd August 1937 and made absolute in November of that year. The motion was resisted on the ground that the debtor was precluded by proviso (c) to S. 3 (ii) of Act 4 from claiming to be an agriculturist, he having been assessed to property tax in the City of Madras on property of a d rental value above the prescribed limit.

The facts are that, during the two years preceding 1st October 1937, the debtor was the owner of a number of houses in Madras which form part of the hypotheca of the mortgages on which the decree was passed. The mortgage suit was filed in 1934 and a receiver was appointed under O. 40, R. 1, Civil P. C., at the instance of the mortgagee. The receiver was during the relevant period in possession of all these houses and he actually paid the property tax thereon. Of the houses, one house No. 46 Pusala Gengu Reddi Street, was actually shown in the municipal assessment register in the name of the receiver and this house was valued at a rental value of Rs. 918 per annum. The other houses stood in the names of three different individuals, one being the judgment-debtor's adoptive mother, another his adoptive aunt and the third a male relative of the judgment-debtor. The mother and the aunt were both dead before the relevant period ; the male relative was living. The position therefore is that the municipal assessment register showed the house property e owned by the judgment-debtor in the names of four individuals, one being the receiver, another being a living relative of the judgment-debtor and the other two being deceased relatives of the judgment-debtor. If the payment of tax by the receiver in respect of the property standing in the receiver's name can be deemed to amount to an assessment of the judgment-debtor himself, the value of that item is sufficient and it is unnecessary to consider the assessment in respect of the other items.

Our learned brother Mockett J. has held that although a receiver appointed under S. 69 (a), T. P. Act, is deemed to be the agent of the mortgagor, a receiver appointed in a mortgage suit under O. 40, R. 1, holds the properties for the benefit of the mortgagee alone and he bases this view upon a decision of Madhavan Nair J. in 54 Mad. 565[1] a decision which has come in for considerable criticism f by the Bench which decided 56 Mad. 546.[2] It is pointed out in this latter decision that a simple mortgagee by getting a receiver appointed in the course of the suit cannot enlarge his security and such a receiver is, like a receiver in other cases, appointed for the protection of the property for the benefit of all the parties to the suit in accordance with their respective rights, as they may eventually be established. No doubt the mortgagee has a certain preferential claim to the profits received in the Court, and to that extent it may be said that the appointment of the receiver is for the benefit of the mortgagee ; but it does not follow that the receiver is the representative of the mortgagee and not the representative of the mortgagor, or that the acts of the receiver are acts done only on behalf of the mortgagee and not on behalf of the mortgagor. We need only g refer to the decision in 44 Mad. 971[3] following the case in (1864) 11 H. L. C. 115[4] as an illustration of the true position of a receiver, as seen from the effect of a payment by the receiver in saving limitation.

It seems to be well established that a payment towards interest under the mortgage by the receiver will save limitation as against the mortgagor. We have no doubt that the true position is that a receiver appointed under O. 40, R. 1 in a mortgage suit represents whoever may be found ultimately entitled to the property as the result of the suit. When a receiver in such a suit pays property tax on the property, he certainly is not paying that property tax on his own individual account. We had in a recent case—A. A. O. No. 339 of 1938—to consider a contention that a payment of poruppu by the trustee of h a charity would disqualify the trustee in his individual capacity from claiming the benefits of Act 4 of 1938 having regard to proviso (d) to S. 3 (ii). We then pointed out that a differentiation must be made with reference to the capacity in which the person makes the payment and that a payment made by a person in respect of properties held and managed by him on behalf of a charity, must be

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1. ('31) 18 A. I. R. 1931 Mad. 626 : 133 I. C. 504 : 54 Mad. 565 : 61 M. L. J. 111, Maharajah of Pithapuram v. Gokuldoss Goverdhandoss.
2. ('33) 20 A. I. R. 1933 Mad. 293 : 141 I. C. 372 : 56 Mad. 546 : 64 M. L. J. 682, Ponnu Chettiar v. Sambasiva Iyer.
3. ('21) 8 A. I. R. 1921 Mad. 704: 68 I. C. 100 : 44 Mad. 971 : 41 M. L. J. 423, Govindasami Pillai v. Dasai Goundan.
4. (1864) 11 H. L. C. 115 : 10 Jur. (N. S.) 855 : 11 L. T. (N. S.) 68 : 13 W. R. 20 : 4 N. R. 520 : 145 R. R. 79, Chinnery v. Evans.

regarded as a payment made by a different person Applying the reasoning of that case to the present facts, when the receiver was assessed to property tax and paid that tax, he was not so assessed in his individual capacity. It follows that he was assessed as a representative of somebody else. Mr. Radhakrishnayya has contended that he was assessed as an officer of Court with reference to properties in custodia legis. That is no doubt true ; but the Court was under no liability to pay this tax and when the receiver paid the tax, though he did so under the orders of Court, he did not pay the tax as the representative of the Court or on behalf of the Court. He was assessed and he paid the tax in his capacity as the representative of whoever might ultimately be found to be the owner of the property as the result of the pending litigation. On the facts of the suit out of which this application arose, it would appear that besides the mortgagee-plaintiff, there were certain puisne mortgagees who were parties and there was a third party claimant, defendant 9. The judgment in the suit affirmed the ownership of the mortgagor and rejected the claim of defendant 9. That judgment was pronounced before Act 4 of 1938 came into force. Though the receiver was directed by the Court to pay the surplus profits of the land into Court, presumably for the benefit of the mortgagee, his first duty was to pay the taxes on the property out of the profits. He was not to pay those taxes in his personal capacity nor was he to pay these taxes in discharge of any liability imposed upon the Court whose officer he was. He was to pay those taxes in discharge of a liability imposed by law upon the owner of the property and the owner must necessarily be the person who might ultimately be found entitled to the property as the result of the suit. The ownership of this property was only questioned so far as defendant 9's claim was concerned. All the mortgagees necessarily must support the title of their mortgagor. Defendant 9 was found not to be entitled to the property. It seems therefore to follow that the payment of the tax by the receiver was a payment on behalf of and as representative of the mortgagor who is the applicant here.

It has been suggested that, as the result of execution, the whole of the hypotheca has been swallowed up without satisfying the mortgages and that the interest of the nominal owner in the property was negligible. That seems to us not to affect the question. At the time when these taxes were paid, the only person entitled to the property and the only person liable to pay the tax was the mortgagor or his representative for that purpose, the receiver in the suit. When the receiver was assessed and when he paid the tax, it was primarily as the representative of the mortgagor that he made the payment. Since we have held that a payment by a person in the position of a trustee will not affect that trustee's personal eligibility to ask for the benefits of Act 4 of 1938, it seems to us to follow that the assessment of a trustee must be deemed to be an assessment of the estate which he holds as trustee ; and similarly the assessment of a receiver to property tax must be deemed to be the assessment of the estate of the owner of the property and the payment in pursuance of that assessment must be deemed to be a payment by that owner. In this view we hold that the assessment of the receiver to property tax on a property of an annual rental value exceeding Rs. 600 is the assessment of the owner of that property on whose behalf the tax was paid and that therefore the applicant was disqualified by proviso C to S. 3 (ii) from claiming to be an agriculturist. In the result, therefore, we allow the appeal with costs and set aside the order of the learned Judge who heard the application. We fix the advocate's fee at Rs. 100 in the appeal.

C.R.K./K.S. *Appeal allowed.*

A. I. R. (29) 1942 Madras 603

HORWILL J.

In re Dashinamurthi — Petitioner.

Criminal Revn. Case No. 192 of 1942 (Criminal Revn. Petn. No. 179 of 1942), Decided on 30th June 1942, to revise order of Presidency Magistrates, Egmore, Madras, D/- 28th February 1942.

(a) Criminal P. C. (1898), S. 370 (i)— Magistrate merely saying that he believed prosecution witnesses without noting their evidence and without any reference to defence evidence — S. 370 (i) is not complied with — Magistrate should give brief statement of reasons for conviction which would necessitate reference to prosecution and defence evidence.

Section 370(i) cannot be said to be complied with where the Magistrate merely says that he believed the prosecution witnesses without noting what the prosecution witnesses said and without any reference to the defence evidence. Under S. 370 (i) the Magistrate should give a brief statement of the reasons for conviction which would necessitate a reference to what the prosecution witnesses had said, so that it would be shown that that evidence if believed would establish the offence with which the accused had been charged. If there are no defence witnesses, it would then be sufficient if the Magistrate says that he believed the prosecution witnesses but when there is defence evidence which is inconsistent with the prosecution story, some brief reasons should also be given why the defence evidence should be discredited. [P 604 C 1]

Cr. P. C. —

('41) Chitaley, S. 370, N. 4 Pts. 1 and 5.

('41) Mitra, Page 1232 N. 1057 : "Clause (i) — Reasons for conviction."

(b) Criminal P. C. (1898), Ss. 370 (i), 441 and 439 — Magistrate not complying with S. 370 (i) by not giving reasons for conviction — High Court in revision sending for record of case — Magistrate can submit report under S. 441 and remedy defect in original order — In such case High Court will not interfere.

Where the order passed by a Magistrate does not comply with the requirements of S. 370 (i) by omitting to give reasons for conviction and the High Court in revision calls for the record of the case, the Magistrate can submit a report under S. 441 and remedy the defect in the original order by giving a brief statement of the reasons for conviction. In such a case the High Court will not interfere in revision : ('23) 10 A. I. R. 1923 Mad. 185, *Rel. on.* [P 604 C 1]

Cr. P. C. —

('41) Chitaley, S. 370, N. 4 Pt. 8; S. 439 N. 1 Pt. 2; S. 441 N. 1 Pts. 2 and 3.

('41) Mitra, Page 1233 N. 1057 : "Clause (i) — Reasons for conviction;" Page 1429 N. 1205, Page 1470 N. 1225.

(c) Madras City Police Act (3 of 1888), S. 75 — Disorderly conduct — One month's rigorous imprisonment and fine of Rs. 25 held very severe—Fact that accused was fined for similar

offence four years ago held not sufficient for imposing heavy sentence — Eight days' imprisonment before release on bail held sufficient.

The accused was sentenced to one month's rigorous imprisonment and a fine of Rs. 25 under Section 75 :

Held that the sentence was very severe for conduct that was not very disorderly. The fact that four years ago the accused was fined one rupee for similar offence was not a sufficient reason for imposing such a heavy sentence. Eight days' imprisonment of accused in jail before his release on bail was ample punishment. [P 604 C 1, 2]

B. T. Sundararajan — for Petitioner.

K. V. Ramaseshan for the Crown Prosecutor — for the Crown.

ORDER. — This petition was admitted because the learned Magistrates did not comply with the requirements of S. 370 (i), Criminal P. C. They should have given a brief statement of the reasons for the conviction. They merely said that they believed the prosecution witnesses without noting what the prosecution witnesses said and without any reference to the defence evidence. A brief statement of the reasons for conviction would necessitate a reference to what the prosecution witnesses had said, so that it could be shown that that evidence if believed would establish the offence with which the accused had been charged. If there had been no defence witnesses, it would then have been sufficient if the Magistrates had said that they believed the prosecution witnesses; but when there is defence evidence which is inconsistent with the prosecution story, some brief reasons should also be given why the defence evidence should be discredited.

As this petition was admitted, I had either to send the case back again for the Magistrates to give a brief statement of reasons as required by S. 370(i) or to read through the evidence myself and decide whether the conviction was justified by the evidence. The vacation has intervened since this petition was admitted, and it is perhaps unlikely that after more than four months have expired the Magistrates would remember very much about what the witnesses said. I have therefore been compelled to perform a duty which the Magistrates themselves should have performed. When the records were called for from the Presidency Magistrates, they could themselves have submitted a report under S. 441, Criminal P. C. If that had been done and the report had remedied the defect in the original order, it would not have been necessary for anything further to have been done by this Court as was the case in 46 Mad. 253.[1] That unfortunately was not done. I have been through the evidence and I see no reason why the evidence of P. Ws. 2 and 3 should not be believed. It is usually not difficult to get a friend or two to support one when one is in difficulty. The two defence witnesses were interested in the accused and I think that interest, a sufficient reason for not accepting their evidence in rebuttal of the evidence of the prosecution witnesses.

Had the order of the Magistrates been in accordance with the requirements of S. 370 (i), Criminal P. C., I in all probability, would not have interfered with the sentence; but after going through all the evidence, I feel the sentence is excessive; for it is almost the maximum sentence that could be imposed. Section 75, City Police Act provides for a maximum punishment of one month's rigorous imprisonment or a fine of Rs. 50 or both. The punishment imposed was one month's rigorous imprisonment and a fine of Rs. 25. That seems to me to be a very severe sentence for conduct that was not very disorderly. It is true that four years ago the accused was fined one rupee for a similar offence; but that is no sufficient reason for the imposing of such a heavy sentence as has in this case been imposed. The accused was eight days in jail before he was released on bail by this Court, and I feel that that is ample punishment for the offence committed by him. The imprisonment is therefore reduced to the term already undergone and the order for payment of fine set aside. The order under S. 106, Criminal P. C., is unobjectionable in the circumstances and will stand.

C.R.K./G.N. *Order accordingly.*

1. ('23) 10 A.I.R. 1923 Mad. 185 : 71 I.C. 212 : 24 Cr. L. J. 84 : 46 Mad. 253 : 44 M. L. J. 84, In re Derwish Hussain.

A. I. R. (29) 1942 Madras 604

KING J.

Avasarala Kamaraju Pantulu and another — *Appellants*

v.

Balla Saramma — *Respondent.*

Second Appeal No. 37 of 1941, Decided on 16th March 1942, against order of Dist. Court, East Godawari at Rajahmundry, D/- 30th August 1939.

(a) Limitation Act (1908), Ss. 4 and 12 — Construction — S. 12 assumes that time requisite for obtaining copy of decree must begin before prescribed period is over — S. 4 presupposes that prescribed period has expired and cannot extend period prescribed under Act — Application for copy of decree made under S. 4 on date on which Court reopened — Extension granted by S. 4 cannot be combined with extension sought under S. 12.

Section 12 assumes that the time requisite for obtaining the copy of decree must begin before the prescribed period is over. Under S. 4 the right to present a suit or appeal or application on the day upon which a Court reopens is a special right which cannot extend the period of limitation prescribed in the Act as S. 4 presupposes that that period has already expired. Therefore under S. 4 the only privilege which is granted to the suitor or appellant is that he may file his suit or appeal on a date after the expiry of the prescribed period if that period had expired while the Court was not sitting. If he delays in making his application for a copy until that day, then he is applying for a copy when the period of limitation has already expired and the extension which is granted to him by the application of S. 4 cannot be combined with the extension which he seeks under S. 12 : ('35) 22 A. I. R. 1935 P. C. 85, *Rel. on;* ('21) 8 A. I. R. 1921 Mad. 654 (Judgment of Ramesam J.), *Approved; Case law discussed.* [P 606 C 1]

Limitation Act —

('42) Chitaley, S. 4 N. 7; S. 4 N. 10 Pts. 3-5; S. 12 N. 24 Pts. 13-15.

('38) Rustomji, Page 75 Pt. 1; Page 215 Note "Application for copy, made on re-opening of Court."

(b) Limitation Act (1908), S. 5—Order refusing to excuse delay under S. 5 — No second appeal lies.

No second appeal lies from an order refusing to excuse delay under S. 5. [P 606 C 1]

C. P. C.—
('40) Chitaley, Ss. 100 & 101 N. 44 Pt. 6.
('41) Mulla, Page 373 Pt. (w).

(c) Limitation Act (1908), S. 5 — Court has discretion to excuse delay under S. 5 — Court holding that no sufficient grounds existed for excusing delay — Decision cannot be interfered with under S. 115, Civil P. C.

Under S. 5 it is a matter for the Court's discretion to decide whether it should excuse the period of delay or not, and when it has decided that no sufficient grounds existed for excusing the delay it is not within the High Court's powers of revision under S. 115, Civil P. C., to interfere with that decision. [P 606 C 1]

C. P. C.—
('40) Chitaley, S. 115 N. 13 Pt. 4; N. 20 Pt. 1.
('41) Mulla, Page 427 Pt. (u).
Limitation Act—
('42) Chitaley, S. 5 N. 39 Pt. 2.

D. Narasaraju — for Appellants.

M. S. Ramchandra Rao — for Respondent.

JUDGMENT.—This is an appeal by two would-be appellants in the Court of the learned District Judge of East Godavari. They attempted on 21st July 1939 to obtain a favourable order from the learned District Judge under S. 5, Limitation Act, for excusing a delay of 19 days in presenting their appeal. The learned District Judge refused to excuse that delay and dismissed the petition and as a natural consequence of that order the appeal was rejected. The argument put forward before me is that the application made by the appellants before the District Judge was really unnecessary, that there was no delay to be excused at all, and that when they first presented their appeal on 7th July, it was in fact presented in time.

The facts and dates are as follows: The decree of the first Court against which the appellants desired to appeal was passed on the 2nd May 1939. A few days later the Court rose for the summer vacation, and both it and the District Court re-assembled after the summer vacation on the 19th June. The period of limitation for appeal is thirty days, and thirty days of course expired before the 19th June, but under the provisions of S. 4, Limitation Act, the appeal could undoubtedly have been presented on the 19th June. On that date however the appellants did not present their appeal, but presented instead a copy application in the Court of first instance. They now maintain that inasmuch as they had a right of presenting the appeal on 19th June they had also a right of applying for a copy on that day, and then, availing themselves of the provisions of S. 12, Limitation Act, of adding to the period of limitation the time taken by them from 19th June to obtain the copy. In support of this position the appellants rely upon 25 Bom. 586[1] and 19 All. 342[2] and also upon a case in 27 Mad. 21.[3] It seems to me that 27 Mad. 21[3] is distinguishable from this case on the facts for, in that case the judgment against which the appeal was sought to be filed was pronounced on the very last day the Court was sitting, so that it was physically impossible for any application for a copy to have been made on the same day. I have also been referred to other decisions in Madras by the learned counsel for the appellants: 43 Mad. 640[4] and 44 Mad. 817.[5] In 43 Mad. 640[4] there is a brief reference to the Allahabad and Bombay decisions but on the facts of that case it was unnecessary to express any agreement with those decisions. In 44 Mad. 817[5] one of the learned Judges appears to approve of the Allahabad and Bombay decisions but the other learned Judge doubts whether they are correct. In 12 M. L. W. 460[6] which has been cited by the learned counsel for the respondent, another Bench of this Court refused to follow 27 Mad. 21[3] unless the facts of that case were in all respects reproduced. It seems to me that in these circumstances there is no direct authority in Madras which is binding upon me and with respect I am in agreement with Ramesam J. in 44 Mad. 817[5] in holding that the Allahabad and Bombay decisions referred to by the learned counsel for the appellants in support of this appeal are wrong.

In my opinion the real clue to the decision of this appeal is contained in a judgment of the Privy Council reported in 57 All. 242.[7] That judgment contains an analysis of S. 4, Limitation Act, and shows that S. 4 by its very language cannot extend the period prescribed for the presentation of any suit or appeal or application. Its purpose is merely to allow any suitor or applicant to file his suit or application on a date after the expiry of the prescribed period if that period had expired while the Court was not sitting. It was therefore held in 57 All. 242[7] that there was no possibility of adding to the period of extension granted by S. 4 a further period which was said to fall within S. 14. In my opinion although in the decision in 57 All. 242[7] the Court was concerned only with the question of combining the periods under S. 4 and S. 14, the principles of that decision will apply equally to any such attempt at combination. I have already had a somewhat similar case to deal with in a judgment which is reported in (1937) 1 M. L. J. 262.[8] The question there was whether an acknowledgment under S. 19 made a day on which the Court re-opened and therefore on the day on which a suit could have been filed under S. 4 was an acknowledgment which would avail to extend the period of limitation. I held in that case that it could not have that force. Section 4 presupposes by its very language that the prescribed period had already expired, and under S. 19 it was necessary that the acknowledgment should be made within the prescribed period. It seems to me that the same principles will apply to S. 12 as they do to Ss. 14 and 19. Section 12 says that "in computing the period of limitation prescribed" for any suit, appeal or application, the day from which such period is to be

1. ('01) 25 Bom. 586 : 3 Bom. L. R. 244, Pandarinath Sakharam v. Sanker Narayan.
2. ('97) 19 All. 342 : 1897 A. W. N. 76, Siyadatunnisa v. Mohamed Mamud.
3. ('04) 27 Mad 21 : 13 M. L. J. 300, Saminatha Iyer v. Venkatasubba Iyer.
4. ('20) 7 A. I. R. 1920 Mad. 359 : 56 I. C. 67 : 43 Mad. 640 : 38 M. L. J. 465, Subramanyam v. Narasimham.
5. ('21) 8 A. I. R. 1921 Mad. 654 : 63 I. C. 924 : 44 Mad. 817 : 41 M. L. J. 84, Ummathu v. Pathumma.
6. ('20) 7 A. I. R. 1920 Mad. 1025 : 63 I. C. 922 ; 12 M. L. W. 460, Masilamani v. Arunga Mudali.
7. ('35) 22 A. I. R. 1935 P. C. 85 : 155 I. C. 205 : 57 All. 242 : 62 I. A. 80 (P. C.), Maqbul Ahmad v. Onkar Pratap Narainsing.
8. ('37) 24 A. I. R. 1937 Mad. 367 : 169 I. C. 653 : (1937) 1 M. L. J. 262, Chidambaram Chettiar v. Venkatasubba Naick.

reckoned shall be excluded and also the time requisite for obtaining a copy of the decree. Section 12 therefore assumes that the time requisite for obtaining the copy of decree must begin before the prescribed period is over. It has already been held that under S. 4 the right to present a suit or appeal or application on the day upon which a Court reopens is a special right which cannot extend the period of limitation prescribed in the Act. The section presupposes that that period has already expired. It seems to me therefore that under S. 4 the only privilege which is granted to the suitor or appellant is that he may file his suit or appeal on that particular day and that particular day alone. If he delays in making his application for a copy until that day, then he is applying for a copy when the period of limitation has already expired and following the principles laid down in 57 All. 242 I must hold that the extension which is granted to him by the application of S. 4 cannot be combined with the extension which he seeks under S. 12. It is clear, therefore, to my mind that the appeal in question was time-barred when it was presented on 7th July and the view of the appellants themselves that it was necessary for them to apply under S. 5, Limitation Act, was the correct one.

The question then arises whether the learned Judge was right in refusing to excuse the delay. On this point it is contended for the respondent that no second appeal lies in this case and it seems to me that, strictly speaking, that is so, inasmuch as there has been no first appeal in existence; and this appeal is not really an appeal against an order of the District Judge dismissing the appeal but an appeal against an order refusing to excuse the delay, against which no second appeal is provided. I have however heard the legal arguments involved in this case because they appeared to me to be important, and there is no reason why I should not treat this second appeal as if it were a revision petition. Having made that decision I am now unable to interfere with the learned District Judge's order. It is a matter for his discretion to decide whether he should excuse the period of delay or not, and when he has decided that no sufficient grounds existed for excusing the delay I do not think it is within my powers of revision under S. 115, Civil P. C., to interfere with that decision. In the result the appeal must fail and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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* A. I. R. (29) 1942 Madras 606

LEACH C. J. AND KRISHNASWAMI AYYANGAR J.

Chellathammal alias Ammamuthuammal—Appellants

v.

Kalitheertha Pillai and others—Respondents.

Letters Patent Appeal No. 57 of 1941, Decided on 2nd April 1942, against judgment and decree of Somayya J., *Reported in A.I.R. (29) 1942 Mad. 300.*

(a) Hindu law—Adoption—Widow not authorised by husband to adopt cannot do so unless she receives assent of nearest sapindas — Nearest reversioners improperly withholding assent — She can adopt with assent of remoter reversioners.

In the Madras Presidency a widow who has not been authorised by her husband to adopt a son to him cannot do so unless she has received the assent of his nearest sapindas. She can lawfully adopt with the assent of the remoter reversioners if the nearest reversioners improperly withhold their assent. [P 607 C 1]

Hindu law—
('40) Mulla, Page 524 S. 462.
('38) Gour, Page 185 Pt. 2; Page 188 Pt. 8.

(b) Hindu law—Adoption—Widow—Sapinda improperly withholding assent — It may be ignored—Two out of six sapindas assenting—Rest improperly withholding assent—Adoption by widow is valid.

Where a sapinda improperly withholds his assent to an adoption by the widow who has not been authorised by her husband to adopt, the assent may be ignored. Consequently, where two out of six sapindas give their assent and the rest improperly withhold their assent the adoption is valid. It is not a question of a majority assenting, but whether those dissenting, if they form the majority have dissented from improper motives: 26 Mad. 627 and 23 Mad. 486, *Rel. on.* [P 607 C 1]

Hindu law—
('40) Mulla, Page 525 Pt. (y).
('38) Gour, Page 190 Pt. 1, Page 181 Pt. 3.

(c) Appeal — Letters Patent — Finding that person was insane cannot be challenged.

A finding that a person was insane during certain period cannot be challenged in Letters Patent Appeal. [P 607 C 1]

C. P. C.—
('40) Chitaley, Let. Pat. (Cal) Cl. 15 N. 14.
('41) Mulla, Page 1408 Note "Points on which appeal may be heard."

(d) Hindu law — Adoption—Widow—Motive for adoption is immaterial.

The widow's motive in making an adoption is immaterial: ('41) 28 A. I. R. 1941 Mad. 937 (F.B.), *Rel. on.* [P 607 C 2]

Hindu law—
('40) Mulla, Page 532 Pt. (y).
('38) Gour, Page 180 Para. 516.

(e) Hindu law — Adoption — Widow—Whether spiritual point of view or property considerations are paramount (*Quære*).

Whether in the case of an adoption by a widow the spiritual point of view or property considerations are paramount. [P 608 C 2]

Hindu law—
('40) Mulla, Page 532 S. 469.
('38) Gour, Page 180 Para. 516; Page 188 Pt. 1.

*(f) Hindu law — Adoption — Widow—Joint family — Only surviving coparcener insane — Widow can adopt with assent of nearest divided sapindas : (1942) 1 M.L.J. 28=('42) 29 A.I.R. 1942 Mad. 300, *REVERSED.*

The widow of a member of a joint family can adopt a son to her deceased husband with the assent of the nearest divided sapindas when the only surviving coparcener is insane : (1942) 1 M.L.J. 28: ('42) 29 A.I.R. 1942 Mad. 300, *REVERSED, Case law discussed.* [P 607 C 1; P 608 C 1]

Hindu law—
('40) Mulla, Page 525 Pt. (b).
('38) Gour, Page 189 Para. 538.

K. R. Rangaswami Ayyangar and S. Venkatesan — for Appellants.

R. Sundaralingam — for Respondents.

LEACH C. J. — The question in this appeal is one of Hindu law and there is no authority which has direct bearing upon it. The question is whether the widow of a member of a joint family can adopt a son to her deceased husband with the assent of the nearest divided sapindas when the only surviving coparcener is insane. It is well settled law in this Presidency that a widow who has not been authorised by her husband to adopt a son to him cannot do so unless she has received the assent of his nearest sapindas, and that she can lawfully adopt with the assent of the remoter reversioners if the nearest reversioners improperly withhold their assent. It has never been decided whether she can go outside the family when there are no joint sapindas capable of advising her, or, if there are, they refuse their assent on improper grounds. On 6th January 1926, one Sethuramalingam Pillai died leaving two widows and a daughter, defendants 1, 2 and 3 respectively. Sethuramalingam Pillai was joint with his brother, Kalitheertha Pillai, the plaintiff. They were the only coparceners. In 1926 Kalitheertha Pillai became insane and remained insane until the year 1931. On 11th December 1930 the widows adopted defendant 4. The nearest sapindas of Sethuramalingam Pillai outside the family were six in number. Two of them gave their assent to the adoption, but four of them refused their assent on the ground that Kalitheertha Pillai was sane. On 28th July 1933 Kalitheertha Pillai instituted a suit in the Court of the Subordinate Judge of Tinnevelly in which he challenged the validity of the adoption and asked for a decree for possession of the family estate. The Subordinate Judge held that the plaintiff was insane when the adoption was made and that the widow was entitled to make the adoption with the assent of two of the sapindas, inasmuch as the other four had improperly withheld their assent. Consequently, he declared that defendant 4 was entitled to a moiety of the properties. On appeal the District Judge of Tinnevelly agreed with the Subordinate Judge. The plaintiff then appealed to this Court and the appeal was heard by Somayya J. who held that in the case of a joint family a widow is not entitled to seek the advice of divided sapindas and therefore is not in a position to make an adoption. The learned Judge having given the requisite certificate defendants 1 to 4 have preferred this appeal under the provisions of Cl. 15, Letters Patent.

The learned advocate for the appellant has taken the preliminary objection that the assent of two of the six sapindas was not sufficient, but on this question Somayya J. agreed with the judgments below and I consider that he was right in so doing. Where a sapinda improperly withholds his assent it may be ignored. It is not a question of a majority assenting, but whether those dissenting if they form the majority have dissented from improper motives: *see* 26 Mad. 627[1] and 23 Mad. 486.[2] The finding of the District Judge that he was insane at the time of the adoption cannot be challenged in this Court and as the four sapindas refused their assent on the basis of the untrue allegation that he was sane their refusal can only be regarded as being improper. In arriving at the conclusion that the widow cannot go outside the joint family when she requires the assent of the sapindas, Somayya J. relied on the observations of the Privy Council in 12 M. I. A. 397,[3] 1 Mad. 69,[4] 41 Mad. 998,[5] and the decision of this Court in (1940) 1 M. L. J. 779.[6] It was in 12 M.I.A. 397[3] that the Privy Council decided that in the Dravida country a Hindu widow, not having her husband's permission, may if duly authorised by his kindred, adopt a son to him. In delivering the judgment of the Board Sir James Colvile said:

"The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband, is the first to suggest itself. Where the husband's family is in the normal condition of a Hindu family, i. e., undivided, that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will."

Sir James Colvile then proceeded to discuss the position when the widow has taken by inheritance the separate estate of her husband, which was there the case, and observed:

"It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend under the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and bona fide performance of a religious duty, and neither capriciously nor from a corrupt motive."

In subsequent cases the Privy Council indicated that the widow's motive might not be a factor and in 1941-2 M. L. J. 803,[7] a Full Bench of this Court held that the widow's motive was not material. The necessity of obtaining the assent of the sapindas, however, remains. One of the questions discussed in 1 Mad. 69[4] was whether an adoption by a widow was lawful when she had not received the assent of her husband's undivided brother, but had received that of a more remote relative who was separate in estate. The Privy Council held that such consent was not sufficient and their Lordships observed:

"There seem to be strong reasons against the conclusion that, for such a purpose as that now under consideration, she can at her will travel out of that undivided family, and obtain the authorisation required from a separated and remote kinsmen of her husband."

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1. ('03) 26 Mad. 627 : 13 M.L.J. 239, Subrahmanyam v. Venkamma.
2. (1900) 23 Mad. 486 : 10 M. L. J. 73, Venkatakrishnamma v. Annapurnamma.
3. ('67-69) 12 M. I. A. 397 : 10 W. R. 17 : 1 Beng. L. R. 1 : 2 Suther 135 : 2 Sar 361 (P.C.), Collector of Madura v. Moottoo Ramalinga Sethupathi.
4. ('76-78) 1 Mad. 69 : 3 I. A. 154 : 3 Sar. 583 : 3 Suther 263 (P.C.), Sri Virada Pratapa Raghunada Deo v. Sri Brozo Kishoro Patta Deo.
5. ('18) 5 A. I. R. 1918 P. C. 97 : 48 I. C. 706 : 41 Mad. 998 : 45 I. A. 265 (P.C.), Veerabasavaraju v. Balasuryaprasada Rao.
6. ('40) 27 A. I. R. 1940 Mad. 950 : 194 I. C. 845 : (1940) 1 M. L. J. 779, Vajjulu v. Gopalakrishnamma.
7. ('41) 28 A.I.R. 1941 Mad. 937 : 198 I. C. 236 : I. L. R. (1942) Mad. 173 : (1941) 2 M. L. J. 803 (F.B.), Kanakaratnam v. Narasimharao.

This decision is direct authority for the proposition that a widow cannot ignore an undivided sapinda but it does not decide whether she can seek the assent of the divided kinsmen when there is an undivided sapinda alive but so mentally afflicted as to be incapable of advising her. In 41 Mad. 998[5] the Privy Council again stated that the requisite authority in the case of an undivided family is to be sought by the widow within that family and that she cannot at her will travel outside and obtain the authorisation required from separated and remote kinsmen of her husband. In that case all the undivided sapindas were dead and the widow did not seek the consent of the nearest separated sapindas. The fact that she ignored them was sufficient ground for holding the adoption to be invalid. While recognizing that in the cases to which reference has been made the Judicial Committee was not called upon to decide the question now before the Court, Somayya J. has read 1941-1 M. L. J. 779[6] as being directly in point, but we do not share that opinion. The Bench which decided that case was composed of my learned brother Krishnaswami Ayyangar and myself. There the appellant as the nearest sapinda challenged the adoption made by a widow nearly 61 years after the death of her husband. The widow claimed authority to adopt under a will and also averred that the appellant and other sapindas had given their consent. The Subordinate Judge held that the will was a forgery, that the appellant was the only living sapinda and that he had not given his consent. The Subordinate Judge dismissed the suit, however, on the ground that the appellant had refused his consent from an improper motive. The appellant had not been asked why he had refused his consent and there was nothing in the evidence which indicated that he had refused it improperly. The Subordinate Judge assumed that the appellant had refused his consent on the ground that his rights as a reversioner would come to an end if the widow adopted a son to her husband and he considered that this would be an improper motive. My learned brother and I held that the Subordinate Judge was not entitled to make this assumption, that the burden was on the respondents to prove improper motive and that as the burden had not been discharged the appellant was entitled to succeed. The Court was not considering the question whether the widow could look to divided sapindas for advice when there was an undivided sapinda alive and he had improperly withheld his consent, although it was recognized that in view of the decision of the Judicial Committee in I. L. R. (1938) Mad. 551[8] that there was no residuary power in the widow to adopt when there was no sapinda alive.

The Hindu law regards the adoption by a widow of a son to her deceased husband as a meritorious act. In 12 Pat. 642[9] the Privy Council referred to the well-established doctrine of the religious efficacy of sonship and their Lordships said that great caution should be observed in shutting the door upon any authorized adoption by the widow of a sonless man. As I had occasion to point out in I.L.R. (1940) Mad. 454[10] the Judicial Committee in 12 Pat. 642[9] recognized the importance of an adoption from a spiritual point of view and indicated that the matter of succession to property is a secondary consideration. It is true in 12 M. I. A. 397,[3] Sir James Colvil, considered it would be unjust to allow the widow to defeat the interests of undivided brothers by introducing a new coparcener, but assuming that, in spite of what was said in 12 Pat. 642,[9] property considerations are paramount in the case of an undivided family—it is not necessary to decide that question here because there was no undivided sapinda capable of assenting—is the widow of a coparcener to be precluded from seeking the advice of divided sapindas when she wishes to adopt a son to her deceased husband and there is no undivided sapinda capable of advising her ? I can see no valid reason for a negative answer to this question. The religious significance of the act of adoption is fully recognized by her personal law and it seems to me that the principle which applies in the case of the divided family can with equal justice be applied here. In 57 Bom. 157[11] the Privy Council held that in the Bombay Presidency a Hindu widow can make a valid adoption, although her husband died undivided and she has not obtained the consent of his surviving coparceners. The Hindu law as administered in the Bombay Presidency has always given greater latitude to the widow in this respect than the law as administered in the Madras Presidency gives her, and the position in the two provinces is not the same, but the decision of the Judicial Committee in 57 Bom. 157[11] provides another indication that property is not the deciding factor in the situation. I would allow the appeal and restore the decree of the Subordinate Judge with costs here and in the second appeal.

KRISHNASWAMI AYYANGAR J.—I agree.

C.R.K./G.N. *Appeal allowed.*

11. ('33) 20 A. I. R. 1933 P. C. 1 : 141 I. C. 9 : 57 Bom. 157 : 60 I. A. 25 (P.C.), Bhimabai v. Gurunath Gowda Kandappa Gowda.

A. I. R. (29) 1942 Madras 608

KING J.

Meer Shafi Sahib — Appellant

v.

Abdul Kharim and others — Respondents.

Appeal No. 185 of 1940, Decided on 10th March 1942, against appellate order of Sub-Judge, Bapatla, D/- 11th April 1940.

Civil P. C. (1908), O. 22, R. 6 and O. 21, Rule 92 — Order confirming sale under O. 21, R. 92 is necessary corollary of order refusing to set it aside—Application by judgment-debtor to set aside sale under O. 21, R. 90—After conclusion of hearing judgment-debtor dying—Subsequent order dismissing application and confirming sale is valid by reason of O. 22, R. 6 even though passed without impleading judgment-debtor's legal representatives.

Under O. 21, R. 92 where an application under R. 90 is disallowed, the Court must make an order confirming the sale. An order under O. 21, R. 92 confirming the sale is therefore a necessary corollary of an order refusing to set it aside. No differentiation can be made between an order refusing to set aside a sale and an order confirming a sale as if they were separate and were orders necessarily to be passed upon

8. ('38) 25 A. I. R. 1938 P. C. 34 : 172 I. C. 724 : I.L.R. (1938) Mad. 551: 32 S.L.R. 328: 65 I.A. 93 (P.C.), Balasubrhmanya v. Subbaya Thevar.

9. ('33) 20 A.I.R. 1933 P.C. 155 : 143 I.C. 441 : 12 Pat. 642: 60 I.A. 242 (P.C.), Amarendra Mansing v. Sanatan Singh.

10. ('40) 27 A.I.R. 1940 Mad. 356 : 188 I.C. 250 ; I. L. R. (1940) Mad. 454 : (1940) 1 M. L. J. 400 (F.B.), Seshamma v. Venkatanarasimharao.

separate proceedings. Consequently where after the conclusion of the hearing of an application under O. 21, R. 90 by the judgment-debtor to set aside a sale the judgment-debtor dies, an order dismissing the application thereafter and confirming the sale is valid by reason of O. 22, R. 6 even though passed without impleading the judgment-debtor's legal representatives. [P 609 C 1]

C. P. C.—

('40) Chitaley, O. 21, R. 92, N. 2, Pt. 1; O. 22, R. 6, N. 2.

('41) Mulla, Page 899, Pt. (y); P. 939, Pt. (y).

K. Krishnamurthy—for Appellant.

JUDGMENT.— The main question involved in this appeal is whether an order of the District Munsif of Tenali dated 31st December 1938 confirming a sale held in execution is void or not. The respondents who are the legal representatives of the judgment-debtor stated that the order was void because it was passed after the death of their father and without their having been impleaded in the execution petition. On the other hand, the decree-holder who appeals argues that the provisions of O. 22, R. 6, Civil P. C., read with the provisions of O. 21, R. 92 justify the order confirming the sale even though the respondent's father was dead at the time it was passed. It seems to me that this contention of the appellant is bound to prevail. The facts are that there was an application by the respondent's father to set aside the sale and that application came up for arguments before the District Munsif in October 1938 when the applicant was still alive. Arguments were heard and judgment was reserved and judgment was not delivered dismissing the application to set aside the sale until 31st December. O. 22, R. 6 provides that a suit shall not abate by reason of the death of a party between the conclusion of the hearing and the pronouncing of the judgment, and O. 22, R. 12 shows that R. 6 in O. 22 will apply to proceedings in execution as well as to suits. The order therefore refusing to set aside the sale is valid by the provisions of R. 6 of O. 22. Rule 92 of O. 21 provides that where an application under R. 90 is disallowed, the Court shall make an order confirming the sale. An order confirming the sale is therefore a necessary corollary of an order refusing to set it aside. The learned Subordinate Judge in the order now appealed against has carefully differentiated between an order refusing to set aside a sale and an order confirming a sale as if they were separate and were orders necessarily to be passed upon separate proceedings. It seems to me impossible to uphold any such distinction, and even if it were granted for technical reasons that there were separate applications to be dealt with by the Court in connexion with deciding whether to set aside a sale or not and passing an order confirming a sale, it would still necessarily follow that when arguments were being heard, both the petitions were being argued and therefore the provisions of O. 22, R. 6 must apply to the final order in both the petitions. It would be an absurd position if an order refusing to set aside a sale is declared valid and an order confirming a sale should be declared void when the subject-matter of both the orders is essentially the same and the arguments in both the orders are the same. For these reasons I am of opinion that the view of the learned District Munsif in this case is to be preferred to the view of the learned Subordinate Judge and the order of the District Munsif of Tenali confirming the sale is not void.

In the result the application which has given rise to this appeal must necessarily be dismissed. The appeal is allowed and the respondents' application dismissed with costs throughout.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 609

HORWILL J.

In re Bellemkonda Kanakayya —

Petitioner.

Criminal Revn. Case No. 163 of 1942 (Criminal Revn. Petn. No. 151 of 1942), Decided on 1st July 1942, to revise judgment of Special 1st Class Magistrate, Guntur, D/- 8th December 1941.

(a) Madras Prevention of Adulteration Act (3 of 1918), Ss. 15 and 5 — Object of S. 15 — Offence under S. 5 — Omission to give notice under S. 15 does not make offence cease.

If an accused commits an offence under S. 5 by offering adulterated ghee for sale, it does not cease to become an offence because of an omission on the part of the Sanitary Inspector to comply with the requirements of S. 15 in giving a notice in writing that he had taken the ghee for the purpose of analysis. Section 15 has been enacted for the protection of the vendor, so that he himself might, if he so wished, have the ghee analysed privately so that he might be satisfied that it was really adulterated in the manner and to the extent indicated by the public analyst. Section 15 is not in any way connected with the prosecution or the trial so as to make it an indispensable preliminary to either. If an accused contends that he would have had his part of the sample analysed but for the failure to give him notice in writing under S. 15 the Court would have to consider the reasonableness of that plea. [P 610 C 1]

(b) Madras Prevention of Adulteration Act (3 of 1918), Ss. 14 and 5 — Sanitary Inspector demanding commodity under S. 14 — Parting with commodity does not amount to sale — Sanitary Inspector not acting under S. 14 but merely tendering money and accused voluntarily handing over goods—Transaction is sale—Fact that goods were required not for consumption but for analysis is immaterial — Owner of shop held guilty of offering ghee for sale — Servant held neither guilty of selling ghee nor of offering it for sale.

The parting with a commodity when it is demanded by the Sanitary Inspector in the exercise of his powers under S. 14 does not amount to a sale within S. 5. If the Sanitary Inspector does not exercise his powers under S. 14 but merely tenders the money and the shop owner or his servant voluntarily hands over the goods, then there would be a sale and the fact that it was subsequently found that the goods were required not for consumption but for analysis, would make no difference to the nature of the transaction that had been entered into. [P 610 C 2]

A was the owner of a shop where he kept and offered ghee for sale. *B* was working in that shop and his duty was to sell the ghee to customers. The Sanitary Inspector entered the shop, exercised his powers under S. 14 and demanded a sample from *B*, who was then selling articles in his master's absence. The sample was found to be adulterated ghee and both the accused were prosecuted :

Held that (1) in displaying the ghee in his shop *A* was offering it for sale within S. 5. [P 610 C 2]

(2) Since the offering of ghee for sale was done by *A*, and *B* had no right to interfere with anything that his master had done or to remove from the shop any articles that his master had placed there for sale and did nothing to make the offer of ghee for sale more attractive *B* could not be said to have offered ghee for sale. [P 610 C 2]

(3) Nor could *B* be said to be guilty of selling the ghee. [P 610 C 2]

G. C. Venkatasubba Rao — for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor — for the Crown.

ORDER. — Accused 1 in this case was the owner of a shop where he kept and offered for sale certain ghee which was found on analysis to be adulterated to the extent of 35 per. cent. Accused 2 was working in that shop and his duty was to sell the ghee to customers. The Sanitary Inspector entered the shop exercised his powers under S. 14, Madras Prevention of Adulteration Act, and demanded a sample from accused 2, who was then selling articles in his master's absence. When this sample was found to be adulterated ghee, both the accused were prosecuted. The Sub-Magistrate of Guntur thought that both of them were guilty. In appeal, the Special First Class Magistrate came to the conclusion that because accused 1 was absent and no notice was given to him as required by S. 15 that it was intended to have the sample analysed, the trial and conviction of accused 1 was vitiated. He however considered that the conviction of accused 2 was right because he thought that he must be deemed to have offered this adulterated ghee for sale. Accused 2 has therefore preferred this revision petition against the affirmation by the appellate Judge of his conviction.

The Special First Class Magistrate seems to have acquitted the man who was guilty of an offence under the Act and to have convicted the man who was innocent. Accused 1, in displaying this ghee in his shop, was offering it for sale; and S. 5 of the Act makes punishable the offering of ghee for sale. If the accused commits an offence under S. 5 by offering adulterated ghee for sale, it does not cease to become an offence because of an omission on the part of the Sanitary Inspector to comply with the requirements of S. 15 in giving a notice in writing that he had taken the ghee for the purpose of analysis. Section 15 seems to have been enacted for the protection of the vendor, so that he himself might, if he so wished, have the ghee analysed privately so that he might be satisfied that it was really adulterated in the manner and to the extent indicated by the public analyst. Accused persons not infrequently take advantage of the notice given to them under S. 15, and get the ghee analysed privately for the purpose of defending themselves against any charge that the authorities might prefer against them. If notice is not given, an accused person may have cause for complaint that he was not given a proper opportunity of defending himself. That argument would of course be available as much to an employee as to the owner. Section 15 does not suggest that it is in any way connected with the prosecution or the trial so as to make it an indispensable preliminary to either. If an accused contends that he would have had his part of the sample analysed but for the failure to give him notice in writing, the Court would have to consider the reasonableness of that plea.

The learned Public Prosecutor concedes that the petitioner was not offering ghee for sale. It is the owner, who displays articles in the shop and thereby invites the public to purchase them, who offers them for sale. The petitioner has no right to interfere with anything that his master had done, or to remove from the shop any articles that his master had placed there for sale. That does not of course mean that he could escape liability for doing any illegal act. He could not, for example, sell adulterated ghee, for that would be punishable under S. 5; but the offering for sale was presumably done by his master. As far as we know, the appellant did nothing to make the offer more attractive. The charge against the petitioner was of offering ghee for sale; but it was argued that he would be guilty of selling the ghee. A sale is a voluntary transaction, even when it is preceded by an agreement to sell. When a person exhibits articles in his shop he is making a general offer to sell them, and any person who comes into the shop and offers the price accepts his offer; but the intending purchaser cannot use physical force or threats to compel the owner to part with the goods. If he does, the transaction is not a sale. If the Sanitary Inspector had not exercised his powers under S. 14, but had merely tendered the money and the petitioner had voluntarily handed over the goods, then there would have been a sale; and the fact that it was subsequently found that the goods were required not for consumption but for analysis, would make no difference to the nature of the transaction that had been entered into. In this case, the petitioner would presumably not have parted with the goods voluntarily when he knew that they would be used for the purpose of bringing a case against him and his master. The petitioner was not therefore guilty of selling ghee. Lakshmana Rao J. in a similar case held that the parting with a commodity when it is demanded by the Sanitary Inspector in the exercise of his powers under S. 14 of the Act did not amount to a sale. The petitioner not having committed either the offence of selling ghee or of offering it for sale, he is entitled to be acquitted. The petition is therefore allowed and the conviction and sentence set aside. The fine, if paid, will be refunded.

C.R.K./G.N. *Petition allowed.*

A. I. R. (29) 1942 Madras 610

WADSWORTH AND PATANJALI SASTRI JJ.

Vali Chetti Munuswami Chetti — *Petitioner*

v.

Vali Chetti Venkataswami Chetti and others — *Respondents.*

Civil Revn. Petn. No. 2022 of 1939, Decided on 28th August 1941, to revise order of Court of Small Causes, Madras, D/- 13th February 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 19—Proceeding under S. 19 is not proceeding in execution of decree but one which gives new statutory remedy.

A proceeding under S. 19 is not a proceeding in execution of the decree, but one which gives a new statutory remedy, whereby the decree as originally passed is modified in the light of a defence not open to the defendant at the time of the original trial and a fresh decree is substituted for that which has been passed. Therefore, the proceedings under S. 19 are not proceedings under the decree originally passed. [P 611 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 19 — Proceedings under S. 19 when

can be regarded as separate and not mere continuation of suit, stated.

For the purpose of the procedure under S. 19 in respect of adding parties, setting aside ex parte orders and so on, it may be convenient and proper to regard the whole of the proceedings as a separate petition and not a mere continuation of the suit. [P 612 C 1]

(c) Madras Agriculturists Relief Act (4 of 1938), S. 19—Decree amended—Appeal lies but order refusing to amend is not appealable.

When under S. 19 a decree is amended a regular appeal lies against that amended decree, but there is no appeal against an order refusing to amend a decree. [P 612 C 1]

(d) Madras Agriculturists Relief Act (4 of 1938), S. 19 — Proceedings under S. 19 after Court comes to conclusion that decree should be amended are proceedings in suit—Presidency Small Cause Court passing decree without contest — Court amending decree under S. 19 after contest — Judgment-debtor can file new trial application under S. 38, Presidency Small Cause Courts Act.

Though the initial stages of a proceeding under S. 19 that is until the Court comes to the conclusion that the petitioner is entitled to reopen the suit may properly be regarded as proceedings outside the suit and not in any way ancillary to the decree, but when it has been decided to reopen the suit and to give effect to the defences under S. 19 so as to pass an amended decree, these later stages of the proceedings may properly be regarded as proceedings in the suit, resulting in a decree in the suit. Consequently, where a decree passed without contest by a Presidency Small Cause Court is amended by that Court on the application by the judgment-debtor under S. 19, Madras Act 4 of 1938 after contest, the judgment-debtor if he is dissatisfied with the amended decree on the ground that full effect has not been given to the defence which he urged under S. 19 can properly file a new trial application under S. 38, Presidency Small Cause Courts Act: C. R. P. No. 2307 of 1939, *Approved;* ('41) 28 A. I. R. 1941 Mad. 362, *Disting.* [P 612 C 1]

(e) Presidency Small Cause Courts Act (1882), S. 38 — Independent proceeding not a suit — Order passed with contest—Whether order can be questioned under S. 38 *(Quære).*

Whether an order in an independent proceeding which is not a suit, though it has been contested and ends in a decretal order can be called into question under Section 38. [P 612 C 2]

S. A. Seshadri Ayyangar — for Petitioner.

D. Ramaswami Ayyangar and T. P. Kannabiran — for Respondents.

WADSWORTH J. — The petitioner here was the judgment-debtor under a decree of the Presidency Small Cause Court. The decree was passed in 1934 without contest. After Act 4 of 1938 came into force a petition was filed under S. 19 of that Act to scale down the decree and the decree was scaled down, but not to the extent which the judgment-debtor thought proper. The judgment-debtor, therefore, filed a new trial application under S. 38, Presidency Small Cause Courts Act. This application was rejected on the ground that the suit out of which the amended decree arose was an uncontested suit. The present revision petition is preferred against this order and it is contended that although the original suit was uncontested, when once the application under Act 4 of 1938 was allowed, the suit was reopened and it became a contested suit and against the amended decree a new trial application would lie. Section 38, Presidency Small Cause Courts Act, provides that :

"Where a suit has been contested, the Small Cause Court may, on the application of either party made within eight days from the date of the decree or order in the suit . . . . order a new trial to be held, or alter, set aside or reverse the decree or order . . . ."

The explanation says :

"Every suit shall be deemed to be contested in which the decree is made otherwise than by consent of or in default of appearance by the defendant."

Now it is not denied that the original decree in the small cause suit was passed without contest. Nor is it denied that the application under S. 19 of Act 4 of 1938 was contested and resulted in an amended decree and that the amendment did not go so far as the judgment-debtor alleged to be proper. Pandrang Row J. in C. R. P. No. 2307 of 1939 held in a similar case that the effect of a proceeding under S.19 of the Act was to reopen the suit for the purpose of applying the provisions of the Act to the decree passed in the suit and that the application must be deemed to be an application in the suit and after the suit was reopened, as was the case in this application, the suit must be deemed to be a contested one. If this position is correct, the civil revision petition must succeed.

It has, however, been contended by Mr. Ramaswami Ayyangar for the respondents that this position requires reconsideration and a reference has been made to the decision of one of us in 1940-2 M. L. J. 940[1] where it was observed that an application under S. 19 of Act 4 is not ancillary to the decree, but destructive of the decree and is not to be deemed an application in the suit, but an entirely separate proceeding. The question under consideration in that case had nothing to do with the Presidency Small Cause Courts Act. The question was as to the applicability of S. 141, Civil P. C., to proceedings under S. 19. It is no doubt now established that a proceeding under S. 19 of the Act is not a proceeding in execution of the decree, but one which gives a new statutory remedy whereby the decree as originally passed is modified in the light of a defence not open to the defendant at the time of the original trial and a fresh decree is substituted for that which has been passed. It follows that the proceedings under S. 19 are not proceedings under the decree originally passed and at any rate until the Court comes to the conclusion that the petitioner is entitled to reopen the suit, the proceedings cannot properly be said to be proceedings in the suit. But when that first stage has been passed and the petitioner has established that he is an agriculturist entitled to have the decree already passed modified with reference to Act 4 can it be said that the proceedings thereafter are not proceedings in the suit ?

It is possible to look at the matter in both ways and for certain purposes, the whole of the proceedings under S. 19 may be regarded as separate proceedings not within the suit, or it is possible to regard the proceedings under S. 19 as falling naturally into two stages, the first being that stage which precedes the establishment of the right to reopen the decree, the second stage being that which follows the reopening of the suit and decides to

1. ('41) 28 A.I.R. 1941 Mad. 362 : 1940-2 M. L. J. 940, Satyanarayana v. Peddi Naidu.

what extent this new defence introduced into the suit by the provisions of Act 4 is entitled to succeed. For the purpose of the procedure under S. 19 in respect of adding parties, setting aside ex parte orders and so on, it may be convenient and proper to regard the whole of the proceedings as a separate petition and not a mere continuation of the suit. But when we are considering what is the remedy resulting from an amended decree, other considerations may arise. We have repeatedly held that when under S. 19 of the Act a decree is amended a regular appeal lies against that amended decree, while there is no appeal against an order refusing to amend a decree. That line of decisions gives some support for the distinction between the proceedings anterior to the Court's finding that the petitioner is entitled to have the decree amended and the further proceedings to decide how effect is to be given to the new defence. If the petitioner is found not to be entitled to the benefits of the Act then the proceedings end with an order on the petition which does not in any way affect the decree already passed. The suit is not reopened and there is no particular reason for regarding those proceedings as proceedings in the suit. But if the Court decides that the petitioner is entitled to the benefits of the Act and that the decree already passed has to be reopened in the light of the new defence, it does seem reasonable to regard the Court at this later stage, when deciding to what extent the defence under the Act must result in the modification of the decree, as having reopened the suit and as acting in continuation of the suit, just as if a fresh issue had been permitted to be raised and decided. On this view, effect would be given to the remedy which under the Presidency Small Cause Courts Act is provided for a judgment-debtor against whom a decree has been passed after contest, which decree requires him to pay more than according to his contentions is payable. To hold otherwise would be to regard these proceedings which result in an amended decree as proceedings against which the petitioner has no remedy except in the rare cases where the decree can be called in question under S. 115, Civil P. C. We are therefore of opinion that though the initial stages of a proceeding under S. 19 may properly be regarded as proceeding outside the suit and not in any way ancillary to the decree, when it has been decided to reopen the suit and to give effect to the defences under Act 4 of 1938 so as to pass an amended decree, these later stages of the proceedings may properly be regarded as proceedings in the suit, resulting in a decree in the suit and the defendant who is dissatisfied with such an amended decree on the ground that full effect has not been given to the defence which he urged, can properly file a new trial application under S. 38, Presidency Small Cause Courts Act.

In this view, it is unnecessary to go into the further question which has been elaborately argued, i. e., whether S. 38, Presidency Small Cause Courts Act confers a right to ask for a new trial when an order has been passed in a contested proceedings which proceedings cannot properly be described as a suit though analogous to a suit. We have had quoted before us cases in which it has been held that proceedings under Chap. 7, Presidency Small Cause Courts Act cannot be the foundation of a new trial application, and there are other cases dealing with applications to set aside an ex parte order in a garnishee proceeding (21 M. L. J. 525[2]) and proceedings under O. 21, R. 50 (2), Civil P. C., (32 Bom. L. R. 1009[3]) with reference to which it has been held that S. 38 has no application. But it is by no means clear that S. 38 would not apply to certain types of proceedings and the argument based on the language of S. 36 which makes a decree and order of the Registrar in a suit or proceedings subject to the same provisions in regard to a new trial as if made by a Judge, is one which has a good deal of force. As, however, it is unnecessary in the view which we have taken to decide this question, we leave the matter open and do not decide one way or the other whether an order in an independent proceeding which is not a suit, though it has been contested and ends in a decretal order can be called into question under S. 38. In the result, therefore, we allow the civil revision petition with costs and remand the new trial application to the Small Cause Court for fresh disposal in the light of this judgment.

C.R.K./G.N. *Petition allowed.*

2. ('11) 21 M.L.J. 525: 8 I.C. 856: (1911) 1 M.W.N. 52, Murugappa Chetty v. Ranganayakalu Chetty.

3. (30) 17 A.I.R. 1930 Bom. 412 : 128 I. C. 17 : 32 Bom. L. R. 1009, Kanji v. Jivraj Dayal.

A. I. R. (29) 1942 Madras 612

MOCKETT J.

Vankineni Peda Venkata Subbayya — *Petitioner*

v.

Jillillamudi Venkayya and another — *Respondents.*

Civil Revn. Petn. No. 1797 of 1940, Decided on 21st February 1941, to revise order of Court of (Principal) Sub-Judge, Ellore, D/- 18th October 1940.

(a) Madras Debt Conciliation Act (11 of 1936), Ss. 7 and 9—Application dismissed otherwise than under S. 7—Further application does not lie.

Section 7 only contemplates the circumstances under which an application once dismissed can be restored : ('40) 27 A. I. R. 1940 Mad. 31, *Not approved.* [P 613 C 2]

There is no provision in the Act for the hearing of a further application, when an application has been dismissed for any reason other than those specified under S. 7 for example under S. 9. [P 613 C 2]

Part 2 of S. 7 and the absence of a similar provision in S. 9 is conclusive that debtors cannot make more than one effective application for the conciliation of a particular debt : ('41) 28 A. I. R. 1941 Mad. 350, *Approved.* [P 613 C 2]

The intention of S. 25 also is that the judgment-debtor is not entitled to obtain a stay more than once : ('40) 27 A. I. R. 1940 Mad. 31, *Approved.* [P 613 C 2]

(b) Madras Debt Conciliation Act (11 of 1936), Ss. 4 and 25 — Application by creditor must be in regard to his own debt.

The applications contemplated by the Act by creditors are in respect of their own debts and not the debts of third parties. When the application is made by a single creditor with reference to a single debt, there is nothing in S. 25 to authorise the staying of proceedings regarding other debts due by the same debtor to other creditors notwithstanding

that those other debts may be taken into consideration by the Board: C. R. P. No. 2122 of 1939, *Rel. on.* [P 614 C 1]

V. Viyanna — for Petitioner.

V. Suryanarayana and M. V. Nagaramayya— for Respondents.

ORDER. — This petition raises a point under Madras Act 11 of 1936 (The Madras Debt Conciliation Act). The short facts are that the petitioner obtained a mortgage decree in March 1936 for a large sum. On 19th September 1938, it was scaled down under Madras Act 4 of 1938. 23rd October 1939 was the date fixed for sale. Respondent 2 then put in an application to the Debt Conciliation Board. That application was marked No. 62 of 1939 and all the creditors were made parties to it. Respondent 1 in this petition was respondent 5. Following on that application on 18th October 1939 a stay of sale was ordered in respect of the present petitioner's sale. This order necessarily was made under S. 25 of Act 11 of 1936. On 24th June 1940 the application was dismissed under S. 9 (b) of the Act. So it will be seen that the application before the Board was pending from October 1939 until June 1940. Section 9 (b) provides that an application may be dismissed if in the opinion of the Board the applicant fails to pursue his application with due diligence. On 19th July 1940 the application to restore the original application was dismissed. The sale was posted to 30th September 1940. On 4th September 1940 an application (No. 29 of 1940) was filed before the Debt Conciliation Board by the present respondent 1, who, be it remembered, was respondent 5, in the application No. 62 of 1939. The particulars of his application, which have to be furnished under S. 6 of the Act, were that the debtor owed him Rs. 2500 on a promissory note dated 21st June 1934 and Rs. 925 interest as per Act 4 of 1938. But in the beginning of his prayer he said, "I pray that the settlement may be made along with the debt due to Vanikenni Venkata Subbayya, creditor." Now, that is the name of the present petitioner and it must be borne in mind that an application to the Board based on that decree debt had already been dismissed for default under S. 9 (b) by the Board. But nevertheless as this application was made, the Subordinate Judge granted a stay of the sale which was ordered in favour of this petitioner for 30th September 1940. Against that order this civil revision petition has been filed.

It is necessary, I think, that I should express my view with regard to the general scheme of the Act so far as it is relevant to a decision of this petition. Section 4 provides for an application for settlement of debts (a) by the debtor and (b) unless the debtor has already made an application, by any of his creditors to a Board to which the debtor might have applied. Section 5 provides that the application should be in writing and signed and verified in the manner prescribed by the Code of Civil Procedure. Section 6 sets out the particulars which must be given by a debtor and sub-s. (2) sets out what a creditor has to do. He has to do this : his application must contain the following particulars : (a) the place where the debtor resides and (b) the amount and particulars of his claim against such debtor. Section 7 provides that the application shall be rejected, if it does not comply with any of the requirements mentioned in Ss. 5 and 6 and that the rejection of an application under this section shall not preclude the applicant from making a fresh application. There is therefore express provision for the making of a fresh application by the applicant when an application has been dismissed for non-compliance with Ss. 5 and 6. I do not find any provision in the Act for the hearing of a further application, when an application has been dismissed for any other reason for example, under S. 9. The next important section to be considered is the proviso to S. 9, which says that when such an applicant, i. e., the applicant whose application has been dismissed, is a creditor, the Board, instead of dismissing such application, may substitute the debtor or any other creditor who shall thereafter be deemed to be the applicant for the purposes of this Act. Section 25 provides that when an application has been made to a Board under S. 4 any suit or other proceeding then pending before a civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Board has dismissed the application. Now, in my view, the applications contemplated by the Act by creditors are in respect of their own debts and not the debts of third parties. Apart from the reasonable supposition that the Act need not be supposed to concern itself with making provision for altruistic or meddlesome persons to intervene in the affairs of others, I think the particulars to be furnished under S. 6 show that the particulars of the claim in respect of which an application is made are confined to the creditor-applicant's claim, because the words "particulars of his claim against such debtor" are used. I think therefore that this application must be taken to be an application only in respect of the debt said to be due by the debtor to the applicant, namely, Rs. 2500 and the amount for interest to which I have already referred. If that is so, S. 25 has no application, because the application before the Board is not in respect of the debt due by the judgment-debtor to the present petitioner but in respect of a debt due by that judgment-debtor to the present respondent 1. The authorities that have been cited to me are, I think, consistent with this view.

Stodart J. in a short judgment reported in (1939) 2 M.L.J. 727[1] held that though there is nothing to prevent a debtor filing one application after another and under S. 25 he can obtain stay of a suit or other proceeding so long as an application is pending, the judgment-debtor is not entitled to obtain a stay more than once. I entirely agree that that must be the intention of the section, but I expressly guard myself against agreeing with the statement of the learned Judge that there is nothing to prevent the debtor filing one application after another under the Debt Conciliation Act, because I have endeavoured to point out that S. 7 only contemplates the circumstances under which an application once dismissed can be restored. Burn J. in (1940) 2 M.L.J. 923[2] found himself "practically in agreement" with Stodart J. In that case the learned Judge decided that debtors could not make more than one effective application for the conciliation of a particular debt and the learned Judge sets out, as I have endeavoured to do, that the second part of S. 7 and the absence of a similar provision in S. 9 is conclusive that fresh applications in the case of effective applications cannot be made. The learned Judge also points out that if that was the case, repeated applications under S. 25 could be made so as to postpone the execution of a decree indefinitely. In

1. ('40) 27 A.I.R. 1940 Mad 31 : (1939) 2 M. L. J. 727, In re Ellappa Chettiar.
2. ('41) 28 A.I.R. 1941 Mad. 350 : (1940) 2 M.L.J. 923, Natesa Aiyar v. Singaravelu Pillai.

my view exactly the same argument can be applied here, for it would be possible for friendly creditors to put in separate applications at the long intervals, which the machinery of this Act appears to make possible and there would be no reasonable prospect of a decree being ever executed at all. Wadsworth J. in an unreported decision (C. R. P. No. 2122 of 1939) said as follows:

"Section 25, Debt Conciliation Act, provides for the stay of proceedings in respect of any debt for the settlement of which an application is made. When the application is made by a single creditor with reference to a single debt, there is nothing in S. 25 to authorise the staying of proceedings regarding other debts due by the same debtor to other creditors and I do not think that the mere fact that those other debts may be taken into consideration by the Board would warrant the Court in staying proceedings without statutory authority. If there is a lacuna in S. 25, it must be supplied by the Legislature."

I entirely agree with the learned Judge. In my opinion applications by a creditor are intended to be made with regard to his own debts and not with regard to the debts of third parties. For the reasons which I have given I consider the learned Subordinate Judge had no jurisdiction to grant a stay in this case. His order will be set aside and in consequence the sale will proceed as soon as may be. Owing to the use or misue of the machinery of this Act a decree of 1936 is still not executed in 1941. The petition will be allowed with costs against respondent 1 here and below.

C.R.K./G.N. *Petition allowed.*

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* A. I. R. (29) 1942 Madras 614

MOCKETT AND KUNHI RAMAN JJ.

Krishnaswamy Reddiar alias Rajah Chidambara Reddiar — Petitioner

v.

Venugopala Reddiar by his agent V. A. Lakshminarasimha Ayyar and others — Respondents.

Civil Revn. Petn. No. 1354 of 1940, Decided on 31st October 1941, to revise order of Sub-Judge, Trichinopoly, D/- 14th August 1940.

(a) Civil P. C. (1908), Ss. 16, 17 and 20—Plea that Court has jurisdiction — How and where cause of action arose not alleged — Plea held technically defective.

A plea in the plaint that the Court has jurisdiction to entertain the suit is technically defective where it does not allege how and where the cause of action arose in terms of Ss. 16, 17 and 20. [P 615 C 2]

C. P. C. —

('40) Chitaley, O. 7 R. 1, N. 8.

('41) Mulla, O. 7 R. 1, Note "Facts showing that the Court has jurisdiction."

(b) Jurisdiction — Immovable property in foreign territory — British Court will not entertain suit affecting property — Nor will British Court recognize foreign judgment adjudicating title to immovable property within British jurisdiction.

It is a basic principle of private international law that no British Court will entertain a suit affecting immovable property in a foreign country, nor will a foreign judgment adjudicating on the title to immovable property within British jurisdiction receive recognition in a British Court. [P 616 C 2]

C. P. C. —

('40) Chitaley, S. 16, N. 2 Pt. 4; Ss. 13 and 14, Note 9.

('41) Mulla, S. 16 Page 106 Pt. (i); S. 13 Page 95 Note "A British Indian Court will not give effect to a foreign judgment pronounced by a Court without jurisdiction."

(c) Government of India Act (1935), S. 292—Effect.

The effect of S. 292 is that the existing law of India continues to operate and therefore the Civil Procedure Code continues in force subject to alteration, repeal or amendment. [P 617 C 1]

(d) Government of India (Adaptation of Indian Laws) Order, 1937, Cl. 2 (2) — Meaning of, explained.

The meaning of cl. 2 (2) is that just as the Interpretation Act, 1889 affects the construction of Acts of Parliament, so equally can it be called in aid in construing the meaning of the Order. [P 617 C 1]

(e) Government of India (Adaptation of Indian Laws) Order, 1937, Cl. 10 — Word "authority" in Cl. 10 includes Court.

The word "authority" in cl. 10 is all comprehensive and includes a Court. [P 617 C 2]

(f) Government of India Act (1935), S. 46 (2) —Act affects its own territory and not foreign territory.

By the Government of India Act the supreme Legislature has thought fit to make far-reaching changes over territories subservient to it. It is not a case of cession of territory to a foreign State. It is a re-arrangement within the Empire. The supreme rule remains. The British Legislature had absolute authority within its own territorial limits to dispose of the rights of its subjects and all property within its limits—the law of eminent domain, a phrase of public international law. It is not a case of the British Legislature passing an Act purporting to affect foreign territory. The Act affects its own territory. [P 620 C 2]

(g) Civil P. C. (1908), Ss. 16, 17 and 20 — Civil Procedure Code is not confined to procedure — Jurisdiction does not come under processual law — Statute affecting procedure or substantive right — Whether retrospective — Right to institute suit or file appeal is substantive right— S. 46 (2), Government of India Act, affects that right and Court's jurisdiction and hence is not retrospective and does not apply to actions pending on 1st April 1937 — Effect of various enactments held to preserve to Courts jurisdiction which they held before 1st April 1937 in regard to actions then properly before them.

The Civil Procedure Code is not confined to procedure. No doubt, the Court derives its jurisdiction to entertain a suit from the Civil Procedure Code, and so far as the procedure governing trial is concerned, it is also derived from the Code. But jurisdiction and procedure are distinct. Jurisdiction does not come under processual matter. As a general rule statutes affecting processual law have a retrospective operation but statutes affecting substantive rights cannot be held retrospective unless a clear intention to that effect is manifested. The right of a party to institute a suit or to file an appeal in a particular Court is a substantive right

and not merely a matter of procedure. The Government of India Act, 1935, by S. 46 (2) affects that right and the jurisdiction of the Court and in the absence of an express provision that pending actions will be affected by the Act of 1935 and in the absence of any special provision relating to such actions, the new Act of 1935 cannot affect prejudicially suits instituted prior to 1st April 1937 and which were pending on that date: (1905) A. C. 369, *Rel. on*; A. A. O. No. 613 of 1938, *Approved*; *Case law discussed.* [P 620 C 1, 2]

The combined effect of the India and Burma Existing Laws, 1937, S. 1, sub-ss. (1) and (2), Government of India (Adaptation of Indian Laws) Order, 1937, paras. 1, 9, 10 and 11 and the Interpretation Act (1889), 52 and 53 Vic., Chap. 63, S. 38 (b), (c), (d) and (e), is expressly to preserve to the Courts the jurisdiction which they held before 1st April 1937 in regard to litigation then properly before them. [P 621 C 2]

Consequently, where a suit in respect of immovable and moveable properties, part of which is situated in British India and part in British Burma was properly instituted in British Indian Courts which had jurisdiction to entertain it and which was pending on 1st April 1937, S. 46, Government of India Act, cannot affect the right of the plaintiff to continue that suit and the Court's jurisdiction to deal with it cannot be said to have been taken away by the Government of India Act under S. 46 (2) thereof. [P 621 C 2]

C. P. C. —

('40) Chitaley, Preamble N. 3 Pts. 1 to 3.

('41) Mulla, S. 1 Page 3 Pt. (w).

(h) Civil P. C. (1908), S. 115—Suit in respect of immovable and moveable properties situate in Burma and British India properly filed in British Indian Court in 1932 — Suit becoming ready for trial only in 1940 — After passing of Government of India Act (1935), defendant raising plea that Court ceased to have jurisdiction over Burma properties by reason of S. 46 (2) of that Act—Plea upheld—High Court held could entertain revision as it raised important question of jurisdiction though point could be taken on appeal.

The suit in respect of properties immovable and moveable partly situated in British India and partly in Burma was properly filed in the British Indian Court in 1932. The suit had a chequered career and became ready for trial only in 1940. In the interval the Government of India Act of 1935 was passed, and according to S. 46 (2) of that Act, it was declared that Burma shall cease to be part of India. This provision came into force from 1st April 1937. Therefore, on the coming into force of S. 46 (2), Government of India Act 1935, the defendant raised an additional plea that the Court had ceased to have jurisdiction to proceed with the trial of the suit so far as it related to the properties situated in British Burma. The plea was upheld and the plaintiff went up in revision against the order upholding the plea :

Held that the revision petition unquestionably raised an important question of jurisdiction and could be entertained by the High Court under Section 115, Civil P. C. Though the point of jurisdiction could be taken on appeal, it would be a very grave hardship on the petitioner to do so. Immense expense might be incurred for obtaining the necessary evidence from Burma, which might possibly be thrown away were the final decision as to jurisdiction to be against the plaintiff in the appeal. As the decision of the High Court in revision would be final so far as the question of jurisdiction was concerned, it was convenient and proper to decide it in revision. [P 616 C 1, 2]

C. P. C. —

('40) Chitaley, S. 115, N. 8 Pts. 13 and 14, N. 9 Pt. 2; N. 11 Pt. 1.

('41) Mulla, S. 115 Page 413, Note "Alternative remedy by way of suit or otherwise"; Page 418 Pt. (h).

T. R. Venkatarama Sastri and K. S. Sankara Ayyar — for Petitioner.

Sir A. Krishnaswami Ayyar (Advocate-General) and K. G. Srinivasa Ayyar—for Respondents.

MOCKETT J.—It is unnecessary to set out the complicated facts which are the basis of the suit, the subject of this civil revision petition. The following statement of the essential facts is sufficient. The plaintiff filed O. S. No. 55 of 1932 in the Court of the Subordinate Judge of Trichinopoly against the defendants, who both reside in Rangoon. The prayer in the plaint is as follows :

"(a) For a decree directing the defendants to deliver the properties in Sch. C, Parts 1, 2 and 3, together with profits from date of suit and declaring that the plaintiff is solely and absolutely entitled to the assets described in Sch. C, Part 4.

(b) In case the plaintiff is held not entitled to that relief, for a decree directing the division of the properties in Schs. A, B and C into one-fourth, three-eighths, and three-eighths shares allotting Schs. A and B to the plaintiff and charity and adding so much property from Sch. C as may be necessary to make them a just moiety of three-fourths and one-fourth respectively of the entire estate.

(c) For a decree that the plaintiff is entitled to the trusteeship of the charity and to the management of the properties attached thereto described in Sch. B, together with what may be added to them on the just ascertainment of one-fourth share for the charities."

It is common ground at the Bar that a large part of the properties concerned are immovable properties in Burma, the others being within the jurisdiction of the Court of the Subordinate Judge of Trichinopoly. Paragraph 20 of the plaint states :

"The cause of action arose at Srirangam, Tiruvanaikoil, Manakkal, etc., villages in the Trichinopoly District, within the jurisdiction of this Court, in February 1932 when Raja Ramanatha Reddi died and when plaintiff became aware of the unfair allotment to Krishnaswami Reddi's share out of Chidambara Reddiar's estate."

This plea is technically defective as it does not allege how and where the cause of action arose in terms of Ss. 16, 17 and 20, Civil P. C. It is however obvious from a reading of the plaint that part of the cause of action arose in Trichinopoly and part in Burma. The defendants never suggested otherwise, and under S. 21, Civil P. C., they would not have been permitted to take this technical point of pleading as to jurisdiction at the trial had events followed their normal course. The defendants did in fact take an objection relating to court-fee, as a result of which the petitioner, in the words of his affidavit filed in I. A. No. 1280 of 1938, "paid a very heavy additional court-fee of Rs. 7910 rendered payable in respect of properties situate in Burma, on 11th January 1938." As an important question concerning jurisdiction is before us I am noticing the above, but actually it has not been contended

before us that, had it not been for the following circumstances, this suit was not properly brought in the Court of the Subordinate Judge of Trichinopoly.

On 1st April 1937 the Government of India Act, 1935, came into operation. Section 46, sub-s. (2) is as follows : "Burma shall cease to be part of India." On 16th November 1938, six years after the plaintiff had filed his suit in Trichinopoly, the defendants filed a petition praying for leave to file an additional written statement. The affidavit in support of that petition alleges (1) that the properties are situate partly in British India within the local limits of this Court's jurisdiction and partly in British Burma which formed part of British India when this suit was instituted ; and (2) that out of the suit properties certain named items in the schedule are situate in Burma. Paragraph 4 is as follows :

"Under the Government of India Act, 1935, S. 46 (2), Burma including British Burma has ceased to be part of India including British India from 1st April 1937. This Court, being a British Indian Court, has, therefore, ceased to have jurisdiction over the said properties in British Burma from the said date. I am advised that there has come into existence a total want and absence of jurisdiction in this Court, in respect of the said pronotes by reason of the said enactment and that a decree passed by this Court in respect of the properties in Burma will be a nullity."

Leave to file the additional written statement was granted. Paragraph 2 of that statement alleges:

"There has come into existence from 1st April 1937 a total want and absence of jurisdiction in this Court in so far as the said properties are concerned by reason of the separation of Burma from India."

An additional issue 33, directly raising the jurisdiction of the Court was framed as follows :

"Has this Court now jurisdiction in respect of the properties situate in Burma included in the plaint Sch. C in view of S. 46 (2), Government of India Act, 1935 ?"

The suit was rightly posted for arguments on this issue, because, in the words of the learned Judge in para. 2 of his judgment, "It was said that a decision on this point will save a lot of oral evidence in the case as the bulk of the properties claimed in this suit are situated in Burma and questions have been raised regarding the ownership of those properties."

The learned Judge has decided that he had no jurisdiction to try this suit regarding the moveables and immovables situated in Burma. If that decision is right, the plaintiff must commence proceedings again in Burma regarding the property in Burma. The issues in that suit will be, as far as I can judge from a perusal of them, identical with those raised affecting the Indian property and remaining within the learned Judge's jurisdiction. They involve a decision inter alia as to the fact and validity of certain adoptions, the validity of a will, partition deed and trust deed, and questions of construction of the documents. Against that decision this civil revision petition has been filed. It unquestionably raises an important question of jurisdiction and can be entertained by us under S. 115, Civil P. C. Sir Alladi Krishnaswami Ayyar, on behalf of the respondents, did not suggest that it is not a proper case in which we should decide the point in revision. I think it right to state that although it might be possible to say that this suit should proceed and that the point of jurisdiction should be taken on appeal, it would be a very grave hardship on the petitioner to do so. Immense expense might be incurred for obtaining the necessary evidence from Burma, which might possibly be thrown away were the final decision as to jurisdiction to be against the plaintiff in the appeal. As it seems to us that our decision in this civil revision petition will be final so far as the question of jurisdiction is concerned, we have thought it convenient and proper to decide it now. The point that we have to decide may be stated in this way. Has the jurisdiction of the Court of the Subordinate Judge of Trichinopoly, as from 1st April 1937, entirely ceased to exist in so far as a suit filed therein before that date affects immovable property in Burma? The respondents contend that the answer should be "Yes;" the petitioner contends that the jurisdiction of the Courts relating to matters pending before 1st April 1937, has been saved or at least has not been specifically taken away and that the Subordinate Judge can continue to try the suit and can pass a decree affecting the immovable property in Burma? It is a basic principle of private international law that no British Court will entertain a suit affecting immovable property in a foreign country, nor will a foreign judgment adjudicating on the title to immovable property within British jurisdiction receive recognition in a British Court. This well known principle has been treated as axiomatic before us and it is unnecessary to quote authority for it. The decisions of the highest Courts are unanimous. I am more than content to adopt the statement on the subject by Prof. Dicey in Edn. 5 of his work on the Conflict of Laws, at p. 203, which reads as follows :

"Subject to the exceptions hereinafter mentioned, the Court has no jurisdiction to entertain an action for (1) the determination of the title to, or the right to the possession of, any immovable property situated out of England."

The exceptions do not apply in this case. The respondents have, therefore, relied on this general principle. They contend that on and after 1st April 1937, so far as the jurisdiction of his Court was concerned the Subordinate Judge had no more right to pass a decree relating to immovable property in Burma than he had to order delivery to the plaintiff of a house in Bangkok. The petitioner's contention, however, is that this general principle, formidable as it may seem, is not applicable to the special circumstances before us. Mr. K. S. Sankara Iyer has argued that when a supreme Legislature thinks it proper to separate territories subservient to it into different entities for purposes of rule and administration, there is nothing startling in the proposition that when doing so it should have, for the purpose of tiding over the inevitable dislocation and inconvenience that may result, preserve in part the *status quo* preceding the day on which the separation takes place so as to prevent that inconvenience and possible injustice to the subjects affected wherever they may be, and he argues that the Legislature would only if it were unavoidable interfere with actions at law in course of trial. Counsel pursues this argument by pressing the contention that an interpretation upon the various enactments should be given, if possible, so as to ensure so reasonable a result. The ultimate decision must rest on a consideration of the Government of India Act and other legislation, such consideration being according to the appropriate canons of construction. The first provisions for consideration are Ss. 292 and 293, Government of India Act. They correspond with Ss. 148 and 149, Government of Burma Act, except of course that in the Burma Act the word "Burma" is substituted

for "British India." Section 292, Government of India Act, is as follows :

Existing law of India to continue in force.

"Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part 3 of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority."

The effect of this section is that the existing law of India continues to operate. It is hardly necessary therefore to say that the Civil Procedure Code continues in force subject to alteration, repeal or amendment. Section 293 is as follows :

Adaptation of existing Indian laws, etc.

"His Majesty may by Order in Council to be made at any time after the passing of this Act provide that, as from such date as may be specified in the order, any law in force in British India or in any part of British India shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of this Act and, in particular, into accord with the provisions thereof which reconstitute under different names governments and authorities in India and prescribe the distribution of legislative and executive powers between the Federation and the Provinces : Provided that no such law as aforesaid shall be made applicable to any Federated State by an Order in Council made under this section. In this section the expression "law" does not include an Act of Parliament but includes any ordinance, order, byelaw, rule or regulation having in British India the force of law."

Under this section the Government of India (Adaptation of Indian laws) Order, 1937, was made by His Majesty in Council. Clause 2 (1) states that the expression 'Indian law' means a law as defined in S. 293 of the Act. Sub-clause (2) is as follows :

"The Interpretation Act, 1889, applies for the interpretation of this order as it applies for the interpretation of an Act of Parliament."

The meaning of this sub-clause is clear : Just as the Interpretation Act affects the construction of Acts of Parliament, so equally can it be called in aid in construing the meaning of this Order. Clause (9) of the Order states :

"The provisions of this Order which adapt or modify Indian laws so as to alter the manner in which, the authority by which, or the law under or in accordance with which, any powers are exercisable, shall not render invalid any notification, order, commitment, attachment, by-law, rule or regulation duly made or issued, or anything duly done, before the commencement of this Order ; and any such notification, order, commitment, attachment, by-law, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this Order by the competent authority and under and in accordance with the provisions then applicable to such a case."

Clause (10) states :

"Save as provided by this Order, all powers which under any law in force in British India, or in any part of British India, were immediately before the commencement of Part 3 of the Government of India Act, 1935, vested in or exercisable by, any person or authority shall continue to be so vested or exercisable until other provision is made by some Legislature or authority empowered to regulate the matter in question."

It has not been contended that the word "authority" does not include a Court. I consider that it must include a Court. The word seems to me all-comprehensive. According to the Oxford Dictionary it includes "power", "right to enforce obedience" ; "delegated power" and "person having authority".

Clause (11) states :

"Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred, under any such law . . ."

The India and Burma (Existing Laws) Act, 1937, also requires consideration. It is an Act to explain and amend Ss. 292 and 293, Government of India Act. Section 1, sub-ss. (1) and (2) read :

Continuance and adaptation of certain existing laws in India and Burma, 26 Geo. V and 1 Edw. VIII, c. 2.

"1. (1) For the purposes of Ss. 292 and 293, Government of India Act, 1935, which provide for the existing laws of British India to continue in force therein after the date of the commencement of Part 3 of the said Act, subject to the power of His Majesty in Council to make such adaptations and modifications in any such law as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the said Act :

(i) A law passed or made before the said date by a Legislature or other competent authority in British India, and not previously repealed, is, for the removal of doubts, hereby declared to be a law in force immediately before that date, notwithstanding that it, or parts of it, may not then be in operation, either at all or in particular areas ;

(ii) any such law which immediately before the said date has extra-territorial effect as well as effect in British India, shall, subject to any such adaptations and modifications as aforesaid, continue to have extra-territorial effect ;

(iii) the power of His Majesty in Council to make in an existing Indian law such adaptations and modifications as aforesaid shall be deemed to include power to declare any such law, or any part thereof, to be repealed, if it appears to His Majesty in Council that its continuance is unnecessary or inexpedient in view of the provisions of the said Act ;

(iv) nothing in the said sections shall be construed as continuing any temporary Act in force beyond the date fixed for its expiration.

(2) Paragraphs (i) to (iv) of the preceding sub-section shall apply also in relation to Ss. 148 and 149, Government of Burma Act, 1935, (being the sections of that Act corresponding to the said sections 292 and 293) with the following adaptations :

26 Geo. V and 1 Edw. VIII, c. 3.

(a) references to British India and to an Indian law shall be construed respectively as references to Burma and to a Burma law ;

(b) for the words 'in view of the provisions of the said Act' there shall be substituted the words 'in view of the separation of India and Burma'."

Section 1 (i), (ii) of the above Act is expressed in the clearest terms. The Interpretation Act of 1889, S. 38, enacts, sub-s. (2) :

"Where this Act or any Act passed after the commencement of this Act repeals any other enact-

ment, then unless the contrary intention appears, the repeal shall not :

(a) revive anything not in force or existing at the time at which the repeal takes effect ; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed ; or

(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed ; or

(d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment so repealed ; or

(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid ;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

It is argued for the petitioner that the intention of the Legislature to be derived from a combined reading of the above Acts and order indicate an intention generally to preserve the rights and liabilities of subjects engaged in litigation in British India before the passing of the Government of India Act. That the general intention of the Legislature was to preserve the rights of parties and not to affect legal proceedings in being before 1st April 1937 seems to me clear. Clause 10 of the Order in Council continues the powers exercised by any person or authority under any law in force in British India or in any part of British India immediately before the commencement of Part 3, Government of India Act, 1935 which appears to be the date selected as the dividing line between the old and the new regime. I do not think that the provisions of Part 3 are relevant. Part 3 came into operation on 1st April 1937 by the Government of India (Commencement, etc.) Order, 1936. Clause 11, Government of India (Adaptation of Indian Laws) Order, states that nothing in the Order shall affect the previous operation of, or anything duly done or suffered under, any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture, or punishment incurred in respect of any offence already committed against any such law. As to the interpretation of the Act, the Interpretation Act of 1889 is obviously of great importance. The Government of India Act, 1935, repealed the Government of India Act of 1915 wholly and virtually the whole of the Acts of 1916 and 1919. Section 223, Government of India Act, specifically provides that the jurisdiction in the existing High Courts shall be the same as immediately before 1st April 1937.

The learned Advocate-General argued as follows. The effect of S. 38, sub-s. (2), Interpretation Act, 1889, is that the repeals under the Government of India Act, 1935 shall not affect any right, etc., acquired or accrued under any enactment so repealed and similarly it shall not affect any legal proceeding or remedy in respect of any such right, and this means that only any rights expressly given under the repealed Acts are preserved. The legal proceeding must be directly traceable to the Act repealed. It only affects legal proceedings and the remedies given by the repealed Act, for example, suits against the Secretary of State. If this argument is sound it would follow that a suit filed in British India against the Secretary of State before 1st April 1937, involving immovable property in Burma could be continued in British India notwithstanding the apparent conflict of jurisdiction involved by the coming into force of S. 46 (2), Government of India Act, 1935. I am asked to hold that nothing under any Act repealed by the Government of India Act, 1935 has any relation to the suit, the subject of this civil revision petition. I am unable to accept this contention. In the Act under which the High Court had its existence and exercised its jurisdiction, S. 101 was, among other sections, repealed. But the Code under which the High Courts referred to in S. 219, Government of India Act, 1935 are to function and under which the Courts subordinate to the High Courts function, is to continue in force in British India until altered, repealed or amended by a competent Legislature. It is hardly necessary to state that an appeal in the suit before me would ordinarily lie to the High Court of Madras. There is no express reference to existing suits in which the jurisdiction of India and Burma may clash, there is no express provision for such a position. So we have, as argued by the respondent, the implications of private international law as a result of S. 46, Government of India Act, on the one hand, and on the other a number of provisions, all in my opinion pointing in the same direction, the preservation of rights and positions generally existing before 1st April 1937. It is necessary to consider the principles governing construction in the special circumstances of this case. A number of authorities have been cited, and it is convenient first to refer to the decision of the Judicial Committee in 1905 A. C. 369.[1] The question there involved was whether the right of appeal from the Supreme Court of Queensland to His Majesty in Council had been taken away by the Australian Commonwealth Judiciary Act, 1903 and Lord Macnaghten at p. 372 says this :

" As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not restrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure ? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regular procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

This is a clear pronouncement by the Judicial Committee on how legislation affecting a party's rights already accrued should be approached. Equally

1. (1905) 1905 A. C. 369 : 74 L. J. P. C. 77 : 92 L. T. 738 : 21 T. L. R. 513, Colonial Sugar Refining Co. v. Irving.

clear is Sulaiman J. in 1941-1 M. L. J. F. C. 65[2] at page 97 :

"Undoubtedly, an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognised rule that statutes should, as far as possible, be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts, nor gaps filled up in order to widen its applicability. It is a well established principle that such statutes must be construed strictly, and not given a liberal interpretation."

There are no decisions on facts corresponding exactly with those before us; but there are decisions of this High Court relating to the effect of transfer of territorial jurisdiction on decrees already passed. 55 Mad. 801[3] is such a case. The facts were that the respondents obtained a final mortgage decree on 20th January 1916 in the District Munsif's Court of Melur in respect of properties part of which was situated within its jurisdiction and part within the jurisdiction of the District Munsif's Court of Madura. In February 1920 the jurisdiction of these Courts was re-arranged, with the result that the suit properties came within the jurisdiction of the District Munsif of Madura Taluk. An application for execution was filed on 27th July 1927 in the latter Court without applying for the transfer of the decree from the Melur Court which continued to exist. The question was whether the Madura Court could execute the decree. The Full Bench held that it could not without the decree having been transmitted from the Melur Court and that the Melur Court retained jurisdiction to execute the decree even after the transfer of territorial jurisdiction. Ramesam J. who delivered the judgment of the Bench, says at p. 814:

"It seems to me that, unless the language of the notification is plain, directions as to the future regarding pending business cannot be implied."

The Full Bench referred with approval to the decision of Phillips and Venkatasubba Rao JJ. in 47 M.L.J. 448.[4] In that case there was a suit on a mortgage properly brought in the Court of the Subordinate Judge of Kumbakonam, but at the time of the passing of the decree the jurisdiction of this Court had been transferred to Mayavaram. Nevertheless the Kumbakonam Court passed the final decree and the objection was taken that the decree was absolutely void. Phillips J. observed at p. 451 :

"The jurisdiction of a Court consists in its powers to entertain suits, and when once a suit has been properly entertained, it is difficult to understand how that jurisdiction is removed unless it is specifically so done by the order of a competent authority. Once the suit has been entertained the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction, but in the exercise of the powers vested in the Court to try suits generally and consequently the only time at which the territorial jurisdiction comes into operation is at the time of filing a suit. Once the Court has seisin of the case, it has jurisdiction to try it to its conclusion, unless there is any reason for holding that that jurisdiction has been removed."

In 38 Mad. 101,[5] Benson and Sundara Ayyar JJ.'s discussion of general principles is of assistance. The facts are not relevant, but at p. 103 the learned Judges observed :

"It is at the same time a well-established principle that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation will not be given to a statute so as to affect, alter or destroy any vested right: *see* S. 6, cl. (c), General Clauses Act and S. 8, cl. (c) of Madras Act 1 of 1891. For, to do so, would result in great injustice and it will be presumed that the Legislature did not intend to deprive any person of a right previously vested in him. The general rule that statutes relating to processual law have a retrospective operation is as much subject to this important qualification as statutes dealing with substantive rights."

And at p. 106 the rule as stated by Jessel M. R. in (1875) 1 Ch. D. 48[6] is relied on. This statement of the Master of the Rolls is :

"I so decide because it is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them."

In (1938) 2 M. L. J. 44,[7] Varadachariar J. on a reference under Cl. 36, Letters Patent, there being a difference of opinion between Pandrang Row and Venkataramana Rao JJ., had to consider whether S. 69, cl. (2), Partnership Act, was applicable to a suit filed after the passing of the Act to a promissory note executed before the passing of the Act. Pandrang Row J. took the view that S. 74 expressly saved the suit, Venkataramana Rao J. taking a different view. Varadachariar J. agreed with Pandrang Row J. Section 74, Partnership Act, enacts :

"Nothing in this Act or any repeal effected thereby shall affect or be deemed to affect — (a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or (b) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability, or anything done or suffered before the commencement of this Act."

The learned Judge came to this decision after considering whether S. 74 expressly saved the suit from the operation of S. 69 and if S. 74 had no such operation, whether on general principles the Court ought to hold that S. 69 does not operate to enforce the cause of action which had accrued prior to the date of the coming into force of the Act. It will be observed that this case does not deal with an action but with a cause of action. The learned Judge decided the case on the ground that S. 74 was directly applicable. But he discusses at pp. 72 to 75 the implications of the words "processual law" and

2. ('41) 28 A. I. R. 1941 F. C. 16 : 192 I. C. 138 : (1941) 1 M.L.J. F.C. 65 : I.L.R. (1941) Kar. F. C. 72 : 1940 F. C. R. 110, United Provinces v. Mt. Atiqua Begum.
3. ('32) 19 A. I. R. 1932 Mad. 418 : 137 I. C. 305 : 55 Mad. 801 : 62 M. L. J. 687 (SB), Ramier v. Muthukrishna Iyer.
4. ('25) 12 A.I.R. 1925 Mad. 117 : 87 I.C. 152 : 47 M. L. J. 448, Chockalinga Pillai v. Velayudha Mudaliar.
5. ('16) 3 A. I. R. 1916 Mad. 607 : 18 I. C. 64 : 24 M.L.J. 54 : 38 Mad. 101, Ramakrishna Chetti v. Subbaraya Iyer.
6. (1875) 1 Ch. D. 48 : 45 L. J. Ch. 12 : 33 L. T. 774 : 24 W.R. 184, In re Joseph Suche & Co. Ltd.
7. ('38) 25 A. I. R. 1938 Mad. 688 : 179 I. C. 16 : (1938) 2 M. L. J. 44, Girdharilal Son & Co. v. Kappini Gowder.

quotes with approval the warning of Holloway J. in 6 M.H.C.R. 122[8] at p. 126 as to the danger of confounding processual provisions with those which under that fictitious appearance are really provisions of material or substantive law. The High Court of Patna in 15 Pat. 704[9] has taken a different view to this High Court on the effect of the transfer of jurisdiction from one Court to another. Mohamed Noor and Saunders JJ. held that where a preliminary decree for possession of land and mesne profits had been passed by a Court, which later ceased to have territorial jurisdiction over the area, after the notification of the Government transferring the area to the territorial jurisdiction of a newly established Court, applications for ascertainment of mesne profits should be made to the latter Court as the former Court entirely ceased to have any jurisdiction over the area concerned. The Madras decisions are of course binding upon me, but were it otherwise, I would, with respect, prefer the Madras view. My attention has been drawn to a judgment (not yet reported) of Pandrang Row and King JJ. in A.A.O. No. 613 of 1938. A decree was passed by a Court in British Burma. On 15th March 1937 the Court ordered the transmission of the decree to the District Court of Ramnad in this presidency. It was received on 25th March 1937. The application for execution was made in the Court of the Subordinate Judge of Sivagana on 14th June 1937 and a further application to execute was made on 6th January 1938. It was objected that after 1st April 1937 the Madras Courts had no jurisdiction to execute the decree passed by a Court in Burma although that decree had been transmitted by the Burma Court before 1st April 1937. The learned Judges held that the contention that jurisdiction was lost appeared to them "not to take notice of para. 10 of the Government of India Act (Adaptation of Indian Laws) Order, 1937, dated 18th March 1937." After setting out the paragraph they observe, "this provision appears clearly to contemplate that powers which were exercisable by any authority such as a Court before the Act came into force should continue to be exercised or to be exercisable even thereafter unless some other provision was made by a competent authority regarding the subject-matter of the jurisdiction." The learned Judges point out that no other provision had been made and they observe, "It seems to us that both the words and the policy of para. 10 of the Adaptation Order referred to above contemplated that the Court to which decrees were transmitted for execution before 1st April 1937 should continue to execute those decrees even after 1st April 1937 on applications presented to it for execution subsequent to 1st April 1937."

With that decision I am in respectful agreement. The learned Advocate-General has urged that if the view maintained by the petitioner is upheld, a strange position arises under S. 10, Civil P. C., the explanation to which states that the pendency of a suit in a foreign Court does not preclude the Court in British India (British Burma) from trying a suit founded on the same cause of action, and he has referred us to the Full Bench judgment of the High Court of Rangoon in A. I. R. 1938 Rang 130.[10] The question before the Full Bench was whether a Court in Burma had power to stay a suit filed after 1st April 1937, when the matters in issue were before a Court in British India in a suit filed before that date. The Full Bench held that S. 2 (5) and S. 10, Civil P. C., as amended related to a matter of procedure and therefore on well established principles affected existing proceedings and that therefore the Court in Burma had not the power to grant a stay of the suit in India. No argument was addressed on the topic before us now, that is, whether the Indian Court continued to have jurisdiction at all. The facts in the Indian suit, a partition suit, are not set out. The decision related to the power of the Court in Burma to stay the suit and rested entirely on whether this was a matter of procedure, which, it was held to be. It seems to me to leave wholly untouched the much wider question now before us. Roberts C. J. in his judgment discusses the English authorities which distinguish the position when matters of procedure and rights of action are concerned and he cites with approval the statement of Jessel M. R. to which I have referred above. It is argued that there is nothing to prevent a suit being filed now with regard to this identical matter in Burma. The answer to that objection must, I think, be that the right to continue this action remains in the Madras Court, alternatively that may be a position for which provision has not been made in the Act. Whether execution of any decree can be done directly or whether it will be necessary to sue as on a foreign judgment is not for us now to decide, nor do I think it in any way affects our decision. In arriving at a decision in this case it is not possible to draw on decisions from similar facts. The matter has not been discussed before on facts similar to those before us. I am not aware that the Courts in England at any time had jurisdiction to deal with real property in Southern Ireland. A consideration of the provisions and rules of the Supreme Court in England are of no assistance. Apart from the common right of appeal to the House of Lords, the jurisdiction of the Courts of England and Scotland is distinct. Order 11, R. 1 of the Rules of the Supreme Court makes provision for the issue of writs beyond the jurisdiction. There is no provision exactly corresponding to S. 17, Civil P. C. Order 11, R. 1, by implication, prohibits the issue of a writ out of the jurisdiction unless in the case of land the whole subject-matter is situate within the jurisdiction. The difficulty or apparent difficulty arises in this case from the fact that a supreme Legislature has thought fit to make these far-reaching changes over territories subservient to it. It is not a case of cession of territory to a foreign State. It is a re-arrangement within the Empire. The supreme rule remains. The British Legislature had absolute authority within its own territorial limits to dispose of the rights of its subjects and all property within its limits—the law of *eminent domain*, a phrase of public international law. The British Legislature cannot legislate with regard to the rights of Britons in the Courts of ,e. g., Thailand and when it is argued that the foundations of private international law and indeed commonsense are shaken when it is suggested that a British Court might just as well pass a decree affecting land in Thailand, I think the argument is founded on a fallacy. This is not a case of the British Legislature passing an Act purporting to affect foreign territory. The Act affects its own territory. I again must emphasize that the British Legislature can do just what it thinks fit with regard to the jurisdiction of the Courts subservient to it over territories subservient to it and there is nothing to me in the

8. (72) 6 M.H.C.R. 122, G. Lee Morris v. Sambamurti Rayar.

9. ('36) 23 A.I.R. 1936 Pat. 546 : 165 I. C. 26 : 15 Pat. 704 : 18 P.L.T. 159, Dineshwari Kuer v. Ram Narain Singh.

10. ('38) 25 A.I.R. 1938 Rang. 130 : 175 I.C. 275 : 1938 R.L.R. 176 (F. B.), Arunachalam v. Valliyappa.

least startling, in the contention of the petitioner.

I must confess to being more surprised at the result of the respondent's argument that the petitioner who has been rightly prosecuting his suit in a Court for several years should be held now to be in the wrong Court. The Government of India Act could have contained an express provision to the effect that suits previously within the jurisdiction of Burma and Indian Courts affecting immovable property in either country should continue within the jurisdiction of those Courts exactly as if the Act had not been passed. Such a provision would have been purely for the purpose of what I will describe as winding up the old order, such process continuing for the convenience of the subject for a time after the introduction of the new order. One of the decisions I have to make in this case is whether that has in fact been done by the various provisions of law to which reference has been made. The learned Advocate-General's chief argument is that this is a case of processual law only and therefore the canons of construction above cited are not relevant, and naturally much has been made of the fact that the Civil Procedure Code provides for the bringing of a suit in one jurisdiction relating to land in another. I am unable to accept that argument. The Civil Procedure Code is not confined to procedure. The Judicial Committee in 54 Bom. 495[11] at p. 502 describes the Code thus :

"The provisions of the Code are regulations dealing with the jurisdiction and governing the procedure of the Courts in British India . . . . ."

Their Lordships held that the Code gave a British Indian Court jurisdiction to try suits relating to immovable property within the jurisdiction of another British Indian Court, if part of the immovable property, the subject of the suit, was within its own jurisdiction, but that it did not give jurisdiction over land in Kolhapur State. It is therefore from the Code that the Court of the Subordinate Judge of Trichinopoly derives its jurisdiction. So far as the procedure governing trial is concerned, it is also derived from the Code. But jurisdiction and procedure are distinct, and I hold that the former, i. e., jurisdiction does not come under the description of processual matter. It seems to me that Lord Macnaughten's statement of the law in (1905) A. C. 369[1] is entirely applicable to the facts in this petition. I see no reason to distinguish in principle between the action with which we are concerned now and the appeal with which their Lordships of the Judicial Committee were concerned. The reports of the arguments of the distinguished counsel who appeared before the Board show that no attempt was made to make any such distinction. Mr. Asquith, counsel for the petitioner, argued that the alteration made by this section was one of procedure and did not affect private rights and therefore took effect with reference to "pending actions"; and Mr. Cohen for the appellants contended that there was no section in the Commonwealth Act which gave power to deprive any Court of the jurisdiction which it was exercising at the time the Act was passed. No doubt Burma is now in the position of a foreign country for many purposes when considering its relations with India. But that position is only of recent creation and long after the institution of this suit. There is no question that the petitioner had a right to file this suit in the Court of the Subordinate Judge of Trichinopoly in 1932, and I find it difficult to agree that a matter of procedure only is affected when a supreme Legislature is said to take from a litigant a right to have heard in a Court convenient to him a suit relating to another part of a territory under the same Legislature. If that view is correct, then I think that the whole trend and meaning of the many detailed provisions to which reference was made, is that the object and intention was to retain to Courts the jurisdiction which they held before 1st April 1937 in regard to litigation then properly before them. It has been impossible for the learned counsel for the respondent to point to any provision in the Act which expressly takes away that jurisdiction. The most that has been argued is that it is done by implication or "by necessary intendment", the implication and intendment to be derived from S. 46, Government of India Act, 1935.

For the reasons I have given I hold (1) that the combined effect of the India and Burma Existing Laws Act, 1937, S. 1, sub-ss. (1) and (2), the Government of India (Adaptation of Indian Laws) Order, 1937, paras. 1, 9, 10 and 11, and the Interpretation Act, 1889, 52 and 53 Vic., Ch. 63, S. 38 (b), (c), (d) and (e), is expressly to preserve to the Court of the Subordinate Judge of Trichinopoly jurisdiction to try the suit, the subject of this civil revision petition and (2) that the petitioner had a right to file his suit in the above Court and that right to continue it has not been taken away expressly by the Government of India Act, 1935. Accordingly I consider that this civil revision petition should be allowed with costs here and below so far as the hearing on the preliminary issue is concerned and the learned Subordinate Judge will therefore proceed with the hearing of this suit. As this judgment involves a substantial question of law as to the interpretation of the Government of India Act, 1935, a certificate will issue in accordance with the provisions of S. 205 of that Act. There will be an interim stay of hearing until 5th January 1942. If by then an appeal to the Federal Court has not been lodged, the proceedings will continue. Otherwise the stay will continue pending the decision of the Federal Court.

KUNHI RAMAN J. — An interesting question of constitutional law arises for decision in this civil revision petition. The suit out of which the petition arises was filed in the Court of the Subordinate Judge of Trichinopoly in 1932 and it was registered as O. S. No. 55 of 1932. Unfortunately, it has had a chequered career. Had the trial proceeded in the normal course, the suit would have been disposed of prior to 1st April 1937, and the plaintiff would not have had to face the contentions which were urged in the Court below and which are now urged before this Court on behalf of the defendants. We are told that as the result of a certain order in an interlocutory application which became the subject-matter of a civil revision petition in this Court in 1935 and as the result of a dispute as to the proper court-fee payable in the lower Court, the suit became ready for trial only in 1940, eight years after it was instituted in the lower Court. In the interval, the Government of India Act of 1935 was passed, and according to S. 46 (2) of that Act, it was declared that Burma shall cease to be part of India. This provision came into force from 1st April 1937, under the Government of India Act (Commencement etc.) Order, 1936. The subject-matter of the suit included not only properties situated in British India within the local limits of the jurisdiction of the lower Court, but also immovable and moveable properties in British Burma. Therefore, on the coming into force of S. 46 (2), Government of India Act, 1935,

11. ('30) 17 A.I.R. 1930 P. C. 188 : 126 I. C. 417 : 54 Bom. 495 : 57 I. A. 194 (P.C.), Nilkant Balwant v. Vidya Narasimah.

the defendant raised an additional plea that the lower Court had ceased to have jurisdiction to proceed with the trial of the suit so far as it related to the properties situated in British Burma. The lower Court has arrived at the conclusion that the defence raised on this point is well founded and has answered the question as to whether it has jurisdiction to try the suit or not in the negative. The plaintiff has come to this Court challenging the correctness of this view.

The main question for determination is whether the separation of British Burma from British India from 1st April 1937 by the Government of India Act, 1935, will affect actions pending on that date. The petitioner's learned advocate argues that in view of the statutory provisions and judicial decisions relied on by him, in the absence of an express provision that pending actions shall be affected by the new enactment and in the absence of any special provision made for the procedure relating to such actions, the new Act cannot affect prejudicially suits instituted prior to 1st April 1937 and which were pending on that date. This contention is based on the assumption which, it seems to me is fully warranted in view of the pronouncement of the Judicial Committee of the Privy Council on that question, that it is a question of substantive law that is concerned in the present case and not merely a question of procedure or adjective law. The right of a party to institute a suit or to file an appeal in a particular Court must, in view of the decision of the Privy Council reported in (1905) A. C. 369[1] be regarded as a substantive right and not merely a matter of procedure or processual law. If the right involved is not of this nature but affects only a rule of procedure, then there cannot be any doubt as to the retrospective effect of S. 46 (2), Government of India Act, 1935. But if on the other hand, the right affected concerns a rule of substantive law, as I feel no doubt it does in the present case, then different considerations must prevail and the newly enacted statute cannot prima facie be presumed to be retrospective in its effect. It must be stated that in the present case at the time when the suit was instituted in the lower Court, there was no doubt whatsoever that it had jurisdiction to entertain the suit and try it. It is by the coming into force of S. 46 (2), Government of India Act, 1935, on 1st April 1937, that it has become possible for the defendants to contend that the lower Court has no jurisdiction to go on with the trial of the suit.

It is argued by the petitioner's learned advocate that the suit in the present case which was properly instituted on the date the plaint was filed in the lower Court could be continued as if the Government of India Acts, 1915 and 1919 which were in force on the date of its inception still continued to be in force, especially in view of S. 38, Interpretation Act, 1889, and cls. (10) and (11) of the Government of India (Adaptation of Indian Laws) Order, 1937. This is because no other provision has been made by the "Legislature or authority empowered to regulate the matter in question" for the continuance of an action like the suit in the present case which was properly instituted in the Court below in accordance with the law in force on the date of such institution. The petitioner's learned advocate does not question the rules of private international law which are relied on by the learned Advocate-General on behalf of the respondents. He argues that the question in the present case turns entirely on the interpretation of the Government of India Act, 1935, and the other enactments and rules relied on by him which have all been dealt with in what I may with respect refer to as the exhaustive judgment just pronounced by my learned brother. Learned counsel argued that the jurisdiction that was admittedly vested in the lower Court on the date the suit was filed has not been taken away by legislation and that therefore it must be held that the lower Court has power to continue the trial and dispose of the suit pending there.

The learned Advocate-General argues that the scope of S. 292, Government of India Act, 1935, is not so wide as contended on behalf of the petitioner but that the expression "competent authority" occurring in this section must be construed as referring to an authority with reference to British India alone and not to any higher or different authority. He also argues that the Interpretation Act can only be applied in interpreting Acts of Parliament and not any other Acts or rules arising as the result of an Act of Parliament. According to him, Ss. 292 and 293, Government of India Act, do not affect the present case. The legal proceeding contemplated by these sections must, he argues, be directly traceable to the Act repealed; in other words, it can only apply to legal remedies given directly by the Acts of Parliament. It can have no reference to a right or proceeding under an Act passed in pursuance of a Parliamentary Statute. There are no authorities directly in point. I am not satisfied that there is any warrant for construing the provisions of these statutes in such a restricted manner. I am in complete agreement with the view taken by my learned brother on the statutory provisions relating to the subject and the cases cited at the Bar and I do not therefore wish to discuss them again in my judgment. I agree to the order proposed by my learned brother.

C.R.K./G.N. *Revision allowed.*

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* A. I. R. (29) 1942 Madras 622

FULL BENCH

LEACH C. J., LAKSHMANA RAO AND KRISHNASWAMI AYYANGAR JJ.

T. P. R. Palania Pillai and others — *Appellants*

v.

Amjath Ibrahim Rowther and another — *Respondents.*

Second Appeal No. 753 of 1940, Decided on 6th July 1942, against decree of Dist. Court, Tinnevelly, in A.S.No. 169 of 1938.

(a) Civil P. C. (1908), S. 100 — Some of cosharers mortgaging certain items of joint property — Suit by other cosharers for partition — Finding that mortgage property cannot be allotted to share of mortgagors without causing hardship to other sharers is one of fact — It cannot be interfered with in second appeal *(Per King J., in Order of Reference).*

Where some of the cosharers mortgage certain items of joint property a finding in the partition suit by other cosharers that there are practical difficulties in the way of allotting the mortgage property to the share of the mortgagors and that such an allotment cannot be made without causing hardship to the other sharers is essentially a finding of fact and cannot be interfered with in second appeal. [P 623 C 2]

a C. P. C. —
('40) Chitaley, Ss. 100 and 101, N. 52, Pt. 1.
('41) Mulla, Page 366, Note "No second appeal lies on the ground of an erroneous finding of fact."

* (b) Limitation Act (1908), Art. 144 — Possession to be adverse must be adequate in continuity, publicity and extent to show that it is adverse to competitor—Property held by Mahomedan family—Some co-owners usufructuarily mortgaging specific items of property — Possession of mortgagee becomes adverse to other members of family from moment of his entry into possession and not from date of ouster to their knowledge — Suit by other members of family for possession of their share at end of 12 years of mortgagee's possession is barred by b Art. 144 — Mortgagee acquires interest of usufructuary mortgagee and not full title: 27 M.L.J. 600 = ('15) 2 A.I.R. 1915 Mad. 447=25 I.C. 573; I.L.R. (1940) Mad. 245=('40) 27 A.I.R. 1940 Mad. 91 = 190 I.C. 42; 20 M.L.W. 122=('24) 11 A.I.R. 1924 Mad. 741=78 I.C. 37; 42 M.L.W. 798=('35) 22 A.I.R. 1935 Mad. 1059 = 159 I.C. 1021 and 52 M.L.J. 203 = ('27) 14 A.I.R. 1927 Mad. 111 = 99 I.C. 158, *OVERRULED.*

Possession to be adverse must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. [P 625 C 1]

Where a person who is in possession under a usufructuary mortgage granted by one of several cosharers remains in possession of the land and cultivates it for years, the requirements of continuity, c publicity and extent for adverse possession are fully complied with. Consequently, where some co-owners usufructuarily mortgage specific items of property held by the members of a Mahomedan family and the mortgagee enters into possession of the mortgaged items under his mortgage deed, a suit to recover the share therein by other members of the same family is barred by Art. 144 at the end of twelve years of such possession, as the possession of the mortgagee becomes adverse against the other members from the moment of the entry into possession by the mortgagee and not from the date of ouster to their knowledge: ('34) 21 A.I.R. 1934 P.C. 23 and 23 Bom. 137 (F.B.), *Rel. on*; ('20) 7 A.I.R. 1920 Mad. 160; 9 Mad. 175; 12 Mad. 292; ('22) 9 A.I.R. 1922 Mad. 369 and ('34) 21 A.I.R. 1934 Mad. 183, *Approved*; 35 Cal. 961, *Expl. and Approved*; 27 M.L.J. 600=('15) 2 A.I.R. d 1915 Mad. 447 = 25 I.C. 573; I.L.R. (1940) Mad. 245 = ('40) 27 A.I.R. 1940 Mad. 91 = 190 I. C. 42; 20 M.L.W. 122 = ('24) 11 A.I.R. 1924 Mad. 741 = 78 I.C. 37; 42 M.L.W. 798 = ('35) 22 A.I.R. 1935 Mad. 1059 = 159 I.C. 1021 and 52 M.L.J. 203 = ('27) 14 A.I.R. 1927 Mad. 111 = 99 I.C. 158, *OVERRULED.* [P 624 C 1; P 625 C 1]

The interest which the mortgagee in such a case acquires by prescription is the interest of a usufructuary mortgagee. He does not acquire a full title to the property. [P 625 C 2]

Limitation Act —
('42) Chitaley, Arts. 142 and 144, N. 16. Pt. 24; N. 63, Pt. 2; N. 76, Pts. 1-3; N. 95, Pt. 6.
('38) Rustomji, Page 1359, Pt. 5; Page 1366, Pt. 1; Page 1368, Pt. 5; Page 1371, Pts. 1,3; Page 1448, Pt. 7.

K. S. Sankara Ayyar — for Appellants.

S. Rangachariar — for Respondents.

ORDER OF REFERENCE

KING J. — The appellant here is defendant 8 who had taken a usufructuary mortgage of some property from defendants 1 and 3. Defendants 1 and 3 were members of a Mahomedan family and as such cosharers in the mortgage property and not full owners of it. This question arose in a suit brought by the plaintiff, another cosharer for a partition. The plaintiffs claim that the mortgage is not valid or binding upon them. The mortgage was in 1920 and it is claimed on behalf of defendant 8 that a suit filed in 1937 against him is barred under Art. 144, because he has been in adverse possession of the mortgage property for 17 years. When the appeal first came before me it was contended also on behalf of the appellant that the learned District Judge might well in granting a final decree have declared that the whole of the mortgage property should be allotted to the shares f of the mortgagors. If that contention had prevailed, the question whether the appellant had perfected a title to the property by adverse possession would not have arisen. I am however unable to agree on this point. The learned District Judge has recognised that, if possible, he ought to meet the equitable claims of the appellant by allotting the mortgage property to defendants 1 and 3, but he has also stated that there are practical difficulties in the way of such a course and that such an allotment cannot be made without causing hardship to the other sharers. It seems to me that in second appeal I cannot possibly interfere with such a finding which is essentially one of fact. It therefore becomes necessary to consider whether the appellant has a title by adverse possession to the suit property. That he has been in possession from 1920 is undisputed. His case is that his intention has been to enjoy the property as mortgagee not of cosharers but of actual owners and therefore his possession with such an intention is adverse. The contention against him is that he has derived his title from two of the cosharers and that as such he cannot prove adverse possession unless he also proves exclusion of the other cosharers. In favour of the appellant's view of the law I have been referred to two decisions of Benches of this Court in 11 M.L.W. 31[1] and in 42 M.L.J. 364.[2] In support of the opposite conclusion I have been referred to two other decisions of Benches of this Court in 27 M.L.J. 600[3] and 50 M.L.W. 721.[4] In those circumstances it seems necessary to me to refer the following point of law to a Full Bench:

"Where some co-owners usufructuarily mortgage specific items of property held by the members of a h Mahomedan family and the mortgagee enters into possession of the mortgaged items under his mortgage deed, is a suit to recover the share therein by other members of the same family barred by Art. 144, Limitation Act, at the end of 12 years of such possession or does adverse possession begin as against the other members only from the date of ouster to their knowledge?"

1. ('20) 7 A.I.R. 1920 Mad. 160 : 54 I.C. 385 : 11 M.L.W. 31, Abdul Gafur v. Ashamath Bibi.
2. ('22) 9 A.I.R. 1922 Mad. 369 : 70 I.C. 317 : 42 M.L.J. 364, Linga Munisami Reddi v. P. S. Govindasami.
3. ('15) 2 A.I.R. 1915 Mad. 447 : 25 I.C. 573 : 27 M.L.J. 600, Muthukrishna Iyengar v. Sankaranarayana Iyer.
4. ('40) 27 A.I.R. 1940 Mad. 91 : 190 I.C. 42 : I.L.R. (1940) Mad. 245 : 50 M.L.W. 721 : (1940) 1 M.L.J. 673, Ramachandra Deo v. Kamoju Balaji.

a The question of the period from which in case the appellant is held not to have perfected his title he must account to the plaintiffs will of course be considered if the Full Bench should decide the point referred against the appellant.

OPINION OF THE FULL BENCH

LEACH C. J. — One A. A. Mohamed Madar Rowther and his brother A. A. Mohamed Meeran Rowther held their properties in common. Mohamed Madar was married twice. His first wife predeceased him. By her he had a son and a daughter, who are defendants 1 and 2 respectively. His second wife is plaintiff 2 and by her he had a son, plaintiff 1. Mohamed Madar died on 18th June 1916. The date of the death of his brother Mohamed Meeran is not known, but it is known that he died before his elder brother. Mohamed Meeran was sur-
b vived by his wife (defendant 5) and two sons (defendants 3 and 4). The widow and the son of Mohamed Madar filed this suit for partition of the properties of the two brothers and for their shares in Mohamed Madar's properties. One of the questions in the suit was whether a usufructuary mortgage created by defendants 1 and 3 in favour of defendant 8 was binding on the plaintiff. This mortgage was created on 28th August 1920 and the mortgagors purported to charge the whole of items 10 to 13 and part of item 9 of Sch. 2 to the plaint. The amount which had been advanced on the security of these properties was Rs. 7250. The plaintiffs' case was that they were cosharers and defendants 1 and 3 had no right to charge their interests in these properties. The suit was not filed until 9th October 1937 and defendant 8 pleaded that so far as his mort-
c gage was concerned the suit was barred by the law of limitation. The plaintiffs maintained that they had no knowledge of this mortgage and that limitation could not commence to run until they had acquired knowledge of it. It is common ground that they acquired knowledge within 12 years of the suit. There is a conflict of authority in this Court on the question whether it is necessary in order to support a plea of adverse possession that knowledge of adverse possession must be proved. The appeal came in the first instance before King J. and in view of this conflict he has referred to a Full Bench the following question:

"Where some co-owners usufructuarily mortgage specific items of property held by the members of a Mahomedan family and the mortgagee enters into possession of the mortgaged items under his mort-
d gage deed, is a suit to recover the share therein by other members of the same family barred by Article 144, Limitation Act at the end of 12 years of such possession or does adverse possession begin as against the other members only from the date of ouster to their knowledge?"

The weight of authority in this Court is in favour of an affirmative answer being given to the first part of the question. There are decisions of the Calcutta and Bombay High Courts to the same effect, and support for the majority view is also to be obtained from the decision of the Privy Council in 61 Cal. 262.[5] In 11 M.L.W. 31[1] a Bench of this Court (Seshagiri Ayyar and Moore JJ.) held that possession of an alienee from one of several co-tenants becomes adverse as against the other co-tenants from the moment of the entry into possession by the alienee. This judgment was based on the decisions of this Court in 9 Mad. 175[6] and 12 Mad. 292,[7] on the judgment of the Full Bench of the Bombay High Court which decided 23 Bom. 137[8] and the judgment of the Bench of the Calcutta High Court which decided 35 Cal. 961.[9] In 9 Mad. 175,[6] Turner C. J. and Muttuswami Ayyar J. held that the ignorance of the owner would not prevent the accrual of title by prescription and in 12 Mad. 292,[7] Muttuswami Ayyar J. sitting with Wilkinson J. held that the contention that the possession of one coparcener was the possession of all for purposes of limitation could have no application as between a purchaser from one coparcener and the other members of the family. The plaintiffs in that case were members of a joint Hindu family, who alleged that there had been a partition and a sale to them by the other members of a share in the family properties more than 12 years before the suit, and they claimed to eject a more recent pur- f chaser. The plaintiffs did not prove that there had been a partition and it was held that the suit was barred. Decisions of this Court to the same effect were given in 42 M.L.J. 364[2] and 39 M.L.W. 161.[10] In the Bombay case, 23 Bom. 137,[8] the question was asked what was the purchaser's position with reference to a coparcener's vendor or mortgagor and the answer given was:

"As he enters as owner and in right of his conveyance, his possession is adverse to them also. In the eye of the law, all the coparceners, though for the sake of convenience they may be in separate possession of portions of the joint estate, are the owners of the whole estate including the alienated portion. It may be and indeed is the case that such a purchaser by his purchase does not get a good title to the land conveyed to him by a single co- g parcener, but only the qualified right laid down in 11 Bom. H. C. R. 72[11] and he is liable under some circumstances even to be evicted if the coparceners take the requisite steps within the statutory period. Nevertheless his exclusive possession does not on that account cease to be adverse. He, entering as owner, his possession must, we think, necessarily be adverse to the true owners. Adverse possession depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested whether in a single person or in many jointly."

With these observations we find ourselves in complete agreement. In 35 Cal. 961,[9] it was said:

"Much stronger evidence, however, is required to show an adverse possession held by a tenant in com- h mon than by a stranger; a co-tenant will not be permitted to claim the protection of the Statute of limitations, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be established that the fact of adverse holding was brought home to the co-owner either by information to that effect given by the tenant in common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the

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5. ('34) 21 A. I. R. 1934 P. C. 23 : 147 I. C. 545 : 61 Cal. 262 : 61 I. A. 78 (P. C.), Secy. of State v. Debendralal Khan.

6. ('86) 9 Mad. 175, Secretary of State v. Vira Rayan.

7. ('89) 12 Mad. 292, Muttuswami v. Ramakrishna.

8. ('99) 23 Bom. 137 (F.B.), Bhavarao v. Rakhmin.

9. ('08) 35 Cal. 961 : 6 C. L. J. 735 : 12 C. W. N. 127, Jogendranath Rai v. Baldeo Das.

10. ('34) 21 A.I.R. 1934 Mad. 183 : 149 I. C. 455 : 39 M. L. W. 161, Palaniappa Chetti v. Raman Chetti.

11. ('74) 11 Bom.H.C.R. 72, Pandurang v. Bhaskar.

co-tenant that an adverse possession and disseisin are intended to be asserted."

But it was also pointed out that while the possession of one co-owner is, in itself, rightful, and does not imply hostility the possession is different when a stranger is in possession. The possession of a stranger in itself indicates that his possession is adverse to the true owners. The decisions of this Court which are in conflict with the decisions already cited are 27 M. L. J. 600;[3] 52 M. L. J. 203;[12] 50 M.L.W. 721;[4] 20 M.L.W. 122[13] and 42 M.L.W. 798.[14] In 27 M. L. J. 600,[3] Ayling and Tyabji JJ. held that before possession could be adverse to cosharers knowledge of the adverse possession must be brought home to them. The learned Judges did not consider the earlier decisions of this Court where contrary opinions were expressed and their judgment was criticised by the Bench of this Court which decided 42 M.L.J. 364.[2] The decision in 52 M.L.J. 203[12] was given by Odgers J. He certainly referred to the conflict in authority, but as he had already expressed an opinion in favour of the necessity of proving knowledge he adhered to it. 50 M.L.W. 721[4] was decided by Burn and Stodart JJ. but they did not consider the other cases and contented themselves with a bare statement that adverse possession must be brought to the knowledge of the owner. 42 M. L. W. 798[14] was decided by Pandrang Row J. and his judgment is open to the same criticism as the judgment in 50 M.L.W. 721.[4] The judgment in 20 M. L. W. 122[13] is not easy to follow. Notwithstanding that the learned Judges quoted with approval 23 Bom. 137[8] they seem to indicate that knowledge should be proved. Possession to be adverse must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor, as the Privy Council pointed out in 61 Cal. 262.[5] As already indicated we are of the opinion that the judgment lends strong support for the majority opinion of this Court. In that case a zamindar claimed against the Crown title to a fishery in a navigable river by reason of adverse possession. The learned counsel who appeared for the Crown advanced the argument that adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there was no authority for this requirement. It was sufficient that possession was overt and without any attempt at concealment so that the person against whom time was running ought if he exercised due vigilance to be aware of what was happening.

When one of several cosharers lets into possession a stranger who proceeds to cultivate the land for his own benefit the other cosharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests they must take the consequences. Where a person who is in possession under a usufructuary mortgage granted by one of several coparceners remains in possession of the land and cultivates it for years, a position which we have here, there can be no doubt that the requirements of continuity, publicity and extent for adverse possession are fully complied with. Consequently we would answer the first part of the question referred in the affirmative and the latter part in the negative. It follows that the decisions in 27 M.L.J. 600;[3] 50 M. L. W. 721;[4] 20 M. L. W. 122;[13] 42 M. L. W. 798[14] and 52 M. L. J. 203[12] must, so far as they indicate a contrary opinion be deemed to be overruled. In order that there may be no misunderstanding we will add that the interest which the appellant has acquired is the interest of a usufructuary mortgagee. He has not acquired a full title to the property. As a matter of fact the learned advocate for the appellant has not suggested otherwise. The costs of this reference will be made costs in the appeal.

C.R.K./G.N. *Answer accordingly.*

12. ('27) 14 A. I. R. 1927 Mad. 111 : 99 I.C. 158 : 52 M. L. J. 203, Govindaswami Chettiar v. Kothandapani Chettiar.
13. ('24)11 A.I.R. 1924 Mad. 741: 78 I.C. 37: 20 M. L.W. 122, Venkatarama Iyer v. Subramania Sastri.
14. ('35) 22 A. I. R. 1935 Mad. 1059 : 159 I. C. 1021 : 42 M.L.W. 798, Moidin v. Kunhalikutti.

A. I. R. (29) 1942 Madras 625

SPECIAL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR f AND BELL JJ.

Commissioner of Income-tax, Madras— Petitioner

v.

G. D. Naidu Industrial Educational Trust—Respondents.

O. P. No. 289 of 1941, Decided on 2nd February 1942, by Commissioner of Income-tax, Madras.

Income-tax Act (1922), S. 4 (3) (i) —*N* creating Industrial Educational Trust and endowing shares held by him in six motor transport companies of which he had control and immovable property worth Rs. 1,10,000 — *N* constituting himself as managing trustee with full powers to deal with its assets—Objects of trust were to provide permanent facilities for improvement of motor, electrical and other industries and transport, to found institution for research, education and training in that connexion and to ensure permanence and efficiency of institution by placing at its disposal work-shops and motor transport concerns in which founder was interested—Institution not to be founded until companies had made sufficient money for the purpose—Trust held would have been charitable if assets were to be directly devoted to its objects —Since *N* had power to utilize assets for his own purpose or purposes of his companies trust could not be said to have been created wholly for charitable purposes—Idea that some day institution contemplated by deed might be founded was not sufficient compliance with S. 4 (3) (i).

N a gentleman largely interested in motor engineering and transport companies in the Coimbatore District, created the G. D. Naidu Industrial Educational Trust and purported to endow it with the shares held by him in six transport companies of which he had the control and immovable property worth Rs. 1,10,000. *N* constituted himself the managing trustee of the trust and gave himself full power to deal with its assets. The objects of the trust were (1) to provide permanent facilities for the improvement of motor, electrical and other industries and transport in the country; (2) to found an institution providing for research, education and training in that connexion; (3) to ensure the permanence and efficiency of the institution by placing at its disposal the work-shops and the motor transport concerns in which the founder was interested. The contemplated institution was not to be brought into being immediately but the foundation of the

same was left over until the companies had made sufficient money for the purpose and the companies in which *N* was interested were to have the benefit of the assets set apart by him. So long as *N* was the managing trustee he was given the power not only to borrow money for the purpose of the trust but he could borrow monies for his own purposes on the security of the assets set apart by him and to sell immovable properties belonging to the trust for the purpose of floating other companies. The trustees were empowered to advance to the companies in which *N* was interested monies for discharging their liabilities, purchasing and substituting other more economical engines for the petrol engines on buses run by them, and for constructing passenger sheds and garages and other "amenities and facilities" for the use of the transport service "wherever the Trust is interested."

Held that (1) no doubt if the assets which *N* purported to set apart were to be devoted directly to the objects specified in the deed, the trust would have been a charitable trust within S. 4 (3) (i); [P 626 C 2]

(2) in view of the provisions of the deed by which the assets could be utilised for *N*'s own purposes or the purposes of his companies, the deed could not be said to have created a trust wholly for charitable purposes. The idea that some day the institution contemplated by the deed might be founded was not sufficient compliance with S. 4 (3) (i). [P 626 C 2]

K. V. Sesha Ayyangar and K. S. Srinivasan— for Petitioner.

Advocate-General and M. Subbaraya Iyer — for Respondents.

LEACH C. J. — On 24th January 1938 one G. D. Naidu, a gentleman largely interested in motor engineering and transport companies in the Coimbatore District, created the G. D. Naidu Industrial Educational Trust and purported to endow it with the shares held by him in six transport companies of which he had the control and immovable property worth Rs. 1,10,000. Mr. Naidu constituted himself the managing trustee of the trust and gave himself full power to deal with its assets. This reference arises out of a claim made under S. 4 (3) (i), Income-tax Act, by Mr. Naidu, as the managing trustee, for a refund of the tax paid in respect of dividends declared on the shares held in these transport companies. The income-tax authorities refused to allow a refund. Their reason was that the shares were not held under trust wholly for charitable purposes within the meaning of the section. The managing trustee having asked the Commissioner of Income-tax to state a case to this Court under S. 66 (2), Income-tax Act, the Commissioner has referred this question :

"Whether on a proper construction of the Instrument of Trust, dated 24th January 1938 the properties in question were held under trust for charitable purposes within the meaning of S. 4 (3) (i), Income-tax Act."

The transport companies in which Mr. Naidu was interested had accumulated their profits from the date of their incorporation in 1932, but after the execution of the deed of 24th January 1938 they declared dividends amounting in the aggregate to Rs. 3,49,155 of which Rs. 2,75,340 represented the dividends on Mr. Naidu's shares. The Rs. 2,75,340 was not, however, paid over to the trustees. The money remained with the companies. All that the trust received were promissory notes of the face value of Rs. 2,75,340. The objects of the trust may be stated shortly as follows : (1) To provide permanent facilities for the improvement of motor, electrical and other industries and transport in the country. (2) To found an institution providing for research, education and training in this connection. (3) To ensure the permanence and efficiency of the institution by placing at its disposal the work-shops and the motor transport concerns in which the founder is interested.

If the assets which Mr. Naidu purported to set apart were to be devoted directly to such objects, no doubt the trust would be entitled to the refund claimed; but the deed clearly shows that the contemplated institution was not to be brought into being immediately and that the companies in which Mr. Naidu was interested were to have the benefit of these assets set apart by him. Clause 54 of the deed provides that so long as Mr. Naidu holds the office of managing trustee he shall have the power to borrow to any extent on the properties conveyed to the trust and that the board of trustees shall be able to borrow monies which are necessary to discharge debts contracted by Mr. Naidu. The power given to him is not limited to borrowing for the purpose of the trust. Apparently, he can borrow monies for his own purposes on the security of the assets set apart by him. By Cl. 55 the trustees are empowered, so long as Mr. Naidu holds the office of managing trustee, to sell immovable properties belonging to the trust "in expanding or floating industrial institutions," in other words for the purpose of floating other companies. Clause 59 provides that the trustees may advance to the companies in which Mr. Naidu is interested monies for (a) discharging their liabilities; (b) purchasing and substituting diesel or other more economical engines for the petrol engines on buses run by them and (c) constructing passenger sheds and garages and other "amenities and facilities" for the use of the transport service "wherever the trust is interested." Clause 60 deals with the foundation of the proposed institution. It reads as follows :

"That the trustees shall as early as they consider it expedient utilise the trust for the purpose of starting an institute for industrial and scientific research and training, with a factory attached thereto, for the manufacture of all or any types of automobiles, electrical plants, mills and other machinery and all accessories and equipment therefor, or other goods approved by the board of trustees from time to time, for providing training to deserving persons irrespective of sex, caste, creed or colour in such scientific research experimental work and manufacture or industries."

The foundation of the institution was apparently to be left over until the companies had made sufficient money for the purpose. By Cl. 71, Mr. Naidu reserves to himself the power to revoke the trust at any time. In view of the provisions of the deed by which the assets can be utilised for Mr. Naidu's own purposes or the purposes of his companies, it is impossible for him to contend with reason that the deed creates a trust wholly for charitable purposes. The idea that some day the institution contemplated by the deed may be founded is not sufficient compliance with the section. It is said that in 1939 Mr. Naidu made considerable alterations in the trust deed and that these alterations remove the objections now referred to. Whether the deed as it now stands creates a trust which is entitled to the benefits of S. 4 (3) (i) is a question with which the Court is not concerned. It is concerned only with the question whether a trust was created wholly for charitable purposes in the year of account, 1937-38,

and it is obvious that this was not the case. The Commissioner of Income-tax has correctly appreciated the situation and the question referred will be answered in accordance with the opinion expressed by him. The Commissioner is entitled to his costs which we fix at Rs. 250.

C.R.K./G.N. *Answer accordingly.*

A. I. R. (29) 1942 Madras 627

SOMAYYA J.

Manal Krishna Nayak and Sons by partners, M. Venkataraya Nayak and others — Appellants

v.

South Indian Railway Co., Ltd. by its Agent at Trichinopoly — Respondent.

Second Appeal No. 96 of 1939, Decided on 12th August 1941, against decree of Dist. Court, South Kanara, in A. S. No. 254 of 1936.

Railways Act (1890), S. 55, cls. (1) and (5)— Remedies of railway for recovering undercharges, explained — Remedy of suit is available even after goods are delivered to consignee.

Under S. 55 recovery of undercharges may be made either by exercising the lien over the particular goods in respect of which this undercharge was made or by exercising the lien over any other goods of the consignor which may subsequently come into the possession of the railway company, or by way of a suit. All these three modes of recovery are open to the railway company, and the railway company can exercise the right of suit even after the goods are all delivered to the consignee. [P 627 C 1, 2]

K. Y. Adiga and K. P. Adiga — for Appellants.

S. S. Ramachandra Ayyar — for Respondent.

JUDGMENT.— The South Indian Railway Co. filed the suit out of which this second appeal arises for recovery of a sum of Rs. 1243-7-6 as freight due to it and which is alleged to have been the undercharge in respect of some consignments by the appellant-defendant from Mangalore to Bombay. Three consignments of gold were booked on 16th September 1933, 23rd September 1933 and 9th October 1933 from Mangalore to Bombay and the case of the railway company is that while these consignments were liable to be charged at specially high rates, by some mistake low freight charges had been collected and that therefore the company is entitled to recover the deficiency. Various defences were raised, but there is only one question which can legitimately be urged in second appeal and that is, whether the railway company has got the right of filing a suit after all the goods were delivered over to the consignees. The contracts in question which are the forwarding notes are Exs. A, B and C. In all these documents there is cl.(8) which runs as follows :

"Goods booked to stations on the South Indian Railway, or railways worked by the South Indian Railway are carried subject to the rules and conditions printed from time to time in the railway company's goods tariff; and goods booked to or over a foreign railway are subject to the rules and regulations of wharfage and other charges in force on such railway."

Here the goods were consigned from Mangalore which is a station on the South Indian Railway to Bombay which is a station over a foreign railway, namely, the G. I. P. Railway. In such a case under cl. (8) of Exs. A, B and C the goods are booked subject to the rules and regulations in force over the G. I. P. Railway. Exhibit G is admittedly a copy of the rules in force over the G. I. P. Railway and over other railways as well. Clause (23) of Ex. G runs thus :

"Right to correct charges: Railways reserve the right to correct any charges that may have been incorrectly made and to recover undercharges from whatever causes arising."

Exhibit G is headed "The Indian Railways Coaching Tariff." It is admitted that the particular consignments are governed by the rules contained in this document, Ex. G. The right to recover undercharges by way of a suit is given by S. 55, cl.(5), Railways Act, which runs thus :

"Notwithstanding anything in the foregoing subsections the railway administration may recover by suit any such rate terminal or other charge as aforesaid or balance thereof."

Under cl.(1) which is one of the sub-clauses referred to :

"If a person fails to pay on demand made by or on behalf of a railway administration any rate, terminal or other charge due from him in respect of any animals or goods, the railway administration may detain the whole or any of the animals or goods or, if they have been removed from the railway, any other animals or goods of such person then being in or thereafter coming into its possession."

So there are two rights which are given under S. 55, cl. (1). If some goods are consigned, those very goods may be detained before delivery unless the amount which is demanded is paid. The second is that even if those goods were delivered over, if any other goods of the consignor come into the possession of the railway company, then the company has got the right of lien over such goods as well. Then cl.(5) of the same section says : "May recover by suit any such rate, terminal or other charges as aforesaid." The railway administration may recover by suit the sums for which they can detain goods under cl. (1). Here the railway authorities are entitled under the Act and under cl. (23) of Ex. G to correct any charges that may have been made incorrectly, and they have got the right to recover the undercharges from whatever cause arising. Recovery may be made either by exercising the lien over the particular goods in respect of which this undercharge was made or by exercising the lien over any other goods of the consignor which may subsequently come into the possession of the railway company, or by way of a suit. All these three modes of recovery are open to the railway company. In this case the railway company exercised the right of suit after the goods were all delivered. I do not see how it can be said that the railway administration is confined to the first two remedies as the learned counsel for the appellant would have it. Mr. Adiga concedes that before the goods were removed from the terminal station the amount in question might have been recovered by exercising the lien which the railway company has. But what he says is that the third remedy by way of suit is not available. If all these three remedies are given by S. 55, two by cl. (1) and the third by cl. (5), it is difficult to see how the railway administration can be confined to the remedies given under cl. (1), particularly when cl. (5) says :

"Notwithstanding anything in the foregoing subsections, the railway administration may recover by suit any such rate, terminal or other charge as aforesaid or balance thereof."

a I therefore confirm the decree of the lower appellate Court and dismiss the second appeal with costs. Leave to appeal is granted.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 628

LEACH C. J. AND BELL J.

A. Rajagopala Iyer and others — *Appellants*

v.

S. Ramachandra Iyer — *Respondent.*

Appeal No. 41 of 1940, Decided on 4th February 1942, from judgment and decree of Somayya, J., D/- 16th February 1940 and 2nd May 1940, respectively.

b

(a) Contract Act (1872), S. 126 — Person in position of surety — In granting relief Court is not confined to contracts of guarantee within S. 126 — Court can apply principles of equity unless case is governed by positive provision of law—Father mortgaging his separate property and having benefit of whole of mortgage loan —Son made party to mortgage deed not as mortgagor but as party of second part — Son not described as surety but brought in in case of need—Son's position held was that of surety —Son held entitled to benefit of security to extent to which he had contributed towards discharge of mortgage.

The Court in granting relief to a person in the c position of a surety is not confined to contracts of guarantee within the meaning of S. 126. The Court is free to apply the principles of equity unless the position is governed by some positive provisions of Indian law and therefore the Court is entitled in a suitable case to apply any of the principles stated in (1881) 6 A. C. 1. [P 629 C 2]

The father mortgaged his separate property and had the benefit of the whole of the mortgage loan. The son was made a party to the mortgage deed executed by his father and the son made himself liable for the repayment of the debt, although not as a mortgagor. There was only one mortgagor, the father. The son was referred to "as the party of the second part", and the deed recited that he had agreed to join in at the request of the mortgagee. The document did not describe him as a surety and d his liability was not expressly stated to be limited to default on the part of the mortgagor :

Held that reading the document as a whole it was quite clear that the son was brought in in case of need and that his position was in reality that of a surety. The case therefore fell within the third category of cases referred to in (1881) 6 A. C. 1 and therefore the son was entitled to the benefit of the security to the extent to which he had contributed towards the discharge of the mortgage : (1881) 6 A.C. 1 and ('33) 20 A.I.R. 1933 Mad. 39, *Rel.on.* [P 629 C 2]

(b) Limitation Act (1908), Art. 147—English mortgage — Suit for foreclosure or sale falls within Art. 147.

Suits for foreclosure or sale of a mortgage in the English form fall within Art. 147 : 30 Mad. 426, (P.C.), *Rel. on.* [P 630 C 1]

Limitation Act —

('42) Chitaley, Art. 147 N. 1 Pt. 12; N. 2.

('38) Rustomji, Page 1520 Pt. 1; Page 1521 Pt. 3.

e **(c) Transfer of Property Act (1882), S. 58 (e)** —English mortgage — Date of payment to be postponed in certain event—Mortgagor to pay cost of insurance and other charges payable in respect of mortgaged property — Provision for extension of time not accompanied by stipulation that mortgagee should reconvey — Provisions held did not alter character of mortgage.

The mortgage deed in the English form provided that if the mortgage debt should not be repaid on the due date, interest shall be charged at seven per cent. per annum, and if the interest was paid regularly every month the date for payment shall be extended from 8th October 1916 to 8th April 1919 and that the mortgagor shall pay the fire insurance premiums, quit rent, assessment rates, taxes and other outgoings for the time being payable in respect of or charged upon the property. It was f contended that these provisions altered the character of the mortgage and also that the fact that the provision for the extension of the time for the payment of the mortgage debt was not accompanied by a stipulation that the mortgagee should reconvey changed the character of the mortgage :

Held that (1) the fact that in a certain event the date of payment was changed from 8th October 1916 to 8th April 1919 did not mean that the mortgagor had not contracted to pay the debt on a certain date within the meaning of S. 58 (e);

[P 630 C 1]

(2) the fact that the mortgagor had agreed to pay the cost of insurance and other charges did not detract from the absolute transfer to the mortgagee;

[P 630 C 1]

(3) the stipulation in the mortgage deed that the g mortgagee shall reconvey on payment being made on 8th October 1916 must be read as applying also in the event of the time being extended to 8th April 1919; [P 630 C 2]

(4) the additional provisions in the mortgage deed did not alter the character of the mortgage in the English form : ('36) 23 A.I.R. 1936 Pat. 211 and ('36) 23 A. I. R. 1936 Cal. 646, *Approved*; ('35) 22 A. I. R. 1935 Cal. 659, *Dissent.* [P 630 C 2]

T. P. Act —

('36) Mulla, Page 345 Pt. (x1); Page 346 Pt. (j1).

('34) Mitra, Page 318 N. 345.

N. T. Shamanna — for Appellants.

K. S. Sankara Ayyar — for Respondent.

LEACH C. J. — This appeal arises out of a suit h filed on the original side of this Court by the respondent for the redemption of a mortgage. The case presents some unusual features and it is necessary in order to appreciate the questions involved in the appeal to state in detail the history of the case. The respondent's father, S. Subramania Iyer, was indebted to the appellants' father, Ayyaswami Iyer, on two promissory notes. Ayyaswami Iyer died on 14th September 1919 and Subramania Iyer on 15th October 1919. In 1920 the appellants instituted a suit against the widow of Subramania Iyer and D. Venkatarama Iyer and M. Gopala Iyer, who had been nominated by him as the executrix and the executors of his will. On 4th March 1921 a decree was passed in favour of the appellants for Rupees 2939-11-0. In execution of that decree the appellants attached the property now in suit and bought it at the sale held in pursuance of an order of the Court passed in the execution proceedings. The sale certificate was issued to them on 22nd January 1925 and the appellants obtained possession on 14th

May 1925. The present suit was instituted by the respondent on 14th April 1937.

The respondent's father had insured his life with the Gresham Life Assurance Society, Limited, and with the Oriental Government Security Life Assurance Company, Limited. The assured assigned to his wife and the respondent, who is his eldest son, the policy issued by the former company and the policy issued by the latter company to them and to his three other sons. In the Court below, it was taken that the assignment of the second policy was only to the sons of the assured, but we have allowed the appellants to put in an extract of the assignment register and this establishes that the widow was also one of the assignees. Subramania Iyer was indebted to a person named Johnstone and to a Mrs. Booth. To Johnston he owed Rs. 5145-13-4 and to Mrs. Booth Rs. 7000. To secure the debt to Mrs. Booth, he mortgaged to her the property now in suit. On 25th October 1920 when the debt due to Mrs. Booth was discharged, there was owing Rs. 7204-2-8. It is the respondent's case that the debt was repaid to the extent of Rs. 4000 out of the moneys received from the Gresham Life Assurance Society Limited and the balance of Rs. 3204-2-8 out of the moneys received from the Oriental Government Security Life Assurance Company Limited. The moneys obtained from the two Insurance Companies did not form part of the deceased's estate. The policies having been assigned by the testator during his lifetime, on his death the assignees became entitled to receive payment by reason of the assignments, not by reason of his will. On the ground that the mortgage in favour of Mrs. Booth was discharged out of the moneys received from these insurance companies in which he had an interest, the respondent claims that he is entitled to the benefit of the security held by her and to consequential relief.

Somayya J. who tried the suit held that of the Rs. 4000, which was paid out of the money received from the Gresham Life Assurance Society Limited, Rs. 2000 came from the respondent. Of the Rupees 3204-2-8 which was paid out of the money received from the Oriental Government Security Life Assurance Company Limited, the learned Judge held that one-fourth, namely, Rs. 801-0-8 was the respondent's money. As the respondent had only a one-fifth share, the figure should have been Rs. 640-12-11. Having found that the respondent had paid Rupees 2801-0-8, towards the discharge of Mrs. Booth's mortgage, Somayya J. gave him a decree for this sum with interest at seven per cent. per annum and directed that the property be sold in default of payment. The sale was however avoided as the appellants paid the money into Court. The appellants challenge the validity of the decree passed by the learned Judge on several grounds. They say that (i) the evidence does not establish that the respondent contributed towards the discharge of the mortgage in favour of Mrs. Booth ; (ii) the respondent is not in law entitled to the benefit of the security, even if he did contribute to the repayment of Mrs. Booth's mortgage, and (iii) the suit is barred by the law of limitation.

We agree with the finding of the learned Judge that the mortgage in favour of Mrs. Booth was discharged out of the moneys received from the Insurance Companies, to the extent of Rs. 4000 out of the moneys received from the Gresham Life Assurance Society Limited, and to the extent of Rs. 3204-2-8 out of the moneys received from the Oriental Government Security Life Assurance Company, Limited. We also agree with the learned Judge that the respondent was entitled to a half of the monies received from the Gresham Life Assurance Society, Limited, but as already pointed out, he was not entitled to a fourth, but only to a fifth, of the money received from the other company. The main question in this appeal is whether the respondent is entitled to the benefit of the security held by Mrs. Booth. The learned Judge considered that the respondent could not be regarded as a surety within the meaning of S. 126, Contract Act, but that his case fell within the third category of the cases referred to in the judgment of Lord Selborne in (1881) 6 A. C. 1.[1] Lord Selborne said that there were three classes of cases in which a surety or a person in an analogous position is entitled to the benefit of security held by the creditor namely (1) those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party, (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.

The respondent was made a party to the mortgage deed executed by his father in favour of Mrs. Booth and he made himself liable for the repayment of the debt, although not as a mortgagor. There was only one mortgagor, the father. The respondent was referred to "as the party of the second part," and the deed recites that he had agreed to join in at the request of the mortgagee. The document does not describe him as a surety and his liability is not expressly stated to be limited to default on the part of the mortgagor ; but reading the document as a whole, it is quite clear that he was brought in in case of need and that his position was in reality that of a surety. We agree with the learned Judge that this case falls within the third category of cases referred to in (1881) 6 A.C. 1.[1]

The Court in granting relief to a person in the position of a surety is not confined to contracts of guarantee within the meaning of S. 126, Contract Act, and the Court is free to apply the principles of equity unless the position is governed by some positive provisions of Indian law and therefore the Court is entitled in a suitable case to apply any of the principles stated in (1881) 6 A. C. 1.[1] This was recognised by this Court in 55 Mad. 949[2] although it was held in that case that (1881) 6 A. C. 1[1] was not in point. There two Nattukottai Chettiars borrowed Rs. 1,00,000 from a bank on a promissory note which they both signed as makers. The bank having paid over the money, each took Rs. 50,000 for his own purposes. One of them became insolvent and the other being jointly and severally liable was called upon to repay the Rs. 1,00,000 due to the bank. The question was whether the solvent borrower who had repaid the bank was entitled to the benefit of securities which the insolvent borrower

1. (1881) 6 A. C. 1 : 50 L. J. Ch. 355 : 43 L. T. 706 : 29 W. R. 763, Duncan Fox & Co. v. North and South Wales Bank.
2. ('33) 20 A.I.R. 1933 Mad. 39 : 139 I.C. 562 : 55 Mad. 949 : 63 M. L. J. 615, Vairavan Chettiar v. Official Assignee of Madras.

had deposited with it. The Official Assignee contended that he was not and the Court upheld the Official Assignee. The judgment in (1881) 6 A.C. 1[1] was discussed, and it was held that the case did not fall within the third category as stated by Lord Selborne because the debt was not wholly of one, but equally of both the Chettiars. In the present case, the debt was wholly that of the mortgagor. It is common ground that the property mortgaged was the separate property of the father and that the father had the benefit of the whole of the mortgage loan.

Turning now to the question of limitation, unless the mortgage is in the English form the suit will be governed by Art. 132, Limitation Act, and therefore will be out of time. The learned Judge held, however, that the mortgage was in the English form and that the appropriate article was Art. 147 which provides for a period of limitation of sixty years. Suits for foreclosure or sale of a mortgage in the English form fall within this Article. This was decided by the Privy Council in 30 Mad. 426.[3] Section 58, T. P. Act, sets out the requirements of an English mortgage. The mortgagee must bind himself to repay the mortgage money on a certain date and transfer the mortgaged property absolutely to the mortgagee, subject to a proviso that the mortgagee will retransfer it to the mortgagor upon payment of the mortgage money as agreed. The learned advocate for the appellants admits that these conditions are fulfilled, but he says, there are other conditions which are not usually found in a mortgage of the English form and therefore this mortgage must be regarded as an anomalous mortgage in which case it will not fall within Art. 147, Limitation Act. The additional provisions in the deed which the learned counsel for the appellants relies on here, are these: (i) If the mortgage debt should not be repaid on the due date, interest shall be charged at 7 per cent. per annum, and if the interest is paid regularly every month the date for payment shall be extended from 8th October 1916 to 8th April 1919; and (ii) the mortgagor shall pay the fire insurance premiums, quit rent, assessment rates, taxes and other outgoings for the time being payable in respect of or charged upon the property. He also says that although there is a provision for the extension of the time for the payment of the mortgage debt it is not accompanied by a stipulation that the mortgagee should reconvey and that this changes the character of the mortgage.

Unless these provisions can be read as altering the obligation of the mortgagor to pay the mortgage debt on a specified date or detract from the absolute nature of the transfer, the mortgage must be regarded as being in the English form. The fact that in a certain event the date of payment is changed from 8th October 1916 to 8th April 1919 does not mean that the mortgagor has not contracted to pay the debt on a certain date within the meaning of S. 58 (e), T. P. Act, and the fact that the mortgagor has agreed to pay the cost of insurance and other charges does not detract from the absolute transfer to the mortgagee. In 14 Pat. 560,[4] the Patna High Court held that a stipulation which gave the mortgagor options with regard to part payment and extension of time for repayment of the principal sum did not affect a clause in the mortgage bond under which the mortgagor bound himself to pay the mortgagee money on a certain date. Nor did a provision in the bond requiring the mortgagor to pay in addition to the mortgage debt and interest, further advances and sums paid by the mortgagee for the protection and preservation of the mortgaged property and Government revenue, rents and all other costs, charges and expenses incurred in connexion with the property make the mortgage any the less an English mortgage within the definition given in S. 58, T. P. Act.

For the appellants, reliance has been placed upon the decision of the Calcutta High Court in 62 Cal. L. J. 285 where it does appear that the view was taken that a provision in a mortgage deed requiring the mortgagor to pay "rent, royalty, cesses, taxes, rates, assessments and impositions which now are or hereafter may be payable in respect of the said premises" did change the character of the mortgage. But dissent from this view is indicated by the decision of the same Court in I. L. R. (1937) 1 Cal. 359.[6] It may be mentioned that 62 C. L. J. 285 was carried to the Privy Council but there it was held that it was not necessary to decide whether the mortgage in that case was in the English form: I. L. R. (1939) 1 Cal. 283.[7] We are not prepared to accept 62 C. L. J. 285 as embodying a correct indication of the answer to be given here. There is no substance in the third contention of the appellants. The mortgage deed contains a stipulation that the mortgagee shall reconvey on payment being made on 8th October 1916 and this stipulation must be read as applying also in the event of the time being extended to 8th April 1919. For the reasons given we hold that the additional provisions in the mortgage deed in suit do not alter the character of the mortgage. Consequently, we concur in the finding of Somayya J. that the mortgage is in the English form, which means that the suit was filed in time. The appeal fails except as regards the decretal amount. As already indicated the respondent is only entitled to Rs. 2640-12-11 but this sum will carry interest at the rate fixed by Somayya J. The decree of the trial Court will be varied to this extent. The parties will pay and receive proportionate costs. Out of the money in deposit in Court, so much of it as is due to the respondent under the decree passed by this Court will be paid out to him on his complying with the other requirements of the decree.

C.R.K./G.N. *Order accordingly.*

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3. ('07) 30 Mad. 426 : 34 I.A. 186 : 17 M.L.J. 444 (P.C.), Vasudeva Mudaliar v. Srinivasa Pillai.
4. ('36) 23 A.I.R. 1936 Pat. 211 : 158 I.C. 738 : 14 Pat. 560: 16 P.L.T. 757, Janaki Nath Ray v. Asad Reza.
5. ('35) 22 A.I.R. 1935 Cal. 659: 159 I.C. 1001: 62 C.L.J. 28, Satya Charan v. Ramkinkar Banerjee.
6. ('36) 23 A.I.R. 1936 Cal. 646 : 170 I.C. 274 : I.L.R. (1937) 1 Cal. 359: 40 C.W.N. 1270, D.E.D. Cohen v. Baidhyanath Mukherjee.
7. ('39) 26 A.I.R. 1939 P.C. 14 : 179 I.C. 328 : I.L.R. (1939) 1 Cal. 283: I.L.R. (1939) Kar. P.C. 78: 66 I.A. 50 (P.C.), Ram Kinkar v. Satya Charan.

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* A. I. R. (29) 1942 Madras 630

SPECIAL BENCH

LEACH C. J., MOCKETT AND KUPPUSWAMI AYYAR JJ.

P, a First Grade Pleader, Markapur.

Referred Case No. 40 of 1941, Decided on 16th December 1941.

(a) Legal Practitioners Act (1879), S. 14— Finding that allegations were false and were result of animosity is of fact — It cannot be challenged in reference to High Court under section 14.

a A finding that the allegations by a pleader against a Judicial Officer were false and were the result of animosity being a finding of fact cannot be challenged in a reference to the High Court under section 14. [P 631 C 2]

*(b) Legal Practitioners Act (1879), S. 13 (f) — Malicious and defamatory allegations by pleader against Judge held amounted to professional misconduct and constituted "reasonable cause" within S. 13 (f).

A pleader wrote a letter to the Governor wilfully and maliciously making untrue statements reflecting on a District Munsif. In the letter the pleader described himself as "the leader of the Bar" and accused the District Munsif of being a sympathiser with the satyagraha movement and that the District Munsif had on a certain date granted an application of an advocate for an adjournment made on the ground that he wanted to go to a certain place to see a friend offering satyagraha while motions of adjournment on strongest conceivable grounds such as death-bed illness, official duty, etc., were refused by the District Munsif. It was contended that the pleader's offence was more in the nature of contempt of Court than professional misconduct :

Held that since the pleader in his professional capacity had made a malicious and defamatory attack on the District Munsif he was guilty of professional misconduct constituting "reasonable cause" within S. 13 (f) : 29 All. 95 (P. C.); ('16) 3 A. I. R. 1916 Mad. 1144 (F. B.) and ('28) 15 A.I.R. 1928 Mad. 918 (F. B.), *Rel. on.* [P 631 C 2]

Advocate General, in support of Notice.

c *V. Govindarajachari and B. V. Ramanarasu* — for Pleader.

LEACH C. J.—The respondent is a first grade pleader practising at Markapur in the Kurnool District. He has been charged with professional misconduct in that he wrote a letter to the Governor of Madras wilfully and maliciously making untrue statements reflecting on the District Munsif of Markapur. The charge has been investigated by the District Judge of Kurnool and he has reported to this Court that it has been fully substantiated. In the letter referred to the respondent accused the District Munsif of being a sympathiser with the satyagraha movement and that on 28th February 1941 he granted an application of an advocate for adjournment of a case made on the ground that he desired to go to Cumbum to see a friend offering satyagraha. He added :

d "I am the leader of the Bar here. I have put in 26 years in the profession. I may be permitted to submit, this sort of sympathy of a Judicial Officer, with the satyagraha movement which is working havoc in the country, is most oppressively shocking and unprecedented in the annals of judicial administration and should be nipped in the bud. Markapur is a most law abiding town. It has contributed comparatively the biggest amount of the District War Fund. The presence of such sympathetic officers may adversely affect in all possibility. I may also humbly submit that there are several instances when motions for adjournment on strongest conceivable grounds, e. g., death-bed illness, official duty, etc., were refused by the same learned District Munsif."

After a careful review of the evidence recorded in the course of the inquiry the District Judge came to the following conclusions: (1) The respondent's version of what happened in Court on 28th February 1941 was entirely false, (2) the allegation that the District Munsif is a sympathiser with the satyagraha movement, was also devoid of truth; (3) the respondent had falsely posed as an enthusiastic supporter of the war effort in order to lend colour to an unwarranted attack on the District Munsif ; and (4) the action of the respondent was the result of animosity towards the District Munsif because the District Munsif had given decisions against him. In the words of the District Judge, the respondent is a person who takes his forensic defeats badly. Mr. Govindarajachari, on behalf of the respondent, has very properly stated that the findings of fact cannot be challenged and consequently he has confined his address to the Court to two points. In the first place he says that the respondent's conduct is not unprofessional, but in the nature of contempt of Court. In the second place he says that there has been no accusation of dishonesty against the District Munsif and the Court should f deal leniently with the respondent.

With regard to the contention that the respondent's offence is more in the nature of contempt of Court than professional misconduct it has to be borne in mind that the letter which the respondent addressed to the Governor of the Province related to orders passed by the District Munsif and the accusations were made by the respondent as "the leader of Bar at Markapur." In these circumstances it is idle for the respondent to suggest that his misconduct should be regarded as being entirely dissociated from his status as a legal practitioner. In his professional capacity he has made a malicious and defamatory attack on a Judge and consequently we consider that he has been properly charged with professional misconduct. We should have thought that this was apparent without recourse to authority, but a decision of the Privy Council and two decisions of this Court have been quoted in the course of the arguments, and we think that we might refer to them. The first of these cases is 29 All. 95.[1] An advocate of the Allahabad High Court had been suspended from practice for a period of four years because he had published an article in a periodical of which he was the editor. The article contained libellous statements in respect of a Judge before whom he had appeared on a particular occasion and against other Judges of the Court in their judicial capacity. The respondent in that case appealed to the Privy Council because he said that the Allahabad High Court had erred in holding him guilty of professional misconduct for what he had written in his capacity as the editor of the periodical. The Judicial Committee refused to accept this h contention and dismissed his appeal. Their Lordships considered what constituted 'reasonable cause' for the suspension of an advocate from practice under the power conferred by the Letters Patent. They said that they would not attempt to give a definition of "reasonable cause" or to lay down any rule for the interpretation of the Letters Patent in that respect because every case must depend on its own circumstances. But they added :

"The rules of the Court, to which reference has been made, indicate the precautions taken by the Court itself to secure that the powers shall not be used capriciously or oppressively, and there is no reason to apprehend that the just independence of the Bar runs any risk of being impaired by its exercise. On the other hand, it is essential to the proper administration of justice that unwarrantable attacks

1. ('07) 29 All. 95 : 34 I.A. 41 : 5 Cr. L. J. 152 : 4 A.L.J. 34 (P. C.), In the marter of Shashi Bushan Sarbadhicary.

should not be made with impunity upon Judges in their public capacity; and having regard to the fact that in this case a contempt of Court was undoubtedly committed (and, as the evidence shows, not for the first time) by an advocate in a matter concerning himself personally in his professional character, their Lordships agree with the conclusion at which the Judges of the High Court arrived, and that there was 'reasonable cause' for the order which they made."

In the present case, the proceedings were instituted under S. 13, Legal Practitioners' Act, 1879, not under Cl. 10, Letters Patent of this Court, but the position is the same. Section 13, Legal Practitioners' Act, 1879, also gives the High Court power to suspend or dismiss a pleader for "reasonable cause." The present case is even stronger against the respondent than the case which was carried to the Privy Council from the Allahabad High Court. The letter in respect of which the respondent in the present case is charged was written as "the leader of the Bar at Markapur." In 39 Mad. 1045,[2] a Full Bench of this Court suspended a pleader from practice because he had sworn and filed in Court an affidavit in which he made unjust aspersions, imputations and insinuations couched in insulting language charging a District Munsif with rancour and prejudice against him and with a desire to injure him and to make common cause with his political opponents in the Bezwada Municipal Council. In 51 Mad. 798,[3] another Full Bench of this Court suspended a pleader's sanad for having sworn a false affidavit in which he stated that he had seen a Magistrate receive a bribe. There can be no doubt that the respondent is guilty of professional misconduct and this being the case all which remains to be considered is the penalty to be imposed. In the last mentioned case, the pleader was suspended for one year and ten months, but the libel there was of a more serious nature than it is here because it contained a charge of bribery. At the same time the respondent's offence is not a light one. Learned counsel for the respondent has, however, expressed on behalf of his client regret for the misconduct and has given an undertaking that the offence will not be repeated. In these circumstances we consider that it will be sufficient to order that the respondent's sanad be suspended until the end of 1942, and there will be an order accordingly.

C.R.K./G.N. *Order accordingly.*

2. ('16) 3 A.I.R. 1916 Mad. 1144 : 32 I.C. 326 : 17 Cr.L.J. 38: 39 Mad. 1045 (F.B.), District Judge of Kistna v. C. Hanumanulu.

3. ('28) 15 A.I.R. 1928 Mad. 918: 110 I. C. 815: 29 Cr.L.J. 783 : 51 Mad. 798 : 55 M.L.J. 170 (F.B.), In re a Second Grade Pleader.

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* A. I. R. (29) 1942 Madras 632

LEACH C. J. AND BYERS J.

RM. N. L. KR. Ramanathan Chettiar — *Appellant*

v.

Unnamalai Achi and another — *Respondents.*

Second Appeal No. 517 of 1940, Decided on 18th March 1942, against decree of Sub-Judge, Devakottai, in A. S. No. 87 of 1938.

(a) Civil P. C. (1908), S. 100 — Finding that person was guilty of fraud supported by evidence — It is conclusive in second appeal.

A finding that a person was guilty of fraud when supported by evidence, is conclusive in second appeal. [P 633 C 1]

C. P. C. —

('40) Chitaley, Ss. 100 & 101, N. 52 Pts. 1, 4.

('41) Mulla, Page 366, N. "No second appeal lies on the ground of an erroneous finding of fact."

*** (b) Transfer of Property Act (1882), Ss. 2 (d), 5 and 53 — Person obtaining transfer of property under order of Court by gross fraud — S. 53 does not apply—Court can remedy injustice by applying principles of common law for avoiding fraudulent conveyances — Party aggrieved can file suit to have transfer declared nullity.**

Sections 2 (d) and 5 prevent S. 53 operating in the case of a transfer under an order or decree of Court. But where a person has obtained a transfer of property under an order of the Court as the result of a gross fraud, the Court is not powerless and can remedy the injustice caused without invoking S. 53 by applying the principles of common law for avoiding fraudulent conveyances which must guide the Court in administering law according to equity and good conscience. Consequently, it is open to the party aggrieved by the fraud to file a suit to have the transfer under the order of Court declared a nullity : 10 Cal. 616 (P. C.) and (1863) 10 H. L. C. 404, *Rel. on*; ('18) 5 A. I. R. 1918 Mad. 557 (F.B.), *Approved.* [P 633 C 1, 2; P 634 C 1]

T. P. Act —

('42) Chitaley, S. 2, N. 6 Pt. 12.

('36) Mulla, Page 11 Pt. (a).

('34) Mitra, Page 11, N. 13; Page 213, N. 255.

V. Ramaswamy Ayyar — for Appellant.

K. Bhashyam Ayyangar and T. K. Sundararaman — for Respondents.

LEACH C. J. — This appeal discloses a case of gross fraud and a fraud practised on the Court. The appellant was a party to this fraud and seeks to retain the benefit of his fraudulent conduct on a technical plea, but it is a source of satisfaction that this technical plea avails him of nothing. Respondent 1 instituted a suit (O. S. No. 56 of 1934) in the Court of the Subordinate Judge of Devakottai to recover moneys said to have been deposited by her with a money lending firm carried on by respondent 2's father at Pyabwe in Burma. Respondent 2 contested the claim and said that he was only an agent and not a partner in the firm. On 23rd January 1935 the Court granted respondent 1 a decree for Rs. 5318-13-9, limited so far as respondent 2 was concerned to his share in the family estate, as there was no proof that he was a partner. On 24th July 1935 respondent 1 commenced proceedings in execution and these proceedings were still pending on 31st July 1936. On 1st April 1936 the appellant filed a suit in the Court of the District Munsif of Devakottai to recover from respondent 2 a sum of Rs. 1000 and interest which he claimed to be due on a promissory note executed by respondent 2 in his favour. On 28th April 1936 he obtained a decree and in execution thereof he attached a house belonging to respondent 2. This house was already under attachment in the execution proceedings instituted by respondent 1 to enforce payment of the decree which she had obtained against respondent 2. On 27th July 1936 the house was sold in the execution proceedings instituted by the appellant and bought by him for the sum of Rs. 1811. The amount of the decree was only Rs. 1221-2-0 and the

balance of the Rs. 1811 was paid out to respondent 2.

Thereupon respondent 1 filed in the Court of the District Munsif of Devakottai the suit out of which this appeal arises for (i) a declaration that the suit instituted by the appellant was fraudulent and collusive, its object being to defeat the attachment which she had effected in execution of the decree obtained by her in O. S. No. 56 of 1934, and (ii) a decree setting aside the sale to the appellant. The plaint did not purport to be filed under the provisions of S. 53, T. P. Act, but respondent 1 sought and obtained leave of the Court to bring the suit on behalf of all the creditors. The District Munsif held that the appellant's suit had been filed for the purpose alleged by respondent 1 and that both the appellant and respondent 2 were parties to the fraud. Accordingly he granted the declaration asked for and set aside the sale. The appellant appealed to the Subordinate Judge who agreed with the District Munsif. The appellant has now appealed to this Court. In the first place he contends that there was no evidence on which the Subordinate Judge could find that he and respondent 2 were guilty of fraud. In the second place he says that the suit must be treated as having been filed under the provisions of S. 53, T. P. Act, and that section does not apply to a transfer made under an order of Court.

There was ample evidence on the record to justify the finding that the appellant and respondent 2, who are related by marriage, were parties to a gross fraud on respondent 1, and incidentally on the Court. There being evidence to support the finding of the Subordinate Judge, his decision is conclusive on the point. This was not seriously challenged. The appellant really relies on the plea founded on S. 53, T. P. Act. Section 2 (d) of that Act says that nothing contained in it shall be deemed to affect, save as provided by S. 57 and Chap. 4, a transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction. Section 5 says that in the sections which follow it the expression "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons. As the transfer of the property to the appellant was made by an order of the Court, his learned advocate says that these sections operate to prevent respondent 1 from filing a suit under S. 53. This is no doubt the case. Mr. Bhashyam Ayyangar on behalf of respondent 1 has in fact agreed that Ss. 2 (d) and 5 prevent S. 53 operating in the case of a transfer under an order or decree of Court. Moreover the preamble says that the Act only relates to the transfer of property by act of parties. But this does not mean that a creditor in the position of respondent 1 is without a remedy. In the course of his argument Mr. Bhashyam Ayyangar quoted the following passage from Kerr on "Fraud and Mistake" (Edn. 6, p. 424):

"A judgment or decree obtained by fraud upon a Court binds no such Court or any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding : (1854) 1 Macq. 535 = 149 R. R. 55 ;[1] (1863) 10 H. L. C. 404 at p. 431=138 R. R. 217 at p. 234 = 32 L. J. Q. B. 337.[2] "Fraud" said De Grey C. J., "is an intrinsic, collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical and temporal." 20 How. St. Tr. 544 = 2 Smith L. C. 687.[3] In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud : (1854) 1 Macq. 535.[1]"

In (1863) 10 H. L. C. 404 at p. 431 = 138 R. R. 217[2] at p. 234 one of the authorities on which the learned author relies for the above statement, Willes J. said :

"A judgment or decree obtained by fraud upon a Court binds not such Court, nor any other ; and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding, (1844) 6 Q. B. 587,[4] (1835) 3 Cl. & F. 479[5] and (1854) 1 Macq. 535.[1]"

A decision which is very much in point is that given in 10 Cal 616[6] where the question was whether a deed of gift was fraudulent and void as against creditors. At the time the Transfer of Property Act had not come into force, but nevertheless the Privy Council affirmed the decree which had been passed setting aside the transaction. In the course of the judgment in that case, Lord Fitzerald said :

"By statute 13 Eliz., C. 5, all conveyances, gifts, and alienations of lands or goods whereby creditors might be in any wise disturbed, hindered, delayed, or defrauded of their just rights, are declared utterly void.

Whether or not that statute (which may not extend to or operate in the moffussil in India) is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience."

These observations have full force here, and the principle which underlies them was applied by a Full Bench of this Court in 41 Mad. 370.[7] It was there held that though by reason of S. 2 (d), T. P. Act, the Act does not apply to sales in execution, yet the principle of S. 36 of the Act, which embodies a rule of justice, equity and good conscience can be applied and rent apportioned from day to day as between a lessor and the transferee of his right in execution in the course of a year of the lease. What the appellant in effect says is that where a person has obtained a transfer of property under an order of the Court as the result of a gross fraud, the Court is powerless to remedy the injustice caused unless S. 53, T. P. Act, can be invoked.

1. (1854) 1 Macq. 535 : 149 R. R. 55, Shedden v. Patrick.
2. (1863) 10 H. L. C. 404 : 32 L. J. Q. B. 337 : 9 Jur. (N. S.) 1081 : 9 L. T. (N. S.) 60 : 11 W. R. 1004 : 138 R. R. 217, The Queen v. Saddler's Co.
3. 20 How. St. Tr. 544 : 2 Smith L. C. 687, Rex v. Duchess of Kingston.
4. (1844) 6 Q. B. 587 : 14 L. J. Q. B. 25, Phillipson v. Earl of Egremont.
5. (1835) 3 Cl. & F. 479 : 9 Bligh (N. S.) 532, Earl of Bandon v. Becher.
6. ('84) 10 Cal. 616 : 11 I. A. 10 : 4 Sar. 500 (P. C.), Abdul Hye v. Mir Mohamed Mozafar Hussain.
7. ('18) 5 A. I. R. 1918 Mad. 557 : 43 I. C. 78 : 41 Mad. 370 : 33 M. L. J. 618 (F. B.), Rangiah Chetty v. Vajravelu Mudaliar.

To follow this argument to its logical conclusion means that all a debtor has to do in order to defeat his creditors is to induce some equally fraudulently minded person to bring a false suit against him, say on a promissory note, obtain a decree and attach and buy in the defendant's property at the court auction. The Court certainly has full power to remedy such an injustice and the Courts below have applied the proper remedy. It is indeed regrettable that the appellant, having been found guilty of fraud against respondent 1, should have persisted in this appeal. The finding of the Subordinate Judge that he was a party to the gross fraud was conclusive, but it may be added that we agree with his finding. The appeal will be dismissed with costs in favour of respondent 1.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 634

ABDUR RAHMAN AND SOMAYYA JJ.

Goverdhandoss Takersey — Appellant

v.

M. Abdul Rahiman and another — Respondents.

Appeal No. 5 of 1940, Decided on 3rd March 1942, against decree of Sub-Judge, Nilgiris at Ootacamund, in O. S. No. 52 of 1938.

(a) Partnership Act (1932), S. 69 (2) — Non-registration of firm—Court is not bound to dismiss suit suo motu.

There is a distinct provision in the Limitation Act that a Court is bound to dismiss a suit on the ground of limitation if it finds the suit to be barred whether a plea of this kind had been raised on behalf of the defendants or not. No such provision however exists in the Partnership Act and therefore the Court is not bound to dismiss a suit on the ground of non-registration of the firm suo motu if no plea had been raised by any of the defendants to the suit. [P 637 C 2]

(b) Partnership Act (1932), S. 69 (2) — Point of non-registration being one of law can be raised for first time in appeal.

The point under S. 69 (2) as to non-registration of a firm being one of law can be raised for the first time in appeal if all the facts necessary for its determination are on the record : ('39) 26 A. I. R. 1939 Sind 206, *Ref.* [P 637 C 2]

C. P. C. —

('40) Chitaley, O. 41, R. 1, N. 12, Pt. 13.

('41) Mulla, Page 1155, N. "Grounds of objection which may be taken for the first time in appeal."

(c) Partnership Act (1932), S. 69 (2)—Applicability—S. 69 (2) must be strictly construed — Contract entered into by partner personally —He can sue alone without joining other partners as plaintiffs — Suit does not fall within Section 69 (2).

A stringent provision like S. 69 (2) must be strictly construed. The provisions of S. 69 (2) can only be attracted to a suit if it was instituted either by or on behalf of the firm, that is to say ex facie it purports to be filed either by or on behalf of the firm or even in the interests of the firm. But this must be clear from the plaint itself and must not in any case depend on the liability of a plaintiff to restore the benefit that he has received out of that suit to the firm of which he is a partner eventually. It is immaterial whether the benefit of the suit is to go to any person other than the plaintiff ultimately. A contract entered into by a partner personally constitutes a personal agreement and therefore the partner is entitled to bring a suit on the contract in his own name without joining the other partners as plaintiffs in the action. Such a suit does not fall within the mischief of S. 69 (2). [P 637 C 2]

(d) Principal and agent — Power to sell immovable property includes power to receive price thereof — Cases of moveable property must be decided on entirely different considerations — Authority to sell goods carries with it authority to receive price—Power to sell sandal wood held included power to agree to sell sandalwood that was not ready for delivery and had to be cut, dried and cleaned later on—Power to sell trees held included power to receive their price.

An agent having an authority to sell must not only be taken to have authority to do every lawful thing which is necessary to effect a sale but also what is usually done in the course of conducting a sale. And the receipt of the value or the price of the property sold by the agent must be regarded to be what is usually done in the course of conducting a sale. Sale as defined in the Transfer of Property Act is a transfer of ownership in exchange for a price and the authority to sell immovable property and to convey the same to the purchaser therefore carries with it the power to receive the price : 20 M. L. J. 479, *Not approved* ; (1834) 42 R. R. 802 and (1858) 27 L. J. Ch. 434, *Expl.* [P 639 C 1, 2]

Cases of moveable property must be decided on entirely different considerations. Section 27, Sale of Goods Act, only provides that a person cannot validly sell the goods belonging to another unless he had authority to do so (or where the authority could not be disputed by the owner on account of his conduct) and does not separate the power of sale from the power of authority to receive the price. The authority to sell goods is assumed to carry with it the authority to receive the price ; (1877) 36 L. T. 705, *Ref.* [P 639 C 2 ; P 640 C 1]

The power of attorney executed by the principal in favour of his agent was as follows : "you shall cut the sandalwood trees in the undermentioned two estates by employing coolies, sell them according to your like, pay the wages, etc., to the coolies, maintain ledger and day-book accounts in respect of sale, deliver them to me with the particulars. You shall yourself sign on my behalf in the forest Government order, permit, etc., in the undermentioned two estates from this date":

Held that the power to sell the wood in the circumstances contained in the power of attorney included the authority to agree to sell the wood that was not ready for delivery and had to be cut, dried and cleaned later on. [P 639 C 1]

Held further that there was nothing in the power of attorney which might even suggest that the agent's powers were in any way limited as long as he was exercising the authority given to him under the power of attorney and that the authority to sell the trees included the power to receive their price, large or small. [P 639 C 1]

(e) Principal and agent—Agent cannot enter into transaction in which his personal interest is in conflict with his duty towards his principal —*A* holding general power of attorney from *B* agreeing to sell to *C* agent of *D* certain tons of

sandalwood out of estates belonging to his principal—*C* paying Rs. 8700 by way of advance to *A*—Rs. 5000 in cash and balance of Rs. 3700 that was due by *A* to *D* was taken into account towards advance — Suit by *D* for refund of advance—*A* in absence of specific authority held could not accept money which he owed to *D* by way of advance on behalf of *B* — *B* held liable for money actually paid by *C* to *A* as advance—Question of *C's* authority to enter into contract held had no relevancy on question of refund though it would be material on question of plaintiff's liability to pay damages for breach.

Under the terms of an agreement *A* who held a general power of attorney from *B* agreed to sell to *C* as an agent of the plaintiff *D* 30 tons of sandalwood that may be got ready by *A* out of two estates belonging to his principal *B* in a period of one year at Rs. 800 per ton and any further quantity of wood that may be available out of the aforesaid estates at Rs. 780 per ton. A sum of Rs. 8700 was paid by *C* by way of an advance to *A* towards the contract. A sum of Rs. 5000 was stated to have been paid in cash and the balance of Rs. 3700 that was due by *A* to the plaintiff *D* in respect of certain previous dealings was said to have been taken into account towards the advance. The plaintiff asked for the refund as *C* was not, according to his contention, authorised to enter into the transaction without his specific authority and even if found to have been acting within the scope of his authority as the contract remained unfulfilled:

Held that an agent could not enter into a transaction in which his personal interest was in conflict with his duty towards his principal and therefore *A* as an agent of *B* could not accept the money which he owed to the plaintiff by way of an advance on behalf of *B* towards the transaction in the absence of specific authority to do so without actually receiving it from *C* unless *A* was not only in a position to pay the amount due by him to the plaintiff in cash in *B's* account but had in fact done so. Nor could *B* be liable to refund the amount that was not paid to *A* on his behalf unless *B* had chosen to ratify *A's* act with full knowledge of all the facts so that *B* might be found to have accepted the responsibility for his agent's act. [P 640 C 1, 2]

Held further that to the extent of the amount that was actually paid to *A* there was no conflict between *A's* interest and duty. It was not possible therefore for *B* to get rid of his liability to refund that amount which was received by his agent within the authority conferred on him by the power of attorney. [P 640 C 2]

Held also that the question of the authority of *C* to enter into the contract might and would in fact bear on the question of the plaintiff's liability to pay damages for the breach of the contract but had no relevancy to the question of refund for which the suit had been instituted. [P 640 C 2]

R. Swaminatha Ayyar — for Appellant.

B. Sitarama Rao and T. Krishna Rao — for Respondents.

ABDUR RAHMAN J.—This appeal arises out of a suit for refund of Rs. 8700 stated to have been advanced by defendant 3 as an agent of the plaintiff to defendant 1 at the time of the execution of the agreement (Ex. J) on 9th November 1936. Under the terms of this agreement, defendant 1 who held a general power of attorney dated 24th March 1936 from defendant 2, agreed to sell to defendant 3, as an agent of the plaintiff 30 tons of sandalwood that may be got ready by the former out of the two estates (Benhope and Killiard) belonging to his principal in a period of one year at Rs. 800 per ton and any further quantity of wood that may be available out of the aforesaid estates at Rs. 780 per ton. The sum of Rs. 8700 was acknowledged to have been received by way of an advance in Ex. J and was agreed to be adjusted at the time when the goods were delivered to defendant 3 on behalf of the plaintiff at the rate of Rs. 100 per ton. The agreement also provided for a liquidated damage at Rs. 150 per ton if either of the parties failed to deliver or take the goods mentioned in the agreement. On the same date another varthamanam letter (Ex. J-2) was executed by defendant 3 as an agent of the plaintiff in favour of defendant 1 as the power of attorney agent of defendant 2 under which six tons of sandalwood (not covered by the agreement Ex. J) were sold at the rate of Rs. 810 per ton and were agreed to be delivered before 30th November 1936. Defendant 3 communicated the terms of the agreement Ex. J to his principal in Bombay the very next day (Ex. F-14) in which he referred to a sum of Rs. 8700 having been paid by way of an advance to defendant 1 towards this contract. A sum of Rs. 5000 was stated to have been paid in cash and the balance of Rs. 3700 that was due by defendant 1 to the plaintiff in respect of certain previous dealings was said to have been taken into account towards the advance. The plaintiff sent a telegram, Ex. F-15, in reply on 13th November 1936 in which he expressed his surprise at defendant 3's failure to act in accordance with the instructions contained in the former's letter (obviously referring to the letter dated 3rd November 1936 Ex. F-11), refused to accept the terms communicated to him in Ex. F-14 and asked defendant 3 to cancel the agreement. Defendant 3 was also forbidden by the plaintiff to pay Rs. 5000 to defendant 1. But the sum of Rs. 5000 or, as it really transpired later, the sum of Rs. 4600 had already been paid to defendant 1 on the date on which Ex. J was executed.

On the receipt of the telegram Ex. F-15, defendant 3 wrote to defendant 1 on 15th November 1936 (Ex. H) in which the plaintiff's refusal to abide by the agreement was duly communicated and the sum of Rs. 5000 alleged to have been paid to defendant 1 was asked to be adjusted towards the price of the six tons of sandalwood covered by the agreement, Ex. J-2. This letter was not acknowledged by defendant 1. Defendant 3 was thus constrained to write another letter on 30th November 1936 (Ex V) in more or less the same terms. This was taken by defendant 1 to Mr. Ramamurthi, an advocate at Ootacamund, who sent a reply to defendant 3, (Ex. K). In this letter a sum of Rs. 5000 was acknowledged to have been received in cash and defendant 3's contention that the agreement, Ex. J, had been entered into subject to the condition of its being ratified by the plaintiff was repudiated. Defendant 1 expressed his readiness and willingness to abide by the terms of the agreement and threatened to make defendant 3 and his principal (the plaintiff) liable if they persisted in committing a breach of the agreement. On the same date a copy of the reply sent to defendant 3 was sent to the plaintiff's lawyer at Bombay (Ex. K-1) in which a copy of Ex. K was enclosed. This was taken or sent by the plaintiff to Messrs. Payne and Co., Solicitors of Bombay for reply. They wrote Ex. L and Ex. L-1 on 23rd December 1936 to defendants 1 and 2, respectively. In these letters, defendant 3's authority to enter into "any contract with any person" without the plaintiff's express authority and sanction

was denied and the agreement was said to have been brought about under some kind of pressure and coercion to which defendant 3 was alleged to have been subjected. In the end, it was asserted that the agreements were conditional on the plaintiff's approval and as he had repudiated them on 15th November 1936, they were no longer binding. The allegations contained in these letters were denied by the defendants in the letters written by their lawyer on 23rd January 1937 (Ex. L-2 and Exhibit L-3).

The present suit was instituted by the plaintiff on 16th February 1938, with the allegations that defendant 3 was not entitled to enter into any agreement on behalf of the plaintiff and that in doing so, he had not only acted beyond the scope of his authority but in direct contravention of the plaintiff's instructions. Defendant 2 was attempted to be made liable for the refund of the amount of Rs. 8700 which formed the consideration of Ex. J, as defendant 1 held a power of attorney from defendant 2 and had acted within the scope of his authority. Defendant 1 in his reply contended that defendant 3 had been for a long time acting on behalf of the plaintiff in such matters and that the agreement was fully within the scope of his authority. And since the breach of the contract by the plaintiff and defendant 3 was alleged to be unjustified and defendant 1's readiness and willingness to abide by the terms of the contract re-affirmed, the whole of the advance of Rs. 8700 was claimed to have been forfeited. A sum of Rs. 1715-8-0 was claimed on behalf of defendant 1 in the alternative as having been suffered by him in consequence of the breach by the plaintiff and defendant 3. Defendant 2 in his written statement contended that defendant 1 had no authority to enter into a contract contained in Ex. J. It was said to be in excess of his powers and the power of attorney referred to by the plaintiff in the plaint was alleged to have been cancelled by defendant 2 long before Ex. J came into existence. In the alternative he asked for damages from the plaintiff to the extent of Rs. 5700. The plaintiff in his replication dated 26th July 1939 also pleaded a ratification by defendant 2 of the agreement entered into by defendant 1 on his behalf.

Two additional written statements were filed on behalf of the first two defendants on 23rd August 1939 in which it was contended that the amount for which the suit was brought was not due to the plaintiff personally and the claim for the same could not therefore be enforced by him. In other words, as specified in para. 3 of the written statement, the suit was not brought by the proper person and was therefore liable to be dismissed. The plea raised on behalf of defendant 2 in his written statement was, if anything, clearer. It was alleged that the suit was instituted by Goverdhandoss, the plaintiff in his individual capacity and as he had no right to the suit amount, he was incompetent to file it. It was also alleged in para. 3 of the additional written statement that the Firm "Goverdhandoss Thakersey" had not been registered as required under the Partnership Act at or before the presentation of the suit and that registration was effected only on 31st July 1939. One of these written statements, i. e., the one filed on behalf of defendant 1 appears to have been admitted on a condition which appears to be meaningless. The writing of the learned Subordinate Judge is extremely illegible but the order admitting the statement on behalf of defendant 1 is read by the office as follows : "Counter filed; not opposed subject to plaintiff being allowed to raise the contention that it is not open to the defendant to revise the memo (written statement) filed."

The other order was unconditional, and it gave permission to defendant 2 to raise this new defence. Why should these two orders passed on the same day have been different in terms cannot be easily understood unless it be that the Subordinate Judge desired to admit the written statement of defendant 2 on the same condition as was imposed by him when he was admitting the additional pleas on behalf of defendant 1. Why were pleas of this nature allowed to be raised at all, unless the Subordinate Judge had applied his mind and come to the decision that these ought to be admitted is equally incomprehensible. The issues framed by the Subordinate Judge on 6th August 1939 raised points other than those mentioned in the written statements. It is not easy to follow how these issues were framed and why the objections on behalf of the defendants were misunderstood. We take it, however, that the issues raised by the lower Court merely covered the objections contained in the additional written statements filed on 23rd August 1939 and their scope could not be enlarged only because they happened to be vague and indefinite. Objections of this kind should be, if raised, faced by the trial Courts and disposed of finally. The pleas should have been either admitted or rejected. The Subordinate Judge in a judgment which is unnecessarily prolix held that although the power of attorney in favour of defendant 1 was not proved to have been cancelled until April 1937, he had no authority to enter into a contract on behalf of defendant 2 and that the latter had not ratified the agreement contained in Ex. J. He also found that defendant 3 had authority on behalf of the plaintiff to enter into the contract. The contention that the whole of the advance was liable to be forfeited was repelled but the plaintiff was held liable to pay damages suffered by defendant 1 to the extent of Rs. 1715-8-0. He also found that out of Rs. 5000 a sum of Rs. 400 was not paid in cash by defendant 3 and that a promissory note for the amount was executed by him in favour of defendant 1. In view of his findings, the Subordinate Judge ordered the promissory note to be returned by defendant 1 to the plaintiff and passed a decree for the sum of Rs. 8300 against defendant 1 after a credit for Rs. 1715-8-0 found to have been suffered by him as damages was allowed to him. The suit against defendant 2 was dismissed. The plaintiff appeals.

Before we go into the various questions raised on behalf of the parties, we would like to examine the contentions advanced on behalf of defendants 1 and 2 in their additional written statements on 23rd August 1939. If the plaintiff's suit is liable to be dismissed on the ground that he had no *locus standi* to maintain the action, it would be unnecessary to examine the other questions. The objection that the plaintiff was incompetent to maintain the suit in his individual capacity was based on the assertion that the money advanced under the agreement Ex. J belonged to the firm working under the name and style of Goverdhandoss Takersey—which also happened to be the name of the plaintiff who was a partner thereof. The plaintiff's capacity to institute the suit in his individual name was, for that reason questioned.

But taking advantage of the issues framed by the lower Court, Mr. Sitarama Rao, learned counsel for the respondents, contended that in so far as the suit was instituted 'on behalf' or in other words, for the benefit of the firm of Goverdhandoss Takersey, it

falls within the mischief of S. 69 (2), Partnership Act (Act 9 of 1932) and is liable to be dismissed on that ground. We have already referred to the fact that the plea advanced on behalf of the defendants was only to the effect that Goverdhandoss Takersey who had filed the suit in his individual name was incompetent to do so and not that the suit was by or on behalf of the firm of Goverdhandoss Takersey and was not maintainable in the absence of the firm having been registered. In fact, the plea that is now being advanced is directly opposed to what had been raised in the written statements. The contention then was that the suit had been instituted by Goverdhandoss Takersey in his individual capacity and it could not therefore be maintained. The argument that is now urged assumes that the suit had been brought by the plaintiff on behalf of the firm and would be maintainable if the firm had been duly registered before its institution as required by the Partnership Act. The reasons for this change of front are not far to seek. It was not denied on behalf of the plaintiff that the firm of Goverdhandoss Takersey was not registered at the time when the suit was instituted but was registered shortly before this plea was raised on behalf of the defendants. The defendants were fully aware of this fact and had in their written statements even given the date when the registration was effected.

In all probability, the plea that the suit was on behalf of the firm and was liable to be defeated on that ground was not raised as one of the learned Judges of this Court had taken the view that the registration of the firm subsequent to the institution of the suit was sufficient and the suit could not be dismissed on that ground : (1937) 2 M. L. J. 273.[1] That is why the plea that the present suit was on behalf of the firm was not raised and the objection—even if the issue was to be taken literally and as extending the scope of the pleas raised in the written statements—not pressed, as stated by the lower Court, at the time of the arguments. But after the decision of this suit by the lower Court, the view in (1937) 2 M. L. J. 273[1] was dissented from in (1941) 2 M. L. J. 968[2] and an attempt was made to press the objection — although not raised in the written statements—which happened to be covered by the words of the issue as framed by the trial Court. The contention was attempted to be supported by a statement of one of the partners of the firm of Goverdhandoss Takersey who was examined as a witness on behalf of the plaintiff (P. W. 1). There is no admission, however, in this statement that the contract, Ex. J. was entered into on behalf of the firm.

When it was pointed out to Mr. Sitarama Rao that the contention now advanced by him was materially different from what was urged by his clients in the lower Court in their additional written statements, he said that it was open to him to raise a point of law for the first time in appeal and that it would be our duty to give effect to it if found to be correct in the same way as it would be our duty to give effect to a plea of limitation even when it has not been raised by a party. He cited a decision of Sind in A. I. R. 1939 Sind 206[3] in support of his contention. There is a distinct provision in the Limitation Act that a Court is bound to dismiss a suit on the ground of limitation if it finds the suit to be barred whether a plea of this kind had been raised on behalf of the defendants or not. No such provision however exists in the Partnership Act. It is not therefore quite easy to accept the view that the Court is bound to dismiss a suit on the ground of non-registration of the firm suo motu even if no plea had been raised by any of the defendants to the suit. We agree however that a point of law of this nature can be raised for the first time in appeal if all the facts necessary for its determination are on the record. Had we therefore been of the view that there was substance in this contention, we would have had to give effect to it. But on a reading of the plaint we find that the suit was not instituted by or on behalf of the firm but by Goverdhandoss Takersey in his individual capacity and this fact was actually admitted by the defendants in their written statement. Learned counsel for the respondents however contended that this would not be material if the suit was actually filed in the interest of the firm. He urged that such a suit would fall within the ambit of S. 69 (2), Partnership Act, and would be covered by the words "on behalf of the firm" used in that section. We are not impressed by that argument. A stringent provision of this nature has, first of all, to be strictly construed. It is, moreover, immaterial in our opinion, whether the benefit of a suit is to go to any person other than the plaintiff ultimately. The provisions of S. 69 (2), Partnership Act, could only be attracted to a suit if it was instituted either by or on behalf of the firm, that is to say, ex facie it purports to be filed either by or on behalf of the firm or even, as urged by Mr. Sitarama Rao, in the interests of the firm. But this must be clear from the plaint itself and must not in any case depend on the liability of a plaintiff to restore the benefit that he has received out of that suit to the firm of which he is a partner eventually. The law has been thus stated in Lindley on Partnership at page 350 (Edition 10) :

"One partner may sue alone on a written contract made with himself if it does not appear from the contract itself that he was acting as agent of the firm ; and one partner ought to sue alone on a contract entered into with himself, if such contract is in fact made with him as principal, and not on behalf of himself and others."

The supreme Court of Hongkong had nonsuited the plaintiff in 14 Moo P. C. 160[4] on the ground that the suit should have been filed by the firm which was beneficially interested and not by the plaintiff who had entered into the contract. This decision was reversed by their Lordships of the Privy Council who held that the contract having been entered into by the plaintiff personally constituted a personal agreement and that he was entitled to bring the suit in his own name without joining his partners as plaintiffs in the action. The suit could therefore be and was properly instituted by the plaintiff and the defendant's objection that the present suit falls within the mischief of S. 69 (2), Partnership Act is therefore overruled. We

1. ('37) 24 A.I.R. 1937 Mad. 767 : 176 I. C. 916 : (1937) 2 M. L. J. 273, Varadarajulu Naidu and Kuppusami Naidu & Co. v. Rajamanicka Mudaliar.

2. ('42) 29 A.I.R. 1942 Mad. 252 : 199 I. C. 99 : I.L.R. (1942) Mad. 355 : (1941) 2 M. L. J. 968, Ponnuchami Gounder v. Muthusami Gounder.

3. ('39) 26 A.I.R. 1939 Sind 206 : 184 I. C. 88 : I.L.R.(1939) Kar. 765, Lokramdas Chatomal Firm v. Tharumal Shevaram.

4. (1861) 14 Moo P. C. 160 : 4 L. T. (N. S.) 155 : 9 W. R. 503 : 134 R. R. 35, Agacio v. Paul S. Forbes.

must now see whether the plaintiff was entitled to bring the suit in his own name. It is true that the agreement, Ex. J, does not clearly state that defendant 3 was acting on behalf of the individual Goverdandoss Takersey and not on behalf of the firm carrying on business in that name — but on going through the various letters that were exchanged between the various parties to the suit (Ex. F-14, Ex. V, Ex. K, Ex. L and Ex. L-1) there is no doubt left in our minds that defendant 3 had entered into the contract, Ex. J, as an agent and on behalf of the individual Goverdandoss Takersey and not the firm of that name. The first important question of fact to decide is whether defendant 1 was empowered by defendant 2 to enter into a contract such as is contained in the agreement Ex. J. The lower Court found (and that finding is not challenged before us) that the power of attorney, Ex. M, had not been cancelled until April 1937, i. e., for at least five months after this agreement was entered into. Defendant 1 would therefore be entitled to enter into a contract on behalf of defendant 2 if he was authorised to do so under that document. The material portion of Ex. M is as follows :

"You shall cut the sandalwood trees in the undermentioned two estates by employing coolies, sell them according to your like, pay the wages, etc., to the coolies, maintain ledger and daybook accounts in respect of sale, deliver them to me with particulars. You shall yourself sign on my behalf, in the forest Government order, permit, etc., in the undermentioned two estates from this date."

These two estates are then described in the schedule. We have already referred to the fact that the sandalwood trees on the two estates known as Benhope and Killiard belonged to defendant 2. They were purchased by him in October and December 1935 under Ex. 18 (a) and Ex. 15 respectively. It was in regard to these sandalwood trees that the power of attorney was executed by defendant 2 in favour of defendant 1. It was in regard to these sandalwood trees that he had entered into an agreement with defendant 3 under Ex. J.

Learned counsel for the appellant argued the case in this Court against defendant 2 both on the basis and independently of this power of attorney. But as, in our opinion, the power of attorney is clear and binding on defendant 2 in respect of this transaction, it is unnecessary for us to refer to a large body of other documents to which our attention was drawn by learned counsel for the appellant in this connexion. Defendant 2 was not held liable by the lower Court, (a) as defendant 1 was found to have entered into a contract in regard to 87 tons of sandalwood which it was not possible to supply to the plaintiff out of the two estates; (b) as the terms in the power of attorney were so construed as not to confer any authority on defendant 1 to enter into a forward contract; and (c) as defendant 1 was not found to have been authorised under the power of attorney to receive a large sum of Rs. 8700 as an advance : *vide* paras. 20, 21, 22 and 23 of the judgment. The same grounds have been reiterated by learned counsel for the respondents before us in support of his contention that defendant 1 could not have been authorised by defendant 2 to enter into a contract of the nature contained in Ex. J. He also attacked the contract on the ground that inasmuch as defendant 1 had been induced to enter into the contract contained in Ex. J by agreeing to make his own principal, defendant 2, liable for the sum of Rs. 3700 in substitution for his own liability, he must be held to have acted in such a way as came in conflict with his own duty as an agent and the transaction must, for that reason, be held to have been vitiated. We will consider this objection separately and later.

The contention that defendant 1 had entered into a contract for the supply of 87 tons of sandalwood that was far in excess of the supplying capacity of the two estates is based upon the terms found in Ex. J that the parties to that document had agreed to deduct Rs. 100 per ton out of the advance received or acknowledged to have been received by defendant 1. We are not however prepared to agree with the construction that is being placed on that agreement. It specifically provides for the sale of 30 tons of sandalwood. This was approximately the quantity of wood that was to be found in the two estates. Had the parties been contemplating the supply of wood not out of the two estates but from other sources, we have no doubt that it would have been clearly mentioned in the agreement. A reference to the supply of further wood was obviously made to cover such additional wood as may be available from out of these two estates in addition to the 30 tons which formed the subject of the agreement. It is difficult to infer that the contract was to supply 87 tons of sandalwood simply because Rs. 100 had to be deducted out of every ton of wood delivered by defendant 1 to defendant 3. The obvious meaning of a provision of that nature was that Rs. 100 would be deducted on the delivery of each ton upto 30 tons and the balance would be deducted from out of the price due in respect of such other wood as may be supplied in addition to 30 tons. It is unreasonable to assume that a contract for the supply of 57 tons would have been left so vague and indefinite if the idea were that defendant 1 could get that quantity from elsewhere and supply it to defendant 3. Had the price of sandalwood risen higher than for which it was agreed to be sold, could it have been contended on the basis of a contract such as is to be found in Ex. J that defendant 3 would have been entitled to recover damages from defendant 1 on the latter's failure to supply 57 tons of wood. We do not think so.

The next contention which appears to have been accepted by the lower Court and was advanced again before us was to the effect that defendant 1 was not empowered by the power-of-attorney to enter into an agreement for the sale of forward goods or rather of wood which had not been cut, dried, cleaned and rendered fit for sale. Learned counsel for the respondents contends that the power of sale mentioned in the power of attorney after the power to have the sandalwood trees cut, leads to the inference that the power to sell could only be exercised after the trees had been cut. If the order in which the various powers have been conferred is read in the manner suggested by learned counsel for the appellant, it would mean that the power to pay wages, etc., to the coolies (apparently for cutting the trees) could not be exercised by defendant 1 unless the sandalwood had been sold. But the sandalwood could not be sold, as contended, unless the trees were cut. And the trees could not be cut unless the coolies were paid either daily or weekly. The suggested construction would make it impossible for defendant 1 to do any work and would defeat the very object for which the power-of-attorney was given to him. It is proved on the record that the usual procedure in this business is that the monies are advanced by the intending purchasers after they have entered into an agreement to buy the wood with the object of enabling the owner of the tree

to pay for the cost of getting the trees cut and the wood dried and cleaned. The advances made by the persons who had entered into agreements of purchase are subsequently deducted from out of the price when the wood is delivered to them. This was exactly what had happened in this case as well. The power to sell the wood in the circumstances contained in the power of attorney would include the authority to agree to sell the wood that was not ready for delivery and had to be cut, dried and cleaned later on.

There is no force in the contention that defendant 1 was not entitled to receive a large sum of Rs. 8700 by way of an advance. There is nothing in the power of attorney which may even suggest that defendant 1's powers were in any way limited as long as he was exercising the authority given to him under Ex. M. But learned counsel for the respondents contended that the mere authority to sell the trees would not entitle defendant 1 to receive their price, large or small. In support of this contention reliance was placed on an observation of a Division Bench of this Court in 20 M. L. J. 479,[5] which was to the effect that the authority to sell immovable property did not carry with it the authority to receive the price of the same. This was, however, in the nature of an obiter as the learned Judges were not satisfied in that case that Mr. Devarajulu Naidu had been authorised to sell the house at the price at which he had purported to sell it without any further reference to the owners. But there is no doubt that the learned Chief Justice was of that opinion and referred to two cases (1834) 42 R. R. 802[6] and (1858) 27 L. J. Ch. 434[7] on the authority of which he was prepared to hold that a mere general authority to sell land did not carry with it an implied authority to receive the purchase money on behalf of the principal. These decisions first of all would have no application to the present case as we are dealing with wood cut and dried and not with immovable property. But even with regard to immovable property it is not quite easy to lay down unconditionally, and we say so with very great respect to the learned Chief Justice, that a person authorised to sell the property would not ordinarily be entitled to receive the price for which he sells the property. It would be different if an agent is authorised to execute a conveyance merely. But when a person is authorised to sell, he is naturally authorised to do something more than to execute conveyances. For instance he can settle the price if he is not already asked to sell for a price fixed by the owner. He can select the purchaser and, in the absence of any specific directions, sell the property to any one that he likes if the same price is offered by more than one. He can enter into an agreement to sell or of sale and can convey the property. An agent having an authority to sell must not only be taken to have authority to do every lawful thing which is necessary to effect a sale but also what is usually done in the course of conducting a sale. And the receipt of the value or the price of the property sold by the agent must be regarded to be what is usually done in the course of conducting a sale. The power to receive the price must be ordinarily, and in the absence of any stipulation or direction to the contrary, considered to be implicit in the power of sale. It would otherwise mean that an agent who is authorized to sell the property to a vendee may sell and convey the property but when it comes to actually receiving the price for which it has been sold, he must withhold his hand and refer the vendee to go and pay it to the owner for the simple reason that there is no specific authority in his favour to receive it on behalf of the owner. What would happen if the vendee becomes an insolvent after the property has been conveyed to him? Is the owner to lose his money? Let us now examine the decision on which the observation of the learned Chief Justice was based.

The facts in (1834) 42 R. R. 802[6] were that an agent was employed to find a purchaser and to enter into a contract to sell an estate. He possessed no authority express or implied, to receive the purchase money and was therefore held not entitled to receive the purchase money on behalf of the owner of the estate. It must not be overlooked that the agent in that case was merely a commission agent. This decision can only be understood on the basis that the agent in that case was an agent to find a purchaser and to enter into a contract to sell the estate but had no power to convey the same. Since the agent did not have the power to pass the title in the property, he was found to possess no authority to receive its price. This decision is no authority for the proposition that an agent who is authorized to sell the property and to convey the same to the purchaser, would not be entitled to receive the price of the property sold and conveyed by him. The case in (1858) 27 L. J. Ch. 434[7] from which the observations of Lord Chancellor Cranworth were cited by the learned Chief Justice should present no difficulty if it is remembered that the vendor's solicitor, although he happened to be in possession of the executed conveyance along "with the signed receipt for the consideration money indorsed" was held not entitled to receive the purchase money for the property as he was found to possess no authority to receive the price and the possession of the conveyance and the receipt executed by the vendor were not found by the Court of Appeal to confer any authority on him to receive the money. There is nothing in that case to suggest that the solicitor was authorized to sell and convey the property himself. We have discussed these cases not because the decision in 20 M. L. J. 479[5] is binding upon us (the observation being in the nature of an obiter) but out of respect for the learned Chief Justice. Sale has been defined in the Transfer of Property Act as being a transfer of ownership in exchange for a price. The authority to sell would therefore carry with it the power to receive the price. At all events, cases of moveable property must be decided on entirely different considerations. An auctioneer who is merely an agent on behalf of an owner of goods was found entitled in (1877) 36 L. T. 705[8] to recover the price from the purchaser himself and was held personally liable when he failed to deliver the goods sold by him to the purchaser. It may be that this decision was arrived at as the auctioneer was held to be in possession of the goods (coupled with interest) as distinct from having merely their custody as a servant or an agent; but we have referred to this case to bring out the distinction between the sale of moveable and immovable property. Section 27, Sale of Goods Act, (1930) and S. 178, Contract Act, confer special powers on mercantile agents in regard to sales and pledges

5. ('10) 20 M. L. J. 479 : 7 I. C. 189 : 8 M. L. T. 7, Narasimhalu Chetti v. Sundaracharlar.
6. (1834) 1 Moo. & Rob. 326 : 42 R. R. 802, Mynn v. Joliffe.
7. (1858) 27 L. J. Ch. 434 : 2 De. G. & J. 468 : 4 Jur. (N. S.) 619 : 6 W. R. 562 : 119 R. R. 213, Veney v. Chaplin.
8. (1877) 2 Q. B. D. 355 : 46 L. J. Q. B. 534 : 36 L. T. 705 : 25 W. R. 728, Wole v. Horne.

of goods. But it is worthy of note that S. 27, Sale of Goods Act, only provides that a person cannot validly sell the goods belonging to another unless he had authority to do so (or where the authority could not be disputed by the owner on account of his conduct) and does not separate the power of sale from the power of authority to receive the price. The authority to sell goods is assumed to carry with it the authority to receive the price.

We then come to the contention advanced by Mr. Sitarama Rao, learned counsel for the respondents, that defendant 1 could not enter into a transaction in which his personal interest was in conflict with his duty towards defendant 2, his principal and the transaction contained in Ex. J could not therefore be binding on him. This contention is based on the fact that the sum of Rs. 3700 (which formed part of the advance stated to have been made by defendant 3 at the time when the agreement, Ex. J, was entered into) had been due to the plaintiff by defendant 1 in respect of certain prior transactions and it was not possible for the latter, as an agent of defendant 2, to have accepted the money which he owed to the plaintiff by way of an advance towards the transaction in suit, without actually receiving it from defendant 3 unless defendant 1 was not only in a position to pay the amount due by him to the plaintiff in cash in defendant 2's account but had in fact done so. In order to substantiate the contention that defendant 1 was induced to act in contravention of his duties towards his principal both by defendant 3 and by the plaintiff, reference was made to the letters Ex. F-11 and Ex. F-13 exchanged between the plaintiff and defendant 3 and it was urged that if the principle that no agent could be permitted to enter into a transaction in which he had a personal interest in conflict with his duty was to be upheld, the agreement Ex. J must be held to be void as against defendant 2.

Reliance was placed by Mr. Sitarama Rao in this connexion on two decisions by the House of Lords in 1929 A. C. 176[9] and 1933 A. C. 1.[10] It was held in the first of these decisions that as the agent had not been authorised under the power of attorney given to him to use his principal's money for the purpose of paying his (the agent's) private debts and that the authority was limited to draw cheques in connexion with the management of the principal's affairs, an issue of a cheque by the agent for the payment of his private debts could not fall within the authority. And as the bankers had notice that the principal's money was being applied for the agent's private purposes, they were held not entitled to keep the proceeds of the cheque. Similarly, in the second case a solicitor who was authorized by a power of attorney to draw cheques on the client's banking account with the object of applying it for the purposes of his client was held to have no authority to draw cheques for the payment of his private debts to the Midland Bank. The Bank was found to have notice from the form of the cheques issued that the money did not belong to the solicitor and was not consequently allowed to retain it as against the debts due to it by the solicitor on a suit for refund brought by his principal. The only conclusion that could be drawn from these decisions is that defendant 1 could not exceed his authority given under the power of attorney, Ex. M, and acknowledge the receipt of money due by him on behalf of his principal without an actual payment made by him in his principal's account. Nor could defendant 2 be liable to refund the amount that was not paid to defendant 1 on his behalf unless he (defendant 2) had chosen to ratify defendant 1's act with a full knowledge of all the facts so that defendant 2 may be found to have accepted the responsibility for his agent's act.

These decisions, or the principles, underlying these decisions, whatever their effect may be in regard to the sum of Rs. 3700 and to a sum of Rs. 400 (out of Rs. 5000) which was not admitted to have been received in cash, can have no effect on the sum of Rs. 4600 which was actually paid to defendant 1 within the authority conferred on him by the power of attorney, Ex. M. Moreover, it must be remembered that the plaintiff is not suing for the performance of the contract contained in Ex. J but merely for the refund of money paid by his agent, defendant 3 to defendant 1. The plaintiff asks for the refund as defendant 3 was not, according to his contention, authorised to enter into this transaction without his specific authority and even if found to have been acting within the scope of his authority as the contract remained unfulfilled. The question of the authority of defendant 3 to enter into a contract of this kind may and would in fact bear on the question of the plaintiff's liability to pay damages for the breach of the contract but has, in our opinion, no relevancy to the question of refund for which this suit has been instituted. Had defendant 2 or defendant 1 suffered no damages whatever in respect of the breach of the contract entered into by defendant 3 within the scope of his authority would it have been possible for defendant 1 or even for defendant 2, if the contract by defendant 1 were found to be within the scope of his authority as this one is already held to be, to urge that the suit should be dismissed even to the extent of Rs. 4600 simply because in taking the advance on behalf of defendant 2, defendant 1 had agreed to accept the sum of Rs. 3700 due by him to the plaintiff. To the extent of Rs. 4600 at least there was no conflict between defendant 1's interest and duty. It is not possible therefore for defendant 2 to get rid of his liability to refund what had been actually received by his agent, defendant 1, subject of course to the deduction of any damages that the plaintiff may be found liable to pay on account of the breach of the contract committed by defendant 3 and subject to our finding on the question of ratification by defendant 2 of the contract, Ex. J, and thus of the advance of the entire sum of Rs. 8700 pleaded by the plaintiff.

There is no evidence on the record that defendant 2 had ever ratified his agent's act in acknowledging the sum of Rs. 3700 as an advance after the former had come to know that this sum of money was due by the latter and was not actually paid by defendant 3. In the absence of any such evidence, it is not possible to make defendant 2 liable for payment of that sum or of any other sum that is not found to have been paid to defendant 1 at the time when the agreement Ex. J was entered into. After considering the evidence both documentary and oral in the case, the lower Court took the view that the contract, Ex. J, entered into by defendant 3 must be taken to have been entered into within the scope of his authority and the plaintiff was therefore liable to pay the damages to defendant 1 for the breach of contract committed by him with the consent and at the instance of the plaintiff.

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9. (1929) 1929 A. C. 176 : 98 L. J. K. B. 136 : 140 L.T. 208 : 34 Com Cas 126 : 45 T.L.R. 36, Reckit v. Barnett Pembroke & Slater Ltd.

10. (1933) 1933 A. C. 1 : 102 L. J. K. B. 297 : 148 L. T. 374 : 37 Com. Cas. 202 : 76 S. J. 165 : 48 T. L. R. 271, Midland Bank Ltd. v. Reckett.

Having been taken through the various documents and the oral evidence on the record we are of the same opinion and would therefore hold that the plaintiff is liable for the breach of contract. Although there is a reference in the notice Ex. K that a sum of Rs. 5000 was paid by defendant 3 to defendant 1, yet we find for a fact that Rs. 4600 were paid in cash to defendant 1 and that defendant 3 had executed a promissory note for Rs. 400 in favour of defendant 1 on that date. This promissory note has not been paid for and was in fact produced in this Court by defendant 1 as Ex. II. This shows that defendant 2 could not be held liable to pay the sum of Rs. 400 which was not received by defendant 1.

Now that the contract Ex. J has been held to have been entered into by defendant 3 within the scope of the authority given by the plaintiff, the last question to decide is to what damages is he (the plaintiff) liable to pay on account of the breach of contract committed by him or at his instance : *see* Ex. F-15 and Ex. H. An attempt was made by Mr. Sitarama Rao to show that his client would be entitled to recover damages at the rate of Rs. 50 per ton for the 87 tons that had been agreed to be supplied under the terms of Ex. J. We have already held that the contract was for the supply of 30 tons of sandalwood definitely and for such other wood that may be got out of the two estates and that it was not for 87 tons. The lower Court was, in the circumstances, of opinion that the damages claimed by defendant 1 in his written statement amounting to Rs. 1715-8-0 were not unreasonable and have been established. Having regard to the market conditions and to the rate prevailing for these goods at or about the time when they would have been delivered by defendant 1 if the contract had not been cancelled in November 1936, we are of opinion that the damages awarded by the lower Court were fully justified and we need not reduce them by Rupees 215-8-0 if we cannot see our way to enhance them in the manner asked for by learned counsel for the respondents.

For the above reasons the plaintiff is entitled to recover the sum of Rs. 4600 from defendant 2 after being debited with the sum of Rs. 1715-8-0, the amount of damages which he has been found liable to pay for his breach. The plaintiff would be entitled to recover this sum from defendant 2. A decree for the balance is accordingly passed in his favour against defendant 2 with interest at six per cent. from the date of the suit upto the date of realisation. Defendant 1 was liable to pay Rs. 3700 to the plaintiff and a decree to that extent against him is maintained. The sum of Rs. 400 is found not to have been paid by defendant 3 to defendant 1. The promissory note executed by defendant 3 is, as stated before, on the record. No decree can be passed in regard to that sum. It will be delivered to defendant 3 as cancelled and he would no longer be liable to pay the amount due thereunder. As for costs the most appropriate order in the circumstances of the case seems to be that as between the plaintiff and defendant 2, the parties will bear their own costs both here and in the Court below. But defendant 1 will be liable to pay proportionate costs to the extent of the sum decreed against him in both the Courts.

C.R.K./G.N. *Order accordingly.*

1942 M/81 & 82

A. I. R. (29) 1942 Madras 641

ABDUR RAHMAN AND SOMAYYA JJ.

Sundaramurthi Nainar — Appellant

v.

Chotti Bibi alias Bacha Bibi and others — Respondents.

Appeal No. 126 of 1940, Decided on 10th April 1942, against decree of Sub-Judge, Cuddalore, D/- 30th March 1940.

(a) Mahomedan law — Wakf — Mutwalli — Mutwalli cannot grant lease of wakf land for more than three years without Quazi's sanction — Office of Quazi has long become obsolete — Court can exercise powers of Quazi — Lease by mutwalli for more than three years granted in 1891 when Civil Courts were functioning — No evidence of Court's sanction — Lease cannot be presumed to have had legal origin.

Mutwalli has no power to grant a lease of wakf land for more than three years without the sanction of the Quazi. [P 642*e*]

The office of Quazi has long become obsolete and a Judge of the High Court, a District Judge or a Subordinate Judge are recognised to have the powers of a Quazi to sanction a lease by a mutwalli for more than three years : *Case law relied on.* [P 642*e*]

Where in the case of a lease for more than three years granted by a mutwalli in 1891 when the office of a Quazi had long become obsolete and the civil Courts were properly functioning there is no evidence that the sanction of the District Judge or any other officer competent to grant it was obtained, the lease cannot be presumed to have a legal origin inasmuch as it is impossible to assume that no record of a sanction would have been kept had the sanction for the grant of lease been applied for and granted : ('30) 17 A.I.R. 1930 P.C. 103, *Rel. on.* [P 642*f*]

(b) Mahomedan law — Wakf — Mutwalli granting lease of wakf land more than three years without Court's sanction — Retrospective sanction when may be granted by Court.

In the case of a lease of the wakf land by a mutwalli without the Court's sanction, before the Court can be called upon to exercise the extraordinary jurisdiction of granting a sanction so as to validate the lease retrospectively, the Court must be satisfied as to the absolute necessity of the lease and of the undoubted benefit which has been conferred on the endowment by the transaction : 37 Cal. 179, *Ref.* [P 643*a,b*]

(c) Mahomedan law — Wakf — Mutwalli — Lease of wakf land by mutwalli for more than three years without Court's sanction is not void but voidable — Succeeding mutwalli not recognising lease — Limitation for suit for declaration of lease as void and for possession runs from death of last mutwalli who had granted lease.

Leases granted by the mutwallis in respect of wakf land for more than three years without the sanction of the Court are not void ab initio under the Mahomedan law but only voidable, and are operative and binding on the mutwalli granting them unless they are declared to be otherwise. Since the lease is not void during the lifetime of the mutwalli who granted it, there can be no question of limitation or of the lessee completing his title by

a adverse possession when the suit by the succeeding mutwalli for declaration of the lease as void and for possession was instituted within 12 years of the death of the mutwalli who had granted the lease. The mutwalli succeeding as a hereditary trustee can either recognise the lease or refuse to do so. If he recognises it a new tenancy would be held to come into existence with his consent. But when he does not do so, the period of limitation must only be taken to have started from the date of the last mutwalli's death : *Case law relied on.*

[P 643*d* ; P 644*c*,*d*]

S. Panchapakesa Sastri and K. R. Krishnaswami Iyer — for Appellant.

K. Bhashyam Ayyangar and K. Desikachari — for Respondents.

ABDUR RAHMAN J. — This appeal arises b out of a suit brought for the recovery of possession of a tope of which a lease was granted to defendant 1's grandfather on 22nd January 1891 (Ex. I) for a period of 83 years by two brothers Quadir Khan and Sikbandar Khan as mutwallis of a mosque and a graveyard situate in Sirukadambur (Ginjee taluk). It was described to be a biluktha lease and the lessee was to recover the money alleged to have been advanced by him to the mutwallis both before and at the time of the execution of the lease from out of the income of the land received by him during its continuance. Quadir Khan died in 1902 leaving several sons and daughters as his heirs. Sikhandar Khan died on 8th April 1925. He left only one daughter Choti Bibi. She has brought the present suit impleading her own sons (defendants 17 and 18) and Quadir Khan's children (defendants 10 to 16 and 19 to 22) as defendants.

c The plaintiff came to Court with the allegation that Ismail Shah Faqir was the hereditary mutwalli of the mosque and the graveyard and the Tauliat having devolved first on his sons and eventually on his grandsons Quadir Khan and Sikhandar Khan, the latter exceeded their authority and granted a lease (Ex. I) for 83 years, that this could not be done under the Mahomedan law without the sanction of the Quazi and was not binding on the plaintiff who is the successor in office of the abovenamed mutwallis. She therefore prayed for a decree for possession in her own favour but it was stated in para. 10 of the plaint that if the Court found defendants 10 to 16 and 19 to 22 to be also entitled to the Tauliat, a decree may be passed in their favour as well. These allegations were met by various pleas but we are concerned in this appeal d preferred on behalf of the lessee's grandson (defendant 1) with two only. Having regard to the facts that the validity of the lease was being impugned almost half a century after its execution when all its attesting witnesses and parties were dead, the first plea was that the lease might be presumed to have a legal origin and to have come into existence with the sanction of the Quazi ; but if the Court was unable to raise such a presumption, it might anyhow grant the sanction retrospectively and validate the lease, as if granted by tke mutwallis for a valid necessity and for valuable consideration. The second contention was that the suit was not within time and that the defendants had in any case prescribed for the limited rights created under the lease by adverse possession. It was not denied on behalf of the defendant that the office of mutwalli was in this case hereditary although on account of her being a female, the plaintiff's right to Tauliat was disputed. The trial Court repelled these objections and passed a decree in favour of the plaintiff "on behalf of herself and defendants 10 to 16 and 19 to 22." Defendant 1 has preferred this appeal. e

As to the first question it was not disputed by learned counsel for the appellant—as indeed it could not have been — that a grant of lease in respect of land would not have been lawful for more than three years without the sanction of the Quazi or the Judge. The powers of a mutwalli to grant leases are restricted under the Mahomedan law. This accounts for the attempt made by Mr. Panchapakesa Sastri to invoke a presumption of legal origin. Reliance was placed in this connection on the decision of their Lordships in 57 Cal. 1293.[1] It must however be remembered that the office of a Quazi who was under the Mahomedan law entitled to sanction a lease for more than three years had long become obsolete in 1891 when the lease came into existence and even if a Judge of a High Court, a District Judge or a Subordinate Judge are recognised to have f the powers of a Quazi (for which *see* 3 C.W.N. 158,[2] 36 Cal. 21,[3] 37 Cal. 870,[4] 43 Cal. 467,[5] 43 Cal. 1085,[6] 23 C.W.N. 138[7] and 24 C.W.N. 339[8]), it does not seem possible to raise that presumption in the present case for the simple reason that the civil Courts in British India were properly functioning when the lease came into existence and it is impossible to assume that no record of a sanction would have been kept, had the sanction for the grant of a lease been applied for and granted. No suggestion was made during the trial as to the presentation of any such application and no order or sanction by any competent authority is forthcoming. Nor is there any reference to it in the lease Ex. I. It is not easy to believe that if a sanction had been granted to the mutwallis by a District Judge, or any other officer competent to grant it, it would not g have been mentioned in this document. The following observation of Viscount Sumner who delivered the judgment of the Board in the very case cited by learned counsel for the appellant (57 Cal. 1293[1] at pp. 1298 and 1299) is pertinent.

"At the same time it is not a presumption to be capriciously made, nor is it one which a certain class of possessor is entitled to *de jure*. In a case such as this, where it is necessary to indicate what particular kind of lawful title is being presumed, the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed, without doing violence to the probabilities of the case. The presumption is not an "open sesame", with which to unlock in favour of a particular kind of claimant a closed door, to which neither the law nor the proved facts would h

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1. ('30) 17 A.I.R. 1930 P.C. 103 : 123 I.C. 722 : 57 Cal. 1293 : 57 I.A. 125 (P.C.), Mohammad Mazaffaral v. Jabeda Khatun.
2. ('98) 3 C.W.N. 158, Shama Churn v. Abdul Kabeer.
3. ('09) 36 Cal. 21 : 1 I.C. 512, In the matter of Wooza Tunnessa Bibi.
4. ('10) 37 Cal. 870 : 7 I.C. 33, In re Halima Khatun.
5. ('16) 3 A.I.R. 1916 Cal 894: 32 I.C. 21 : 43 Cal. 467 : 20 C.W.N. 113 : 22 C.L.J. 577, Atimannessa Bibi v. Abdul Sobhan.
6. ('16) 3 A.I.R 1916 P.C. 132 : 35 I.C. 30 : 43 Cal. 1085 : 43 I.A. 127 : 8 L.B.R. 517 (P.C.), Mohamed Ismail Arif v. Ahmed Molla Dawood.
7. ('19) 6 A.I R. 1919 Cal. 615 : 49 I.C. 799 : 23 C.W.N. 138, Jamila Khatun v. Abdul Jalil.
8. ('20) 7 A.I.R. 1920 Cal. 129 : 56 I.C. 475 : 47 Cal. 592 : 24 C.W.N. 339, Fakhrunnessa Begam v. Disirict Judge, 24 Parganas.

a in themselves have afforded any key. It is the completion of a right, to which circumstances clearly point, where time has obliterated any record of the original commencement."

It is impossible to assume, in the words of their Lordships that "time has obliterated any record of the original commencement" or "the completion of a right to which circumstances clearly point." The next contention advanced under this head was that even if we were unable to raise a presumption in favour of the validity of the lease, we might grant the sanction now so as to validate the lease retrospectively. Reliance was placed in that connection on the decision in 37 Cal. 179.[9] But before we can be called upon to exercise an extraordinary jurisdiction of that nature and to confirm a transaction retrospectively, we must be satisfied as to the "ab-
b solute necessity" of the lease and of the "undoubted benefit which has been conferred on the endowment by the transaction." We are not satisfied that there was any necessity or benefit for which the lease, Ex. I, may have been essential. There is no evidence on the record why a sum of Rs. 2138-4-0 was required during the ten years (1880 to 1890) as referred to in the lease when the annual income from the wakf property was in the vicinity of Rs. 500. Nor are we satisfied that the cash stated to have been paid at the time of execution was needed or spent on the wakf or that there was any necessity to execute a lease for more than three years. The trial Court has exhaustively dealt with this portion of the case in paras. 28 to 37 of its judgment and it seems to be unnecessary for us to tread the same ground once again except to say that we find ourselves in complete agreement with its conclusion
c that "the necessity recited in Ex. A and the necessity set up in the pleading do not bear scrutiny" and that this is not a fit case for inviting the sanction of the Court *ex post facto* (as representing the jurisdiction of the old Quazi) to validate the transaction.

This brings us to the next question which is one of limitation but really that of adverse possession, as the lease granted by the mutwallis for 83 years in favour of defendant 1's grandfather was, in the absence of a sanction by the Quazi before its grant or retrospectively by the Courts in the present suit, characterised by learned counsel for the appellant to be void after the lapse of three years and the possession of the lessee and his grandson (defendant 1) alleged to have been adverse under Art. 144.
d He contended that Arts. 134A and 134B which were added to the statute book by the amendment to the Limitation Act would have no application as his title had become complete long before the Amending Act 1 of 1929 came into force. The limitation, according to Mr. Panchapakesa Sastri, started on 21st January 1894 and his limited title to the lease became complete in 12 years thereafter. The underlying assumption in the whole of this argument is that the lease by the mutwallis in excess of three years was void to that extent. This is however incorrect. Leases granted by the mutwallis in respect of land for more than three years are not void ab initio under the Mahomedan law but only voidable. Mr. Ameer Ali has, in his Mahomedan Law (Vol. I, pp. 478 and 479) cited the following passages from Durr-ul-Mukhtar, Radd-ul-Mukhtar and Hedaya :

Durr-ul-Mukhtar :

"So where the wakif has left indeterminate the e
period for which a wakf property may be leased, some (jurists) have said the Kyyum (mutwalli) has a general discretion as to the length of the term : whilst others have said the limit should be one year in all cases. And the fatwa is with regard to a year for (the lease of) houses and three years in respect of land unless expediency is opposed to this, and expediency varies according to time and locality."

Radd-ul-Mukhtar :

"When the repairs of the wakf premises cannot be effected without letting (some portion of) it, the matter must be placed before the Judge who can direct the grant of a lease long enough for that purpose."

Hedaya :

"Similarly, where the wakif has made a condi- f
tion that the mutwalli shall not grant a long lease of the wakf, and people are not willing to take a short lease thereof, and it is to the advantage of the wakf that a long lease should be given the mutwalli should prefer the matter before the Qazi, who, if he deems necessary, can make an order to that effect, 'for the Qazi is the guardian of the poor.' If the wakif has made a condition that the mutwalli shall not grant a long lease unless he deems that it would be productive of great benefit to the *cestui qui trust*, the mutwalli can give the lease in case of necessity, without reference to the Qazi."

Baillie in his Digest of Mahomedan law thus stated the rule at p. 606 (2nd Edn.) :

"In the absence of any condition, the approved doctrine is that the lease of estates in land may be decreed to be lawful for three years, unless it be for the benefit of the wakf to annul them ; and that g
with regard to leases of other property, they should be decreed to be unlawful when they exceed one year unless it be for the benefit of the wakf to sustain them. But this varies with the change of places and times. This is approved for the futwa."

The same view was taken by the Allahabad High Court in 44 All. 677[10] :

"We may mention, moreover, that the provisions of the Mahomedan law are not quite so rigid as the learned Judge seems to have understood. It is quite true that there was a rule laid down with regard to house property that a mutwalli should not in general be authorised to make a lease of such property for a period longer than one year, but there was this qualification attached to it, namely, that in all cases the Quazi might empower the mutawali to grant leases for longer periods if he h
thought that such a grant was for the benefit of the trust estate."

If the lease had to be annulled by a Court and had to be regarded in force until then, the whole of the appellants's contention would fall to the ground. Leases which are usually the result of an act of management (or it may be that of mismanagement) had to be distinguished from sales. They have to be regarded as operative and binding on the trustee granting them unless they are declared to be otherwise. That is why a Division Bench of the Calcutta High Court composed of Greaves and Mukerji JJ. observed in 30 C.W.N. 807[11] at p. 810 as follows :

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9. ('10) 37 Cal. 179 : 3 I.C. 353 : 11 C.L.J. 317 : 14 C.W.N. 535, Nemaichand Adhya v. Golam Hossein.

10. ('22) 9 A.I.R 1922 All. 417 : 68 I.C. 764 : 44 All. 677 : 20 A.L.J. 697, Baijanath v. Muhammad Ismail.

11. ('26) 13 A.I.R. 1926 Cal. 322 : 90 I.C. 781 ; 30 C.W.N. 807, Jabeda Khatun v. Mohamed Mozafar Ali Hussain.

"These contentions are, I think, clearly untenable in view of the decision of the Judicial Committee in 48 I.A. 302 [12] That case deals with a Hindu math but the Board states that the principles there laid down apply equally to Mahomedan endowments and it is clear from that case that unless authorised by the Qazi no mutwalli could create a leasehold interest to endure beyond his life, that the lessees acquired no title by adverse possession against the succeeding mutwalli and that if the succeeding mutwalli recognised the interest, the consent is only referable to a new tenancy created by him and that there is no adverse possession until his death or until a new mutwalli takes his place."

The same view was taken by Division Bench of the Bombay High Court in A.I.R. 1933 Bom. 217.[13] There is no doubt that although an assignment or disposition of a math by a mahanth was held to be void from its very inception, a permanent lease by him of an item of property appertaining to the math, even if not for necessity was held to be valid during the tenure of his office. This is so held by their Lordships of the Privy Council in 12 Pat. 251.[14] The rules relating to maths were not only stated to be applicable to Muslim endowments by Mr. Ameer Ali alone in 44 Mad. 831,[12] but also by Viscount Sumner in 57 Cal. 1293[1] at p. 1301 in the following words :

"There remains the question whether the decision of the Board in 46 Bom. 481 = 49 I.A. 54[15] can and ought to be distinguished on any ground. The only possible distinction is that it was a Hindu math with which the case was concerned. In principle, the cases are in themselves analogous. In the language of the judgment there is nothing to suggest that the subject then under discussion was regarded as being in any sense peculiar or special As a matter of public right, their Lordships think it would be very undesirable to introduce purposeless distinctions between the law applicable in the case of one community and that applicable to another. They are therefore of opinion that the presumption rightly made by the High Court completed the defendants' answer to the plaintiff's claim to possession and they will humbly advise His Majesty that this appeal should be dismissed with costs."

If the transaction embodied in Ex. I was not void during the lifetime of the mutwallis who granted the lease and the latter of the two did not die, as stated before, until 8th April 1925, there would be no question of limitation or of defendant 1 completing his title by adverse possession as the suit was instituted within 12 years of that date. On the death of the last mutwalli, the plaintiff who has been found to be a hereditary trustee could have either recognised the lease or refused to do so. There is no allegation that she agreed to recognise it. Had she done so, a new tenancy would have been held to come into existence with her consent. But since she did not do so, the period of limitation must only be taken to have started from the date of the last mutwalli's death. For the above reasons, the appeal fails and is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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12. ('22) 9 A.I.R. 1922 P.C. 123 : 65 I C. 161 : 48 I.A. 302 : 44 Mad. 831 (P.C.), Vidya Varuthi Tirtha Swamigal v. Balusami Iyer.

13. ('33) 20 A.I.R. 1933 Bom 217 : 148 I.C. 385 : 57 Bom. 709 : 35 Bom. L. R. 252, Hamidmiya Sarfuddin v. Nagindas Jivanji.

14. ('33) 20 A.I.R. 1933 P.C. 75 : 142 I.C. 214 : 12 Pat. 251 : 60 I.A. 124 (P.C.), Ram Charandas v. Naurangi Lal.

15. ('22) 9 A.I.R. 1922 P.C. 163 : 66 I.C. 162 : 46 Bom. 481 : 49 I.A. 54 (P.C.), Magniram Sitaram v. Kasturbhai Manibhai.

A. I. R. (29) 1942 Madras 644

SOMAYYA J.

Cherukuri Gangaraju — Petitioner

v.

Seemakurti Lakshminarayanamurti and others — Respondents.

Civil Revn. Petn. No. 1687 of 1939, Decided on 13th March 1942, to revise order of Dist. Court, West Godavari, D/- 8th March 1939.

Provincial Insolvency Act (1920), S. 50 — Debt expunged — Dividend already paid cannot be claimed back.

A creditor to whom a dividend has been paid cannot be directed to bring back that amount merely by reason of the fact that subsequently the debt is expunged from the list of creditors : ('33) 20 A.I.R. 1933 All. 117 and 29 Bom.L.R. 1167, *Disting*;(1882) 21 Ch. D. 537 ; (1924) 2 Ch. 325 ; ('36) 23 A.I.R. 1936 Rang. 151 and ('37) 24 A.I.R. 1937 Rang. 234, *Rel. on.* [P 645*a*]

V. Rangachary — for Petitioner.

B. V. Ramanarasu — for Respondents.

ORDER.—This is a revision petition filed under S. 75, Provincial Insolvency Act 5 of 1920 and the petitioner seeks to revise the order of the District Court of West Godavari dated 8th March 1939 passed by him in C. M. A. No. 139 of 1937. By that order the District Judge reversed the order of the Additional Subordinate Judge of Ellore passed by him in I. A. No. 4 of 1937 in I. P. No. 62 of 1934. I. A. No. 4 of 1937 which has given rise to this revision petition was one filed under S. 50 of Act 5 of 1920 for expunging the entry of the petitioner as a creditor in the insolvency. The petitioner was admitted as a creditor and a dividend was paid to him by the Official Receiver. Subsequently I. A. No. 4 of 1937 was filed for action under S. 50 of the Act. The application was resisted mainly on the ground that there were no other assets to be realised by the Official Receiver and no prospect of any further dividend, that the Insolvency Court has no power even if it finds that a creditor's name ought to be expunged to make an order that the amount already paid to him by way of a dividend should be brought back by him and that therefore an inquiry on the merits was not called for in this case. If after an order expunging his name from the list of creditors, the Court could not follow it up by making an order directing him to bring back the amount that had already been distributed to him and there was no prospect of any future dividend, then it is clear that an inquiry on the merits would be wholly unnecessary. There were also other applications filed to expunge the names of other creditors from the list. These applications were all heard together by the Additional Subordinate Judge and he decided relying upon certain authorities to be presently referred to that the position stated above was the correct one and that therefore there was no need to take evidence on the question whether the various debts were really true debts. He therefore dismissed I. A. No. 4 of 1937 and also the other applications along with it. Appeals were filed in the District Court of West Godavari and the District

a Judge reversed the decision of the Subordinate Judge and remanded I. A. No. 4 of 1937 and other petitions for inquiry on the merits. The Judge took the view that the Court has got the power to require a person to whom a dividend has been distributed and whose debt is subsequently directed to be expunged from the list of creditors to bring back the money into Court. The petitioner challenges the correctness of this order and contends that both in England and in India the position is well established that a creditor to whom a dividend has been paid cannot be directed to bring back that amount merely by reason of the fact that subsequently the debt is expunged from the list of creditors. On an examination of the authorities, I think the position advanced by the petitioner is correct and that the view taken by the District Judge is wrong.

b In (1882) 21 Ch. D. 537,[1] Jessel M. R. while holding that lapse of time is no bar to a petitioner for expunging a debt pointed out that an order expunging the debt would only operate to prevent the creditor from participating in future dividends and that he cannot be called upon to pay back what he had already received. That was a decision under R. 73 of the Bankruptcy Rules, 1870, under which a trustee in bankruptcy who has admitted a proof against the estate is entitled at any time afterwards to apply to the Court to expunge the proof, on the ground that it was originally wrongly admitted. This rule corresponds to S. 50, Provincial Insolvency Act. At p. 541 Jessel M. R. says this :

" There was no limit to the time within which a proof might be expunged. In the cases which I have already mentioned the proof was expunged on the ground that its original admission had been c wrong. The new rule is in accordance with the old practice. And no injustice can be done, because any dividends which have been already paid are allowed to be retained by the creditor, and the expunging affects only the right to receive future dividends."

In (1924) 2 Ch. 325,[2] Lawrence J. approved of the principle that dividends paid already cannot be recovered and held that while the debt of a creditor was reduced, he is not entitled to participate in the future dividends until and unless the other creditors were paid to the extent to which he was paid. On p. 327 Lawrence J. refers to the remarks of Jessel M. R. in the earlier case with approval and then proceeds to say this :

" The mere fact that the trustee cannot recover either payments made to a person whose proof is subsequently expunged or overpayments made to a d creditor whose proof is subsequently reduced does not, in my opinion, prevent the operation of the well known principle of equity that a beneficiary who has been overpaid is not entitled to receive any further payment out of the trust fund until the payments to the other beneficiaries are levelled up to the amount received by the overpaid beneficiary."

Williams in his work on Bankruptcy at p. 528 under R. 24 after setting out R. 24 which corresponds to S. 50, Provincial Insolvency Act says this :

" Under R. 73 of 1870, and the previous practice, the trustee was entitled at any time afterwards to apply to expunge a proof which he had originally wrongly admitted, and mere lapse of time was no objection, though the creditor was entitled to retain any dividend already received." e

Mr. Mulla on his Law of Insolvency says on page 495 :

" The creditor, however, is entitled to retain the dividends already received, the reduction affecting only the right to receive future dividends."

Page C. J. who delivered the leading judgment in 13 Rang. 703[3] says on p. 708 :

" For the reasons that I have given it is immaterial as between respondent 1 and the appellant whether the proof by Musafar's representatives ought or ought not to be expunged, because even if it was ordered that the proof ought to be expunged dividends already paid would not be affected: (1882) 21 Ch. D. 537.[1]"

The decision of the Bombay High Court in 104 I. C. 378,[4] referred to by the lower appellate Court has no application to the present case. There in f ignorance of the existence of the claim of another creditor who had lodged his claim prior to the declaration of a dividend certain dividends were paid out and the question was whether the Court has got the power to compel the creditors who had received the amount to bring back enough to pay the creditor whose claim had been overlooked. The decision in (1883) 21 Ch. D. 537,[1] is not even referred to and the case itself relates to a different set of facts. In A. I. R. 1937 Rang. 234,[5] Leach J. (as he then was) says this on pp. 236 and 237 :

" The money which has been paid out to a creditor by way of dividend in insolvency proceedings is not recoverable in law : (1882) 21 Ch. D. 537[1] and 13 Rang. 703.[3] The expunging of a proof only affects the right to receive future dividends . . . . . Mr. Kalyanwalla has also relied on a decision of the g Bombay High Court in 104 I. C. 378.[4] It was there held by Marten J. that where creditors have been paid more than they were entitled to by way of dividend the Official Assignee is entitled to recover the excess payment on the ground of mistake under S. 72, Contract Act. This decision runs contrary to the decision in (1882) 21 Ch. D. 537[1] and the decision in 13 Rang. 703,[3] but it is not necessary for me to discuss it as the last mentioned case is binding on me."

The case reported in A.I.R. 1933 All. 117,[6] which has been referred to by the Court below decided that where a distribution was made under an order of adjudication which was later on set aside, provisions of S. 144 could be applied. Where the adjudication itself was set aside later on, then the whole ground for distributing the amounts was h taken away and the case would be covered directly by S. 144, Civil P. C., read with S. 55, Provincial Insolvency Act. This decision does not touch the question which calls for decision in this case. In the present case there was no question of any non-compliance with the rules. The Official Receiver acted quite properly in distributing the amount in his hands. The District Judge has gone entirely off the track and has indulged in a good deal of criticism against the Official Receiver. For this purpose, he called for the various records from the

1. (1882) 21 Ch. D. 537 : 52 L. J. Ch. 117 : 47 L. T. 421 : 31 W. R. 152, Ex parte Harper ; In re Tait.
2. (1924) 2 Ch. 325 : 93 L. J. Ch. 571 : (1924) B. & C. R. 114 : 68 S. J. 755, In re Searle, Hoare & Co.
3. ('36) 23 A.I.R. 1936 Rang. 151 : 161 I. C. 795 : 13 Rang. 703, A. K. R. M. M. C. T. Chettiar Firm v. Dayabhoy & Sons.
4. ('27) 104 I. C. 378 : 29 Bom. L. R. 1167, In re Ramachandra Ganuji Waiker.
5. ('37) 24 A.I R. 1937 Rang. 234 : 171 I. C. 401, Official Assignee v. S. P. Dayabhoy.
6. ('33) 20 A.I.R. 1933 All. 117 : 143 I. C. 330 : 1932 A. L. J. 1095, Pannalal v. Abdullah.

Official Receiver's office and has set out in para. 9 of his judgment what he considers the facts which were disclosed by those records and then says that certain irregularities committed by the Official Receiver came to light during the arguments of the appeals. I have been taken through this record and I hold that there is absolutely no justification for any of the District Judge's remarks against the Official Receiver. The District Judge went out of his way and remarked that the Official Receiver would even be personally liable but I see no justification for that remark as well. I reverse the decision of the lower appellate Court and restore that of the Additional Subordinate Judge with costs here and in the lower appellate Court to be paid by respondent 1. It is regrettable that the respondents did not appear but their case has not suffered as I requested Mr. B. V. Ramanarasu to help the Court and represent what could be said on their behalf.

C.R.K./R.K. *Revision allowed.*

A. I. R. (29) 1942 Madras 646

LEACH C. J. AND BYERS J.

Indian Hume Pipe Co. Ltd. — *Appellant*

v.

Travancore National and Quilon Bank Ltd., by Official Liquidator — *Respondent.*

Appeal No. 16 of 1941, Decided on 2nd April 1942, from order of Venkataramana Rao J., in Appln. No. 2324 of 1938, D/- 5th April 1940.

Companies Act (1913), S. 229 — Company having current account with Travancore Bank at Nagarcoil — Bank suspending business on 20th June 1938 and in process of liquidation under Court's order for its compulsory winding up — Company having no account with Bank's Bombay branch — On 14th June 1938 company instructing Bombay branch of Bank to collect amount of cheque in its favour on Indian Bank at Bombay and remit proceeds to Bank's Nagarcoil branch to credit of company's account — Bombay branch of Bank collecting amount next day but not remitting it to Nagarcoil — After Bank's liquidation amount remaining with Bombay branch—Bank's position held was of agent holding his principal's money for special purpose—Company held entitled to amount of cheque.

The company carried on business at Nagarcoil in the State of Travancore and at Bombay. The Nagarcoil office had a current account with the Travancore National and Quilon Bank Ltd., which suspended business on 20th June 1938 and was in the process of liquidation under an order for its compulsory winding up passed by the Court. The Bank had a branch at Bombay but the company had no account there. On 14th June 1938 the company instructed the Bombay branch of the Bank to collect Rs 5000, the amount of a cheque drawn in its favour on the Indian Bank at Bombay, and to remit the proceeds to the Nagarcoil branch of the Bank to the credit of the company's account. The Bombay branch of the Bank collected the amount of the cheque the next day, but did not carry out its instructions to remit the money to Nagarcoil. When the Bank went into liquidation the money remained with its Bombay branch and was never sent to Nagarcoil :

Held that so far as the company was concerned, the Nagarcoil and Bombay branches of the Bank were distinct business concerns and the ordinary relationship between a Bank and a customer keeping a current account with the Bank never existed between the company and the Bank in Bombay : 1912 A. C. 212, *Rel. on.* [P 648*a*]

If the money had got into the company's account at Nagarcoil, the Bank's position would no longer have been that of an agent holding his principal's monies. It would then have been entitled to the control and the use of the money, which would give the Official Liquidators a right to it for the benefit of the general body of creditors. But as the money never got to Nagarcoil the Bank's position was that of an agent holding his principal's monies for a special purpose and being so clothed with a specific trust no property in the monies passed to the Bank. The money therefore belonged to the company and could not be retained for paying the Bank's creditors : (1819) 2 B. & Ald. 683 ; (1859) 28 L. J. Q. B. 350 and (1923) 1 Ch. 41, *Rel. on* ; 1903 A. C. 240, *Disting.* [P 648*a*,*b*]

V. K. Thiruvenkatachari and S. Ramanatha Davay — for Appellant.

King and Partridge — for Respondent.

JUDGMENT.—The appellant company carries on business at Nagarcoil in the State of Travancore and at Bombay. The Nagarcoil office had a current account with the Travancore National and Quilon Bank Limited, which suspended business on 20th June 1938 and is in the process of liquidation under an order for its compulsory winding up passed by this Court. It will be convenient to refer to the appellant company as "the company" and to the Travancore National and Quilon Bank, Limited as "the Bank." The Bank had a branch at Bombay, but the company had no account there. On 14th June 1938, the company instructed the Bombay branch of the Bank to collect Rs. 5000, the amount of a cheque drawn in its favour on the Indian Bank at Bombay, and to remit the proceeds to the Nagarcoil branch of the Bank to the credit of the company's account. The cost of collection and remittance was Rs. 4-11-0, which the company paid. The Bombay branch of the Bank collected the amount of the cheque the next day, but did not carry out its instructions to remit the money to Nagarcoil. When the Bank went into liquidation the money remained with its Bombay branch and was never sent to Nagarcoil. In these circumstances the company applied to this Court in liquidation proceedings for an order directing the Official Liquidators to pay to it the Rs. 5000 on the ground that it represented money held by the Bank in trust. The application was heard by Venkataramana Rao J. who was of the opinion that the entrustment of the money to the Bombay branch of the Bank for the purpose of transmission to its Nagarcoil branch could not be considered to be money received by the Bank for a special purpose. He regarded the position as being one merely between creditor and debtor. The company has appealed from this order.

Section 229, Companies Act makes the insolvency rules applicable in the winding up of an insolvent company. Section 52, Presidency Towns Insolvency Act states that the property of the insolvent divisible amongst his creditors shall not comprise, inter alia, property held by the insolvent on trust for any other person. This corresponds to

S. 38 of the English Act. It is pointed out in Williams on Bankruptcy (Edn. 14, p. 244) that trusts, for the purpose of this section, include—(a) express trusts and trusts *virtute officii*; (b) trusts created by the bankrupt on what was his own absolute property and (c) trusts of agency on the subject matter of which the bankrupt had not the general, but only a special property.

It is common ground that if the Bank had paid the Rs. 5000 into the company's account at Nagarcoil, the Official Liquidators would be entitled to it, but as it never reached that account the appellant says that the case falls within category (c). In deciding this question, great assistance is to be obtained from certain English decisions, which we will proceed to examine. The first is that in (1819) 2 B. & Ald. 683.[1] There a person advanced to a bankrupt money for the purpose of settling with his creditors. The purpose failed and a part of the money was repaid to the lender. It was held that this repayment was protected. Abbott C. J., said that the fair inference from the facts proved was that the money was advanced for a special purpose, and being so clothed with a specific trust, no property in it passed to the bankrupt.

The principle in (1819) 2 B. & Ald. 683[1] was applied in (1859) 28 L. J. Q. B. 350,[2] where the facts were these: A firm of bankers carried on business at Blandford in Dorsetshire under the style of Oak and Snow. A run on the bank was anticipated and certain friends of the firm signed a guarantee on the understanding that it should not be used unless the bankers could clearly see that it would carry them over the crisis. The defendants carried on business as bankers in London and in that capacity acted as the London agents of Oak and Snow. The defendants advanced to the firm on the security of the guarantee the sum of £3000 in gold and notes, which were placed in a box and handed to Snow. On his return to Blandford the same evening, Snow ascertained from his partner that it was hopeless to expect to meet the run the next day and the box containing the £3000 was returned to the defendants, on the day after the firm suspended payment. It was held by Lord Campbell C. J. and Earle and Crompton JJ. that there had been no fraudulent preference because in returning the money Snow was influenced by a letter received from one of the sureties stating that as the position of the firm was hopeless they could not safely or honourably return the money and that it ought to be returned. It was held by Earle and Crompton JJ. that the money having been obtained for a special purpose, and that purpose having failed, the sureties had an equitable right to the return of the money. In the course of his judgment Crompton J. said :

"The question does not appear to me to be what the rights of the defendants are, but what the rights of the bankrupt are in equity as well as law, and whether a third person has an equitable right which prevents the assignees from interfering. This is a perfectly well known and self established principle of Bankruptcy law, and from the decided cases it appears that the principle has been extended to the case of money advanced for a special purpose ; and it appears to me that the present falls within the authority of the case before Lord Tenterden : (1819) 2 B. & Ald. 683.[1]"

Crompton J. also said :

"It is a new case, but I think we must look to ascertain whether the bankrupts had an equitable right to use the money as against all persons. I think equity would have prevented them from using it had there been time to interfere, and so the bankrupts had not the equitable right, but only the legal right to the possession of the money ; and therefore I am of opinion that the money would not pass to the assignees under the principle of Bankrupt law to which I refer."

The next case is (1923) 1 Ch. 41,[3] where the facts are more complicated. On 16th December 1920 one Voyce paid into his account at the Birmingham branch of Farrow's Bank a cheque for £1493 drawn on the West Bromwich branch of the London Joint City and Midland Bank. Farrow's Bank immediately credited Voyce's account with the amount and sent the cheque to its agents, Barclays Bank, for clearance. On 17th December Barclays Bank, having presented the cheque at the clearing house to the London Joint City and Midland Bank remitted the amount to its West Bromwich branch. At the same time Barclays Bank credited Farrow's head office on the clearance sheet, but subject to recourse. On the 18th the West Bromwich branch of the London Joint City and Midland Bank debited the drawer and informed its head office that the cheque had been cleared. On Sunday 19th December Farrow's Bank suspended payment and all cash remittances received on Monday were returned. At 8-30 A. M. on that day, a notice was posted on the doors of the head office of Farrow's Bank stating that payment had been suspended and at 12-15 P. M. instructions to suspend payment were telegraphed to all its branches. When the London Joint City and Midland Bank received information from its West Bromwich branch that the cheque had been cleared it settled with Barclays Bank through the clearing house. This was at 12-30 P. M. Thereupon Barclays Bank informed Farrow's head office that the cheque was cleared. The question was whether the proceeds of the cheque had become part of the general assets of Farrow's Bank and therefore divisible among the creditors or whether Farrow's Bank remained in the position of a mere collecting agent, which meant that the proceeds belonged to Voyce. The summons was heard by Astbury J. whose judgment was confirmed by the Court of Appeal. The points decided are concisely stated in the headnote from which the following extracts are taken :

"Where a customer pays a crossed cheque into his bank, the question whether the bank receive it as holders for value or as agents for collection is a pure question of fact.

The fact that the cheque is immediately credited in the ledger does not necessarily make the bank holders for value. That inference may be rebutted by notices in the pass book and paying in slip or other evidence showing that the customer could not draw before clearance.

If the bank receive the cheque as agents for collection and stop payment before it is finally cleared at the clearing house, they can only receive and hold the proceeds as collecting agents for their customer, and not on the ordinary bank relationship of debtor and creditor."

It was pointed out by Astbury J. that the monies were never in fact collected by Farrow's Bank at a time when they were entitled to claim them as

1. (1819) 2 B. & Ald. 683 : 53 R. R. 147, Toovey v. Milne.
2. (1859) 2 El. &. El. 29 : 28 L. J. Q. B. 350 : 33 L. T. (O.S.) 236 : 119 R. R. 608, Edwards v. Glyn.
3. (1923) 1 Ch. 41 : 92 L. J. Ch. 153 : 128 L. T. 332 : 66 S. J. 78, In re Farrow's Bank.

part of their assets. In the present case the cheque was collected by the Bank before suspension, but it did not send the money to Nagarcoil and it could not claim the proceeds as part of its assets until it had done so. In (1912) A. C. 212,[4] Lord Robson said that although branch Banks are agencies of one principal firm it is well settled that for certain special purposes of banking business, they may be regarded as distinct trading bodies. So far as the company was concerned, the Nagarcoil and Bombay branches of the Bank were distinct business concerns and the ordinary relationship between a Bank and a customer keeping a current account with the Bank never existed between the company and the Bank in Bombay. Lord Macnaughten in delivering the judgment of the Privy Council in 1903 A. C. 240,[5] pointed out that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes the holder for value of the cheque ; but that was never the position here and the principle stated in (1819) 2 B. & Ald. 683[1] and (1859) 28 L. J. Q. B. 350[2] applies. Undoubtedly, if the money had got into the company's account at Nagarcoil, the Bank's position would no longer have been that of an agent holding his principal's monies. It would then have been entitled to the control and the use of the money, which would give the Official Liquidators a right to it for the benefit of the general body of creditors. But as the money never got to Nagarcoil it belonged to the company and the company's money cannot be retained for paying the Bank's creditors. The Official Liquidators must pay it over to the company. The appeal is allowed with costs. The Official Liquidators will have their own costs out of the assets of the Bank.

C.R.K./G.N. *Appeal allowed.*

4. (1912) 1912 A. C. 212 : 81 L. J. P. C. 140 : 105 L. T. 650 : 28 T. L. R. 41, Rex v. Lovitt.
5. (1903) 1903 A. C. 240 : 72 L. J. K. B. 451 : 88 L. T. 574 : 51 W. R. 671 : 8 Com. Cas. 221 : 19 T.L.R. 462, Capital and Counties Bank v. Gordon.

A. I. R. (29) 1942 Madras 648

ARDUR RAHMAN J.

Nagappa Prabhu — Petitioner

v.

Minor Chandrashekara by guardian and mother Triveni alias Rukmabai and another — Respondents.

Civil Revn. Petn. No. 1450 of 1941, Decided on 8th April 1942, to revise decree of Dist. Munsif, Kundapur, D/- 23rd December 1940.

(a) Madras Village Courts Act (1 of 1889), S. 13 —Suit against defendant not minor—Defendant dying after institution of suit — Minor legal representative can be brought on record.

Section 13 provides that no suit could be brought against a minor; but it does not say that if a suit were brought against a person who was not a minor, a minor legal representative could not be brought on the record if that person happened to die after the institution of the suit. [P 649 *a*]

(b) Madras Village Courts Act (1 of 1889), Ss. 32 and 69 — Suit dismissed in absence of parties — Remedies open to plaintiff indicated —Defendant dying pending suit—Before expiry of period of 60 days provided in S. 69 suit dismissed in absence of parties—Second suit held competent under S. 32—Second suit held would be competent even if period of 60 days had expired on date of dismissal of suit.

Once a suit is dismissed in the absence of the parties, two remedies are available to the plaintiff. He can make an application to the same Court to set aside the order of dismissal. If this application is accepted and the suit restored, he can proceed with the suit. But if this application is rejected, he can bring a fresh suit provided it has not become barred by limitation. He may however decide not to make an application for setting aside the dismissal and bring a fresh suit straightway. [P 649*e*]

During the pendency of the suit the defendant died and before the period of 60 days under S. 69 for bringing his legal representatives on record had expired, the suit was dismissed in absence of parties. It was contended that as the defendant was already dead and could not appear in Court on the date on which the suit was dismissed the dismissal should be regarded as one in the absence of the plaintiff alone:

Held that (1) as the suit was dismissed in the absence of parties it was immaterial whether the absence was voluntary or involuntary, intentional or forced; [P 649*f*]

(2) second suit by the plaintiff was competent under S. 32; [P 649*g*]

(3) even if the period of 60 days under S. 69 had expired on the date on which the suit was dismissed a fresh suit would have been maintainable. [P 649*g*]

K. Vittal Rao — for Petitioner.

M. L. Nayak — for Respondents.

ORDER.—A suit to recover a sum of Rs. 34-14-0 was instituted in the Panchayat Court of Sankaranarayana under the Madras Village Courts Act against one Gundu alias Narasimba Bhandari. It was dismissed on 7th April 1940 as the parties failed to appear before the Panchayat Court for a number of hearings. After the dismissal the plaintiff brought a suit for the same amount in the Court of the District Munsif of Kundapur. But as Gundu had died by that time, the suit was instituted against his minor son Chandrasekhara and his widow Triveni. It was denied on their behalf that Gundu had any dealings with the plaintiff and it was contended that the suit was barred by limitation. But the District Munsif overruled their contentions. A third contention was advanced on behalf of the defendants. It was to the effect that Gundu had died while the suit was pending before the Panchayat Court and as no application was filed on behalf of the plaintiff under Ss. 68 and 69, Madras Village Courts Act (1 of 1889) roughly corresponding to O. 22, R. 4, Civil P. C., a fresh suit for the same amount was not competent. There was no evidence on the record as to the date of Gundu's death. This is admitted by the District Munsif in his judgment. But an admission seems to have been made by counsel for the plaintiff during his final arguments that Gundu had died some months before the date of the dismissal of the suit by the Panchayat Court. Assuming that to be the case, the District Munsif came to the conclusion that it was incumbent on the plaintiff to have presented a petition under S. 68 of the Act and inasmuch as no petition was presented to bring Gundu's legal representatives on the record, a fresh suit by the plaintiff for the same amount against Gundu's legal representatives was not maintainable.

Two grounds were urged in reply on behalf of the plaintiff before the District Munsif. They have been repeated here before me. Firstly it was contended that it was unnecessary for him (i. e. the plaintiff) to bring a minor legal representative on the record as no suit could be brought under S. 13 of the Act against a minor in the Panchayat Court. There was and is no force in this contention although the District Munsif was of the view that the suit would have had to be returned for presentation to the proper Court after the minor legal representative had been brought on the record. Section 13 of the Act provides that no suit could be brought against a minor; but it does not say that if a suit were brought against a person who was not a minor, a minor legal representative could not be brought on the record if that person happened to die after the institution of the suit. The second contention advanced on his b behalf was that as the suit was really dismissed by the Panchayat Court on account of the absence of the parties, the plaintiff was competent to bring a suit under S. 32, Village Courts Act. This was negatived by the District Munsif.

There can be no doubt that a plaintiff can bring a suit under that section if his suit were dismissed in the absence of parties under S. 30 (1). It was however contended on behalf of the defendants and that contention prevailed before the District Munsif, that as Gundu had died before the suit was dismissed, a second suit would not be competent and it was incumbent on the plaintiff to make an application to the Panchayat Court under Ss. 68 and 69 to bring the defendant's legal representative on the record. The District Munsif proceeded on the assumption in accordance with the admission made by the plaintiff's counsel before him that Gundu had died c some months before the suit was dismissed. Learned counsel for the petitioner has alleged before me that Gundu had died on 19th February 1940 and that the period of 60 days mentioned under S. 69 of the Act had not expired on the date on which the suit was dismissed by the Panchayat Court. It is a pity that the District Munsif had not recorded the statement of the counsel for there was no evidence of Gundu's death on the record. This should have been done. In view of the allegation as to the date of Gundu's death made before me I would have been inclined to send the case back for a fresh finding on the point. But as learned counsel for the respondents stated before me that his instructions were to the effect that Gundu had died on 19th February 1940, I consider it unnecessary to adopt that course. The position therefore is that on the date on which d the Panchayat Court dismissed the suit the period of 60 days within which the application under S. 69 had to be made had not expired and the suit was dismissed in the absence of the parties.

It was contended on behalf of the defendant that it was not only open to the plaintiff to make an application to the Panchayat Court to bring the legal representatives of the deceased defendant on the record after the date of the dismissal but that was his only remedy and if he fail to avail himself of the same, a separate suit would not be maintainable. I am not impressed by the contention. There is nothing in the Act which could support the respondents. In fact the suit had been dismissed and unless the order of dismissal was set aside, an application by the plaintiff to bring the defendant's legal representatives on the record would not lie. But it is argued on behalf of the respondents that the plaintiff should have asked for the order of dismissal of suit to be set aside. There was nothing in the Act that made it essential for the plaintiff so to do. But even if the plaintiff had applied, where was the guarantee that the Court would have accepted the application? Had the Court declined to set the dismissal aside and to restore the suit, what would have happened? Would a second suit have been competent? If so, why? Why should the maintainability of a second suit be made to depend upon the Court's decision to set aside or not to set aside the order of dismissal of the suit? Once a suit is dismissed in the absence of the parties, two remedies are available to the plaintiff. He can make an application to the same Court to set aside the order of dismissal. If this application is accepted and the suit restored, he can proceed with the suit. But if this application is rejected, he can bring a fresh suit provided it has not become barred by limitation. He may however decide not to make an application for setting aside the dismissal and bring a fresh suit straightway.

Learned counsel for the respondents contended that as the defendant had amittedly died on 19th February 1940 and could not appear in Court after that date, the dismissal should be regarded as one in the absence of the plaintiff alone. This is not however correct. The suit was dismissed in the absence of parties. It is immaterial whether the absence was voluntary or involuntary, intentional or forced. Moreover, the Court and for a matter of that the plaintiff according to his evidence did not actually know on or before 7th April 1940 that Gundu had died. Why should one therefore travel beyond the order passed by the Panchayat Court for the purpose of ascertaining the reasons which had led the parties to absent themselves? But in any case the period of 60 days had not expired when the suit was dismissed and it became impossible then for the plaintiff to make an application to bring Gundu's legal representatives on the record, even if he had come to know of Gundu's death and decided to present an application for that purpose. I am for the above reasons clearly of opinion that a second suit was competent when the period of 60 days given in S. 69 had not expired on the date on which the suit was dismissed. It is unnecessary in this case to decide whether a fresh suit would have been maintainable even if the period of 60 days had expired on the date on which the suit was dismissed by the Panchayat Court, although, as at present advised and for the reasons that I have given, I am inclined to take the view that a fresh suit would have even then been competent. Since the other questions had been decided by the District Munsif in favour of the plaintiff, this revision must be accepted and a decree for the amount passed with costs in both the Courts in favour of the plaintiff against the defendants. They will be liable to the extent of the assets received by them for Gundu.

C.R.K./G.N. *Revision accepted.*

A. I. R. (29) 1942 Madras 649

WADSWORTH J.

Sri Raja Manyam Kanakayya Garu — *Petitioner*

v.

Sriman Mudumba Venkata Ranga Anaharacharyulu Garu — *Respondent.*

Civil Revn. Petn. No. 2089 of 1939, Decided on 20th March 1942, to revise order of Special Assist. Agent, Bhadrachalam, D/- 30th March 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 15 (4)—Application under — Plea for reduction of rent, when can be entertained explained.

No doubt in an ordinary case it would not be open to the Court under S. 15 (4) to entertain a plea which amounted in substance to an attempt to reduce the rent from that previously payable or even to entertain a plea which amounted to an attempt to repudiate liability for rent on the ground that irrigation works had not been repaired. Such pleas would not be available to the tenant in an ordinary suit for rent under the Madras Estates Land Act and therefore could not be urged in an application under S. 15 (4) of Act 4 of 1938. But to the extent to which there are contentions open to the tenant affecting the amount of rent payable, the Court dealing with an application under S. 15 (4) necessarily has to go into those contentions in order to find out what is the amount of rent. Where the contract upon which the tenure is based itself provides for an abatement of rent in case there is any shortage in the extent in the possession of the tenant and for an abatement of rent in case there is any deficiency in the supply of water by the landholder to the tenant's holding, it cannot be contended that the Court which has to decide what is the amount of rent can shut out contentions based on such contract which contemplates fluctuations on certain grounds. [P 650c,d,e]

M. Appa Rao — for Petitioner.

K. Krishnaswami Ayyangar and A. Seshadri— for Respondent.

ORDER.—The petitioner is a landholder against whom an application was preferred under S. 15 of Act 4 of 1938. The main contention in revision is that the lower Court had no jurisdiction in an application under S. 15 (4) of the Act, to go into the question whether the applicant was entitled to any abatement of rent for non-possession of part of the lands in his holding or whether the applicant was entitled to any abatement of rent for failure of irrigation supply. The contention put forward in revision is that the enquiry under S. 15 (4) must be confined to ascertaining what is the figure of rent according to the patta and whether that figure has been paid and that the Court is not entitled to go into subsidiary questions affecting liability for rent. No doubt in an ordinary case it would not be open to the Court under S. 15 (4) to entertain a plea which amounted in substance to an attempt to reduce the rent from that previously payable or even to entertain a plea which amounted to an attempt to repudiate liability for rent on the ground that irrigation works had not been repaired. Such pleas would not be available to the tenant in an ordinary suit for rent under the Madras Estates Land Act and therefore could not be urged in an application under S. 15 (4) of Act 4 of 1938. But to the extent to which there are contentions open to the tenant affecting the amount of rent payable, the Court dealing with an application under S. 15 (4) necessarily has to go into those contentions in order to find out what is the amount of rent. The present case is peculiar in that the contract upon which the tenure is based itself provides for an abatement of rent in case there is any shortage in the extent in the possession of the tenant and for an abatement of rent in case there is any deficiency in the supply of water by the landholder to the tenant's holding. In the face of such clauses in the original patta it cannot be contended that the Court which has to decide what is the amount of rent can shut out contentions based on these clauses in the patta which contemplates fluctuations on certain grounds. There is nothing else in the revision petition which can be considered under S. 115, Civil P. C. The petition is therefore dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

A. I. R. (29) 1942 Madras 650

KING J.

Hota Veerabadhrayya and another— *Appellants*

v.

Bolla Bulli Subbarayudu and others— *Respondents.*

Second Appeals Nos. 315 and 1150 of 1940, Decided on 4th March 1942, against decree of Sub-Judge, Amalapuram, in A. S. No. 1 of 1938.

(a) Civil P. C. (1908), O. 21, Rr. 58, 63, 46 — Scope — Right of vendor to unpaid purchase money from vendee is attachable where vendee admits liability to pay but claims to defer such payment till vendor pays off other incumbrances.

The consideration of a sale was by the terms of the sale deed retained in the hands of the vendee for the purpose of discharging two debts due to plaintiff; one on a first mortgage and the other on a promissory note. The property sold was subject also to a second and a third mortgage. These mortgages the vendors undertook to discharge. The vendee did not discharge the promissory note debt and plaintiff accordingly sued to recover it and obtained decree against the vendors. In execution of that decree he attached the debt which he alleged to be due from the vendee to the vendors as unpaid purchase-money in respect of the sale. On notice being sent to the vendee he denied that any debt was due, contending that he was under no liability to pay the purchase-money until the vendors had cleared off the second and third mortgages. The executing Court accepting this contention raised the attachment. Plaintiff thereupon filed a suit under O. 21, R. 63. It was contended the suit was not maintainable :

Held that where the existence of the debt which means existence of facts from a consideration of which it follows in law that the garnishee is indebted, is admitted by the garnishee, Rr 58 to 63 of O. 21 apply. Here the vendee admitted that he had purchased the property and had not paid for it, and in essence claimed only that he was entitled not to refuse payment altogether but only to defer it and therefore the vendee's obligation to pay the vendor was a debt attachable and hence the suit under O. 21, R. 63 was maintainable. [P 651e]

C. P. C. —

('40) Chitaley, O. 21 R. 46, N. 7 Pts. 4-6.

('41) Mulla, Page 813 Pt. (c); Page 838 N. "Whether Rr. 58 to 63 apply if the property attached is debt."

(b) T. P Act (1882), S. 55 (5) (b)—Money left with vendee to pay mortgagee not sufficient to pay off mortgagee—He may defer payment till vendor contributes remainder to pay him off.

Under S. 55 (5) (b) it is the duty of the vendee to pay the money when he retains in his hands to the mortgagees, but if the sum required to pay off the mortgagees is greater than the amount left in his

hands he may defer doing so until the vendor is prepared to contribute the remainder of the sum due to pay him off completely: 21 All. 223 (P.C.), *Rel. on.* [P 651*g*]

T. P. Act—
('36) Mulla, Page 307 Pt. (c).
('34) Mitra, Page 280, N. 314.

(c) T. P. Act (1882), S. 55 (5) (b) — Right of vendee—Nature of.

The right which is given to the vendee by S. 55 (5) (b) is not a right to say that he is under no obligation, but a right to postpone the discharge of that obligation. [P 651*h*]

T. P. Act—
('36) Mulla, Page 307, N. "S. 55 (5) (b)—Payment of price."
('34) Mitra, Page 279, N. 314.

K. Bhimasankaran, D. Narasaraju and P. Somasundaram—for Appellants.

V. Govindarajachari—for Respondents.

JUDGMENT.—The ultimate transaction which has given rise to these appeals is the sale by defendants 2 to 4 of certain properties to defendant 1 in December 1929. The consideration of Rs. 2500 was by the terms of the sale deed retained in the hands of defendant 1 for the purpose of discharging two debts due to plaintiff; one on a first mortgage and the other on a promissory note. The property sold was subject also to a second and a third mortgage. These mortgages the vendors undertook to discharge. Defendant 1 did not discharge the promissory note debt and plaintiff accordingly sued in 1931 to recover it and obtained decree against defendants 2 to 4. In execution of that decree he attached the debt which he alleged to be due from defendant 1 to defendants 2 to 4 as unpaid purchase-money in respect of the sale. On notice being sent to defendant 1, he denied that any debt was due, contending that he was under no liability to pay the purchase-money until defendants 2 to 4 had cleared off the second and third mortgages. The executing Court accepting this contention raised the attachment on 1st August 1935. Plaintiff thereupon filed the present suit (O. S. No. 188 of 1936) under O. 21, R. 63 impleading all four defendants. The suit was dismissed by the learned District Munsif of Razole. Meanwhile in August 1936 defendants 2 to 4 transferred to defendant 5 their right to receive from defendant 1 the unpaid purchase money. Defendant 5 in 1937 paid off the second and third mortgages, and then in O.S. 23 of 1938 sued defendant 1 for the money, and obtained a decree. The decree, however, did not award him interest from the date of the sale transaction. Against this part of the decree defendant 5 appealed and this appeal (A. S. No. 48 of 1940) was heard recently by me sitting with Lakshmana Rao J. We confirmed the decree refusing interest for the whole period until defendant 5 paid off the two mortgages, holding that under S. 55 (5) (b), T. P. Act, defendant 1 was entitled to retain the purchase money in his hands.

Plaintiff appealed against the decree of the District Munsif in the present suit. Defendant 5 was impleaded as supplemental respondent. The appeal was allowed. Defendant 5 and defendant 1 have separately filed the two second appeals which I have now heard The first point taken for the appellants is that plaintiff's suit was not maintainable. It is argued on the authority of 59 Mad. 966[1] that when a garnishee denies his liability to the judgment-debtor the question between him and the decree-holder is one which is outside the scope of O. 21, Rr. 58 to 63 altogether. It is clear, however, that 59 Mad. 966[1] does not go so far as this, and recognises that where the "existence of the debt" is admitted by the garnishee these rules apply. The expression "existence of the debt" is ambiguous but I think it must be interpreted to mean "existence of facts from a consideration of which it follows in law that the garnishee is indebted." Here defendant 1 admitted that he had purchased the property and had not paid for it, and in essence claimed only that he was entitled not to refuse payment altogether but only to defer it. I would accordingly hold that plaintiff's suit does lie. The question then arises whether in 1935 at the time of the order raising the attachment defendant 1 was under any immediate obligation to his vendors. The argument for plaintiff is that even though a Bench of this Court may have held that defendant 1 was entitled to retain the purchase money in his hands this privilege was coupled with a corresponding duty under S. 55 (5) (b) to pay it to the mortgagees. As he had not fulfilled this duty for nearly six years, the right of his vendors to receive the purchase money had been restored. In support of this argument I have been referred to 36 Mad. 348[2] and 35 M. L. J. 692[3] but these are cases which have nothing to do with S. 55 (5) (b). They merely lay it down that where a vendee has undertaken to discharge his vendor's debts to simple money creditors and fails to do so within a reasonable time the vendor may sue the vendee directly for the money.

The learned advocates for the appellants do not deny that under S. 55 (5) (b) it is the duty of the vendee to pay the money when he retains in his hands to the mortgagees, but they argue that this obligation cannot arise if the sum required to pay off the mortgagees is greater than the amount of the purchase money. Although the Transfer of Property Act is not specifically referred to in that judgment this principle seems clearly to follow from a judgment of the Privy Council reported in 21 All 223.[4] It is there explicitly laid down that a vendee charged with the obligation of paying off an encumbrancer to a certain extent may defer doing so until the vendor is prepared to contribute the remainder of the sum due to pay him off completely. In 1935 therefore defendant 1 was not compellable to pay anything to the second and third mortgagees unless defendants 2 to 4 joined with him in paying them off — and it follows from this that in 1935 defendants 2 to 4 had no legal claim upon defendant 1 for the amount of the purchase money. But this finding does not conclude the matter. A debt which is not immediately payable in 1935 may nevertheless be attachable in 1935 if it is an obligation already in existence. It is argued for the appellants that there was no debt or obligation in existence at any time before 1937 but it seems clear to me that the obligation to pay for the property purchased sprang into being by virtue of the very transaction of sale itself in 1929. The right which is given to the vendee by S. 55 (5) (b) is not a right to say that he is under no obligation, but a right to postpone the discharge of that obligation. The cases cited for

1. ('36) 23 A. I. R. 1936 Mad. 152 : 160 I. C. 534 : 59 Mad. 966 : 70 M. L. J. 20, Butchayya v. Krishnamchari.

2. ('13) 36 Mad. 348 : 12 I.C. 353 : 21 M.L.J. 983, Raghunatha v. Sadagopa.

3. ('19) 6 A.I.R. 1919 Mad. 367 : 49 I. C. 313 : 35 M.L.J. 692, Komukutti v. Kumara Menon.

4. ('99) 21 All. 223 : 26 I.A. 45 : 7 Sar. 472 (P.C.), Muhammad Siddiq Khan v. Nasia Ulla Khan.

a the appellants, viz., 27 Cal. 38,[5] 50 All. 507[6] and 56 M. L. J. 299[7] are clear cases in which an obligation is not yet due, and easily therefore distinguishable from the facts of the present case. For these reasons I hold that the obligation in question in this case was a debt attachable in 1935 and these appeals must therefore fail. They are dismissed with costs. Leave refused.

C.R.K./K.S. *Appeals dismissed.*

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5. (1900) 27 Cal. 38 : 4 C.W.N. 87, Haridas Acharjia v. Baroda Kishore.

6. ('28) 15 A.I.R. 1928 All. 193 : 108 I.C. 229 : 50 All. 507 : 26 A.L.J. 253, Lachman v. Jarbandan.

7. ('29) 16 A. I. R. 1929 Mad. 347 : 121 I. C. 155 : 56 M.L.J. 299, G. D. John v. Sambamurthi Iyer.

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A. I. R. (29) 1942 Madras 652

HAPPELL J.

Pottentakath Kunholan — Appellant

v.

Krishnan and others — Respondents.

Second Appeal No. 720 of 1940, Decided on 6th March 1942, against decree of Sub-Judge, Calicut, in A. S. No. 112 of 1940.

Malabar Tenancy Act (14 of 1930), S. 3 (v)— Usufructuary mortgagee is not tenant within S. 3 (v) and is not entitled to benefits of Act.

The surplus paid by a usufructuary mortgagee to his mortgagor after appropriating part of the usufruct to the interest due on the mortgage money is not rent within S. 3 (v): ('40) 27 A. I. R. 1940
c Mad. 939, *Rel. on.* [P 652*h*]

A usufructuary mortgagee gets possession of the mortgaged property by virtue of his mortgage as security for the mortgage money. He has, however, to account for the income from the property, and the reservation of a part of the income towards interest and the payment of the balance to the mortgagor are not consideration for the enjoyment of the land within S. 3 (v), but are no more than items in the account between mortgagor and mortgagee : 2 Mad. 187 (judgment of Innes J.), *Approved.* [P 653*c*,*d*]

The enumeration in S. 3 (v) of persons included in the definition of tenant is not exhaustive, but apart from intermediaries, the specific inclusion of occupiers under well known Malabar tenures which
d are defined in the Act itself while a "usufructuary mortgagee" is neither defined nor included indicates that it was not the intention of the Legislature that the definition of "tenant" should cover a usufructuary mortgagee or that a usufructuary mortgagee should be entitled to the benefits of the Act. The fact that a usufructuary mortgagee is by definition a tenant for the purposes of the Malabar Compensation for Tenants Improvements Act is immaterial. [P 653*d*,*e*]

P. Govinda Menon — for Appellant.

K. P. Ramakrishna Ayyar — for Respondents.

JUDGMENT. — The question in this second appeal is whether a usufructuary mortgagee from a sub-kadomdar is entitled to the benefits of S. 33, Malabar Tenancy Act. The appellant was the assignee of certain properties in respect of which the jenm right had been sold in court auction, and on the same day on which the jenm right was assigned to the appellant the kanomdar also assigned his rights in the property to him. The appellant then brought a suit O. S. No. 82 of 1938 in the Court of the District Munsif of Parappanangadi, to redeem and recover possession of the suit properties. This suit was contested by the sub-kanomdars from defendant 16, defendants 1 to 8; and the present respondents, who were defendants 9 to 11 in the suit and were in possession of the suit properties as usufructuary mortgagees from defendants 1 to 8, filed a petition, I. A. No. 186 of 1938, under S. 33, Malabar Tenancy Act, claiming that they were entitled to purchase the house and site situated on the property as a separate kudiyiruppu. The trial Court decreed the suit but allowed the applications that the house and site should be treated as a separable kudiyiruppu, and the lower appellate Court dismissed the appeal of the plaintiff against the decision on the question which arose under S. 33, Tenancy Act. Section 33, Malabar Tenancy Act, provides that : f

In any suit for eviction relating wholly or in part to a kudiyiruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyiruppu, of the landlord who seeks to evict him, at the market price on the said date.

The argument advanced in the lower Court against the respondents' claim seems to have been chiefly that "landlord" in S. 33 means immediate landlord and that consequently persons holding from a sub-kanomdar were not entitled to purchase the jenmi's rights in kudiyiruppu. This argument was not accepted by either the trial or the first appellate Court on the ground that in other sections of the Act, 16 to 18, where it was intended that the g tenant should be given rights to relief against his immediate landlord only, the term "immediate landlord" is used. It is now conceded that the decision of the lower Courts on this point was right, and the argument put forward is that the respondents are not tenants within the meaning of the Malabar Tenancy Act. It is also conceded that the respondents are usufructuary mortgagees within the meaning of S. 58 (d), T. P. Act, and that they had been in continuous occupation of the property for ten years on the date of suit. "Tenant" is defined in S. 3 (v), Malabar Tenancy Act, as follows :

Tenant means any person who has paid or has agreed to pay rent, or other consideration, for his being allowed by another, to enjoy the land of the latter, and includes an intermediary, a kanomdar, a kuzhikanomdar, and a verumpattamdar of any h description.

The appellant by the terms of his mortgage deed after paying himself the interest on the money advanced undertook to deliver annually to the mortgagor 100 cocoanut leaves and one bunch of plantains. It has been held that the surplus of the usufruct paid in this way by a usufructuary mortgagee to the mortgagor is not "rent:" 52 M. L. W. 639.[1] That, however, does not conclude the matter for, by definition, a person may be a tenant within the meaning of the Malabar Tenancy Act who has paid not "rent" but "other consideration." The question therefore is whether the respondent paid the consideration, namely, the leaves and bunch of plantains, or reserved the rest of the usufruct for appropriation towards interest "for being allowed" by their mortgagor, the predecessor-in-title of de-

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1. ('40) 27 A.I.R. 1940 Mad. 939 : (1940) 2 M.L.J. 712 : 52 M. L. W. 639, Vasudevan Nambudiri v. Raman Nambudiri.

fendants 1 to 8, to enjoy his land. In deciding in 52 M.L.W. 639[1] that the surplus paid by a possessory mortgagee to his mortgagor after appropriating part of the usufruct to the interest due on the mortgage money was not rent, Patanjali Sastri J. who delivered the judgment of the Court referred to and followed the decision in 2 Mad. 187.[2] That was a case of the possessory mortgage of certain premises. "Rent" for the premises was fixed at Rs. 16-12-0. Out of this Rs. 14 was appropriated towards the payment of the interest on the principal and rupees 2-12-0 was to be paid "as rent" to the mortgagor. The premises were burned down. The rent ceased to be paid, and the mortgagor sued for recovery of the site and the arrears of rent. In holding that the suit ought to be dismissed Innes J. observed as quoted in 52 M. L. W. 639[1]:

"The gist of the agreement was not a letting of the premises with a rent reserved but a usufructuary mortgage of the premises with a certain small portion of the income of it made payable to plaintiff" and he also observed :

"The application of the income of the premises is properly an item in the account between the mortgagor and mortgagee which cannot at present be taken."

Muthuswami Ayyar J. said :

"I take the defendant to have really got into possession not as a tenant not because he engaged the plaintiff to pay Rs. 2-12-0 a month for the use of the warehouse but as a mortgagee, and because of the assignment of the usufruct in lieu of interest amounting to Rs. 14 per mensem."

It seems therefore that the surplus of the usufruct paid in the form of cocoanut leaves and plantains is neither rent nor consideration for being allowed to enjoy the land within the meaning of S. 3, sub-cl. (v), Malabar Tenancy Act. The question remains whether the part of the usufruct reserved and appropriated towards the interest on the mortgage money can be regarded as consideration "for being allowed to enjoy the land." The observation of Muthuswami Iyer J. that the defendant in that case got into possession "as a mortgagee, and because of the assignment of the usufruct in lieu of interest" perhaps indicates that the reservation of the usufruct would be consideration for the enjoyment of the land. Innes J., however, said that the application of the income from the premises was properly an item in the account between mortgagor and mortgagee, and that, it seems to me is the true view. A usufructuary mortgagee gets possession of the mortgaged property by virtue of his mortgage as security for the mortgage money. He has, however, to account for the income from the property, and the reservation of part of the income towards interest and the payment of the balance to the mortgagor are not consideration for the enjoyment of the land but are no more than items in the account between mortgagor and mortgagee. Section 3 (v) of the Act states that the definition of tenant includes "an intermediary, a kanomdar, a kuzhikanomdar and a verumpattamdar of any description." The enumeration is, of course, not exhaustive, but apart from intermediaries, the specific inclusion of occupiers under well known Malabar tenures which are defined in the Act itself while a "usufructuary mortgagee" is neither defined nor included would seem to indicate that it was not the intention of the Legislature that the definition of "tenant" should cover a usufructuary mortgagee or that a usufructuary mortgagee should be entitled to the benefits of the Act.

It is argued by learned counsel for the respondents that a usufructuary mortgagee is by definition a tenant for the purposes of the Malabar Compensation for Tenants Improvements Act. I do not see that this helps the respondent. On the contrary, if the Legislature had intended that the Tenancy Act and the Tenants Improvements Act should be applicable to the same categories of persons there seems no reason why the definition of tenant in the latter and earlier Act should not have been incorporated in the Tenancy Act. But that has not been done. The appeal is therefore allowed. I see no indication that this point of law was raised in the lower Court. The appellant will pay his own costs of the appeal. (Leave to appeal is granted.) The only further order necessary is the direction that the appellant will be entitled to recover possession of the kudiyiruppu on payment into Court for payment to the respondents of the sum of Rs. 21-10-5 in addition to the amount already ordered in respect on the recovery of the other items. One month's time for deposit.

C.R.K./G.N. *Appeal allowed.*

2. ('79) 2 Mad. 187, Venkateshwara v. Kasava Shetti.

A. I. R. (29) 1942 Madras 653

HORWILL J.

Dommarapati Pedda Venkatappa and another—Petitioners

v.

Marupuri Latchanna — Respondent.

Criminal Revn. Case No. 86 of 1942 (Criminal Revn. Petn. No. 79 of 1942), Decided on 26th March 1942, to revise order of Dist. Magistrate, Chittoor, D/- 5th January 1942.

Criminal P. C. (1898), S. 436—It is desirable that Magistrate passing orders in revision should give reasons for orders passed though mere absence of reasons is not indication that Magistrate has not given case full consideration.

Chapter 32, Criminal P. C., which governs references and revisions, says nothing about the giving of reasons for any orders passed. As in many places in the Code it is required of a Magistrate or Judge that reasons should be given for the order passed, it must be taken that the Legislature did not intend to make it obligatory on revisional Courts to give reasons for their orders. Nevertheless, it is as a rule desirable that reasons should be given. The fact that no reasons are given is no indication that the Magistrate has not given the matter his full consideration ; but sometimes mistakes, even of fact, are made by revisional Court. In order that the High Court should exercise its revisional powers satisfactorily, it is desirable that it should know what was in the mind of the lower revisional Court when it passed its order : ('14) 1 A.I.R. 1914 Mad. 676, *Rel. on.* [P 654*a*,*b*]

Cr. P. C.—

('41) Chitaley, S. 436 N. 14 Pt. 1.

('41) Mitra, Page 1402 N. 1185.

A. Bhujanga Rao, M. S. Ramachandra Rao and D. R. Krishna Rao — for Petitioners.

N. Somasundaram — for Respondent.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER.—The petitioners were accused of an offence punishable under S. 326, Penal Code, but

a they were discharged by the Joint Magistrate of Madanapalli before whom the case came up for trial. In revision, the District Magistrate of Chittoor set aside the order of discharge saying that "the evidence on record was sufficient to justify the framing of a charge. In view of it, I set aside the lower Court's order of discharge and direct further inquiry into the case." The petitioners have brought the matter before this Court in revision on the ground that the Magistrate's order is irregular, if not illegal, and ought to be set aside on the ground that no reasons are given.

Chapter 32, Criminal P. C., which governs references and revisions, says nothing about the giving of reasons for any order passed. As in many places in the Code it is required of a Magistrate or Judge that reasons should be given for the order passed, it must be taken that the Legislature did not intend b to make it obligatory on revisional Courts to give reasons for their orders. Nevertheless, it is as a rule desirable that reasons should be given; as was pointed out by Ayling J. in 1914 M. W. N. 46.[1] I am not prepared to go as far as to say that the fact that no reasons are given is any indication that the Magistrate has not given the matter his full consideration: but sometimes mistakes, even of fact, are made by revisional Courts. In order that this Court should exercise its revisional powers satisfactorily, it is desirable that it should know what was in the mind of the lower revisional Court when it passed its order. As the question involved in these proceedings is however a very simple one, I have no reason to think that the absence of reasons led to any injustice being done to the petitioners. The petition is dismissed.

c C.R.K./K.S. *Petition dismissed.*

1. ('14) 1 A.I.R. 1914 Mad. 676 : 21 I.C. 172 : 14 Cr. L. J. 572 : 1914 M. W. N. 46, Thirukonam Kuppachari v. Emperor.

A. I. R. (29) 1942 Madras 654

HORWILL J.

In re Pariti Narayana Murti —

Appellant.

Criminal Appeal No. 645 of 1941, Decided on 11th March 1942, against order of Sessions Judge, Vizagapatam, in C. C. No. 28 of 1941.

Evidence Act (1872), S. 24—Mere administering of oath is not tantamount to threat — Con- d fessional statement made on oath to assistant registrar is not inadmissible.

Merely administering an oath to a witness cannot be said to be tantamount to a threat to the person under oath that he, if he does not speak the truth, will be punished for it, so as to bring it within the mischief of S. 24, Evidence Act. [P 654*g*]

A confessional statement made on oath by an accused person before the Assistant Registrar of Co-operative Societies in an inquiry held by him in regard to certain forged cheques is not necessarily inadmissible under S. 24, Evidence Act : ('26) 13 A.I.R. 1926 Bom. 144, *Disting.*; 3 Mad. 271 (F.B.) and ('29) 16 A.I.R. 1929 Mad. 236, *Rel. on.*

[P 654*e*; P 655*a*]

B. V. Subramaniam—for Appellant.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

JUDGMENT. — The appellant was convicted by the Sessions Judge of Vizagapatam of offences punishable under Ss. 467, 471, 409 and 477A, I.P.C., e and sentenced to two years rigorous imprisonment under each count, the sentences to run concurrently. The chief question in this appeal—as in the trial—is whether a confessional statement made by the accused on oath before the Assistant Registrar is admissible evidence against him. It is argued on a point of law that no statement made on oath can be a voluntary statement that would be admissible under S. 24, Evidence Act. The learned advocate for the appellant relies on 50 Bom. 56[1] the decision of a single Judge. The question there was whether a statement made on oath by an accused person examined by a coroner was admissible against him in the sessions trial. The learned Judge held that it was not. His judgment is concerned primarily with the questions whether the statement of the accused was protected by virtue of S. 132, Evidence Act, and whether the coroner did not act in contraven- f tion of S. 162, Criminal P. C., in recording a statement on oath from the accused or, rather, having recorded a statement on oath in ignorance of the fact that the person giving the statement would be an accused, he acted illegally in putting that statement before the coroner's jury. He decided both these questions in favour of the accused; and then, in the last sentence or two of his judgment, he says:

"The statement before the Coroner in this case cannot be admitted as a confession as it is a statement on oath. A confession must be voluntary; and a person who is summoned to give evidence and who is put on oath and who answers questions or makes a statement under the compulsion of his oath cannot be said to have made a voluntary statement."

It may be said that this learned Judge, during the course of his judgment, expressed his disagreement g with the decisions of two Full Benches of his own Court. Section 24, Evidence Act, says nothing about voluntary statements. It makes irrelevant a confession if it appears to the Court that that confession was "caused by any inducement, threat, or promise .... proceeding from a person in authority ..... sufficient .... to give the accused person grounds which would appear to him reasonable for supposing that by making it he would .... avoid any evil of a temporal nature ...." So that the statement with which we are concerned can only be inadmissible on the ground that it was caused by a threat. It does not seem to me reasonable to argue that the administering of an oath is tantamount to a threat to the person under oath that if he does not speak the truth, he will be punished for it. If that were the case, there would be no reason for the enactment of the proviso of S. 132, Evidence Act; for if h no evidence on oath by a witness could amount to a voluntary confession, it never could be used against him. On at least two occasions a somewhat similar question has been considered by this Court. A Full Bench of five Judges held in 3 Mad. 271[2] that a statement given on oath in an affidavit filed in a civil suit could be used against a person making the statement. That case was followed in 52 Mad. 432,[3] in which a statement given by a person examined as a witness was subsequently used against him on a charge of defamation.

1. ('26) 13 A.I.R. 1926 Bom. 144 : 93 I.C. 225 : 27 Cr. L. J. 433 : 50 Bom. 56 : 28 Bom. L. R. 79, Emperor v. Dawood Kazhi.
2. ('81) 3 Mad. 271 : 2 Weir 781 (F. B.), Queen v. Gopaldas.
3. ('29) 16 A. I. R. 1929 Mad. 236 : 116 I. C. 337 : 30 Cr. L. J. 613 : 52 Mad. 432 : 56 M. L. J. 570, Pedabba Reddi v. Varada Reddi.

a A statement made on oath may be said in certain cases to be made as the result of the holding out of a threat; but that is always a question of fact. It is contended that in this case there was such an inducement; and the learned counsel for the appellant relies on a statement made by P. W. 7 a retired District Medical Officer and the Chairman of the Co-operative Bank, six of whose cheques the accused is said to have forged. It appears from the cross-examination that he replied in the affirmative to this question put by the counsel for the accused: "As soon as P. W. 3 and yourself went to the Bank on 23rd April 1941, did you not ask the accused whether he realized the consequences of the fraud that he had committed?" Such a question was not however put to P. W. 3; the Deputy Registrar of Co-operative Societies who conducted the inquiries and questioned the accused. Both P. W. 3 and b P.W. 7 say in examination in chief that when they entered the premises of the bank, P. W. 3 first checked the cash balance with reference to the cash book and found it to be correct. P. W. 3 then asked the accused about the forged cheques and showed those cheques to him; whereupon the accused admitted that he had forged those cheques and drawn money on them. It seems to me that if it is true that such a question was put to the accused, it must have been put to him after he had been shown these cheques and the accused had answered that he had forged them. It seems most unlikely that P. Ws. 3 and 7 walked straight into the Bank and without asking the accused any preliminary questions, said to him, "Do you realize the consequences of the fraud you have committed?" (His Lordship considered the other evidence in the case apart from the confessional statement and came to the conclusion c that the accused-appellant was guilty and the judgment concluded.) I have no doubt that the accused was properly convicted. The sentence of two years rigorous imprisonment is a light punishment for such serious offences. The appeal is dismissed.

C.R.K./K.S. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 655

WADSWORTH J.

Arunagiri Chettiar — Appellant

v.

Kuppuswami Chettiar — Respondent.

d Second Appeal No. 912 of 1941, Decided on 29th July 1942, against decree of District Court, North Arcot at Vellore, in A. S. No. 336 of 1939.

Madras Agriculturists' Relief Act (4 of 1938), Ss. 7 and 12—Money paid after Act appropriated towards interest — Money in excess of interest as scaled down — Excess cannot be recovered in absence of plea and proof of mistake.

Where payments are definitely appropriated towards interest at the time when they are made neither the debtor nor the creditor has the right to tear up these appropriations by an unilateral Act. The Court has no power to re-appropriate the payments to principal unless the Act contains a provision for such re appropriation. The only way in which a debtor might get back money which he has paid after the Act came into force in excess of the amount properly due under the provisions of the Act, would be by establishing a right to a refund under the ordinary law on the ground that the payment was made under a mistake. The excess amount paid towards interest as scaled down cannot, therefore, be recovered by the powers of Ss. 7 and 12. e

[P 655*g,h*]

T. R. Ramachandran — for Appellant.

V. T. Rangaswami Ayyangar and K. Ramaswamy — for Respondent.

JUDGMENT. — The appellant was the defendant in a suit on a promissory note executed for Rs. 1400 on 4th June 1936. The question in appeal arises under Ss. 9 and 12 of Madras Act 4 of 1938. The appellant made payments totalling Rs. 210 before the Act came into force. These payments were more than the amount due for interest as scaled down under S. 9. They were definitely appropriated to interest and there can be no question of any refund. After the Act came into force, the appellant made a payment of Rs. 100 towards interest on 24th September 1938 and another payment on 12th April 1939 of which Rs. 320 was appropriated f to interest and Rs. 30 to principal. These two payments for interest are very considerably in excess of the amount of interest as scaled down under S. 12 to 6¼ per cent. per annum.

It is argued in appeal that, granted that there can be no refund of excess payments after re-appropriation in the manner laid down in S. 9, that there is no provision in S. 12 prohibiting the ordering of a refund by the creditor, such as we find in Ss. 8 and 9; and that under S. 7, the general rule is laid down that no sum in excess of the amount as scaled down shall be recoverable from the debtor. It seems to me that it is not sufficient to show that the creditor cannot recover more than the amount as scaled down. The fact is that he has recovered more than the amount of interest as scaled down and the only question is whether the appellant can compel g him to pay back the excess or to submit to a re-appropriation towards principal. The two payments in 1938 and 1939 were definitely appropriated towards interest at the time when they were made. Neither the debtor nor the creditor has the right to tear up these appropriations by an unilateral act. The Court has no power to re-appropriate the payments to principal unless the Act contains a provision for such re-appropriation. I am not aware of any such provision in Act 4 of 1938. To my mind the only way in which a debtor might get back money which he has paid after the Act came into force in excess of the amount properly due under the provisions of the Act, would be by establishing a right to a refund under the ordinary law on the ground that the payment was made under a mistake. For this purpose there must be a definite plea h of set off supported by evidence showing that a mistake was in fact made. No such plea has been taken in this case nor is there any such evidence of the circumstances of the payments. I, therefore, hold that the excess amount paid towards interest as scaled down cannot be recovered by the powers of Ss. 7 and 12 of Act 4. This position is not so unreasonable as it might seem; for there are many cases in which the question whether the debtor is or is not an agriculturist is extremely doubtful and if in such cases the defendant voluntarily makes a payment at the contract rate of interest without thinking of availing himself of a possible remedy under Act 4 of 1938, there is no apparent reason why he should necessarily be allowed to claim a refund of the excess over the interest as scaled down. The appeal is, therefore, dismissed with costs.

C.R.K./R.K. *Appeal dismissed.*

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c **A. I. R. (29) 1942 Madras 656**

BYERS J.

T. S. Rajagopala Iyer — Appellant

v.

South Indian Rubber Works, Ltd., Coimbatore and others — Respondents.

Second Appeal No. 671 of 1940, Decided on 26th June 1942, against decree of Sub-Judge, Coimbatore, in A. S. No. 22 of 1939.

Company — Prospectus changed in material particulars before allotment — Application for shares can be revoked.

A person is entitled to revoke his application for shares in a company when, before the date of the allotment, the prospectus of the company is changed
b in material particulars, e. g., the minimum subscription is reduced from Rs. 40,000 to Rs. 10,000 : ('30) 17 A. I. R. 1930 Mad. 325, *Rel. on* ; (1881) 17 Ch. D. 373, *Ref.* [P 656*b*, *g*]

T. V. Ramanatha Ayyar — for Appellant.

M. Krishna Bharathi — for Respondents.

JUDGMENT. — The question of law which arises in this second appeal is whether the plaintiff is entitled to revoke his application for shares in a company when, before the date of the allotment, the prospectus of the company is changed in material particulars. The brief facts of the case in so far as they are necessary are that the plaintiff had applied for shares in the respondent-company on the basis of the prospectus issued on 20th January 1937 containing, inter alia, the names of several persons as directors and specifying the sum of Rs. 40,000 as
c the minimum sum upon which the company would proceed to allotment of the shares. Before the allotment took place, there were changes in the directorate, on which the plaintiff-appellant relied as one ground on which he could withdraw his offer and decline allotment ; the minimum subscription required before allotment was reduced from Rs. 40,000 to Rs. 10,000 and it was this proceeding which put the appellant upon enquiry. This important change was made on 9th May 1937 and two days later an allotment letter was sent to the plaintiff-appellant. On 26th May he wrote to the company drawing their attention to this reduction and asking for certain particulars regarding the meeting at which the change had been effected. At the same time he drew the company's attention to an announcement made in the press by some of the
d directors denying responsibility for the special resolution. Some correspondence ensued and eventually on 1st June the plaintiff appellant repudiated his offer to take the shares on the ground of the reduction of the minimum subscription. In his letter of repudiation, he made no mention of the change in the directorate. This was mentioned for the first time in the plaint filed nearly two months later. It is clear, therefore, that the change in the directorate did not operate on his mind so as to influence him in repudiating his offer. He eventually brought this suit to recover the money paid with his application for shares, after the respondent company had refused to make any refund. Both the lower Courts found against the plaintiff.

As already mentioned, the change in the directorate found no place in the correspondence immediately following the allotment and since it did not affect the plaintiff's mind at the time, there is no necessity to discuss it. It is only necessary to consider whether the change in the minimum subscription required was a material change in the prospectus which the plaintiff could rely on in repudiating his offer to take shares. When one looks at the objects of the company as disclosed in the prospectus, it is surprising that the directors could have contemplated commencing business with such a ridiculously low figure as Rs. 10,000. They proposed to erect a modern factory in which to manufacture motor tubes, cycle tyres and tubes and other rubber goods required for vacuum brakes, etc., mills, printing presses, electrical departments, rubber sheetings, toys, battery cases, rubber shoes, clothing and various other articles. The annual working expenses are shown as nearly Rs. 80,000 while the capital expenditure required was over one and a half lakhs and it requires very little knowledge of the cost of modern plant and machinery to realise that Rs. 10,000 was an absurd figure on which to proceed to the allotment of shares in such a company with such an ambitious programme. The principle involved is to be found in *Anderson's case*, (1881) 17 Ch. D. 373[1] which has been referred to by Sundaram Chetti J. in 1929 M. W. N. 837.[2] That was a case connected with a change in the directorate, as was *Anderson's case*,[1] but the principle applies equally to the facts of the present case. In dealing with the change of the directorate in *Anderson's case*,[1] Maline V. C. made the following observation:

"I do not think there was dishonesty when the prospectus was issued, because it was believed that Mr. Gibson and Mr. Rose would act ; but when the company found that these gentlemen would not act, they were bound to issue a new prospectus containing other names, and to inform those who had applied for shares, that before the allotment was made other directors had been appointed ; and then it would be for the applicants for shares to say, under those circumstances, whether they would adhere to their offer or would withdraw it."

Sundaram Chetti J. quoted the following passage from Lindley on Company law :

"If an application for shares is made on the faith of a statement which is true when made but which is not true when the shares are allotted, the applicant may refuse to take them."

The learned advocate for the respondent company was anxious to resist any suggestion that there had been misrepresentation but this is not the essence of the case. All that the plaintiff-appellant need show is that there has been a material change in the prospectus since he made his offer and he is then entitled to decide that with this material change the prospectus of the company are not sufficiently attractive to warrant him in subscribing his money. Misrepresentation or fraud would seem to be of importance only regarding the remedies he may have against guilty directors. In the present case he has brought this suit against the company to recover the money paid and it is difficult to see on what satisfactory grounds the trial Court could hold that the suit was not maintainable. I agree with Mr. T. V. Ramanatha Iyer, the learned advocate for the appellant, that there was a material change in the prospectus and that his client was entitled to a refund. An attempt has been made to show that the appellant was guilty of delay but as he was acting with his father, with whom he formed

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1. (1881) 17 Ch. D. 373: 50 L. J. Ch. 269: 43 L. T. 723 : 29 W. R. 372, In re Scottish Petroleum Co.
2. ('30) 17 A. I. R. 1930 Mad. 325 : 124 I. C. 193 : 1929 M. W. N. 837, Venkataramayya v. Indian Industrial Bank Ltd., Calcutta.

a joint family, and his father lived elsewhere, the obvious explanation is that the intervening time was occupied in consulting his father as to what ought to be done. In the result the appeal is allowed and the suit is decreed for the plaint amount together with costs throughout and subsequent interest at six per cent. Leave refused.

C.R.K./R.K. *Appeal allowed.*

A. I. R. (29) 1942 Madras 657 (1)

HORWILL J.

In re Venkitaswami Naicken and others Accused.

Criminal Revn. No. 68 of 1942 (Case Referred No. 5 of 1942), Decided on 5th March 1942, referred by Sess. Judge, Coimbatore Division, in his letter, D/- 31st December 1941.

(a) Criminal P. C. (1898), Ss. 562 and 380 — S. 562 applies only to convicted persons — Reference under S. 562—Magistrate must proceed under S. 380 — S. 380 does not empower Magistrate to set aside conviction — Further enquiry under S. 380 — Object.

Section 562 applies only to convicted persons. When a reference is made under S. 562 the Magistrate to whom it is referred has to proceed as in the manner provided by S. 380 which relates only to the passing of a sentence or making of an order and does not empower the Magistrate to set aside a conviction. [P 657*e*, *f*]

Section 380 empowers the Magistrate to make further enquiries so that he may decide whether or not it is a fitting case for the passing of an order under S. 562 or whether, on the other hand, he ought to impose some substantial sentence under the Penal Code : ('33) 20 A. I. R. 1933 Mad. 728, *Rel. on.* [P 657*f*]

Cr. P. C. —

('41) Chitaley, S. 380, N. 3 Pt. 1; S. 562, N. 3.

('41) Mitra, Page 1239, N. 1062; Page 1809, N. 1434.

(b) Criminal P. C. (1898), S. 439 — Order of acquittal without jurisdiction — Order to continue proceedings from point where illegal order was passed likely to unduly harass accused — Evidence against accused very little and entitling them to benefit of doubt—Order held should not be interfered with.

On a reference under S. 438, Criminal P. C., to set aside an order of acquittal on the ground that it was without jurisdiction :

Held that ordinarily an order passed without jurisdiction should be set aside and the Magistrate ordered to continue the proceedings from the point where the illegal order was passed but as such a course might unduly harass the accused against whom evidence was very little and who should have been given the benefit of the doubt it was not necessary to interfere with the order of acquittal. [P 657*g*]

Cr. P. C. —

('41) Chitaley, S. 439, N. 12 Pts. 1, 3 and 4.

('41) Mitra, Page 1427, N. 1204 "Interference with acquittal."

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER. — The police charged four persons with the theft of a calf or, in the alternative, of an offence punishable under S. 411 or S. 414, Penal Code. All the four accused were convicted by the Stationary Sub-Magistrate of Udumalpet. He sentenced accused 3 to a substantial term of imprisonment; but he thought that as the other three accused had not before committed any offence, they might well be released under S. 562, Criminal P. C. As the Magistrate had no powers to pass orders under S. 562, Criminal P. C., he referred the matter under the proviso to that section to the Sub-Divisional Magistrate to pass the necessary orders. The Sub-Divisional Magistrate instead of doing this acquitted accused 1, 2 and 4. The Sessions Judge has referred the matter to this Court, expressing his opinion that the Sub-Divisional Magistrate acted illegally and without jurisdiction. There can be no doubt that the Sessions Judge was correct. Section 562, Criminal P. C., applies only to convicted persons, as can be seen from the very wording of that section. It begins with the words "when any person not under 21 years of age is convicted of an offence . . ." Further, the proviso begins "provided that where any first offender is convicted by a Magistrate of the third class . . ." When a reference is made under S. 562, Criminal P. C., the Magistrate to whom it is referred has to proceed as in the manner provided by S. 380. Section 380, Criminal P. C., relates only to the passing of a sentence or making of an order and does not empower the Sub-Divisional Magistrate to set aside a conviction. The section does say that : "if the Magistrate 'thinks' further enquiry or additional evidence on any point to be necessary, he may make such enquiry or take such evidence himself . . . ."; but that has been interpreted in 57 Mad. 85[1] as giving the Sub-Divisional Magistrate power to make further enquiries so that he may decide whether or no it is a fitting case for the passing of an order under S. 562, Criminal P. C., or whether, on the other hand, he ought to impose some substantial sentence under the Penal Code.

Ordinarily, an order passed without jurisdiction should be set aside and the Magistrate ordered to continue the proceedings from the point where the illegal order was passed; but upon hearing the Public Prosecutor, I think, that perhaps this might unduly harass the three accused, against whom evidence is very little. I agree with the Sub-Divisional Magistrate that they should have been given the benefit of the doubt. I do not therefore think it necessary to accept the reference. It is rejected.

C.R.K./G.N. *Reference rejected.*

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1. ('33) 20 A. I. R. 1933 Mad. 728 : 145 I. C. 659 : 34 Cr. L. J. 1045 : 57 Mad. 85 : 65 M. L. J. 405, Public Prosecutor v. Gurappa Naidu.

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* A. I. R. (29) 1942 Madras 657 (2)

PATANJALI SASTRI J.

Kaningamanna Melathil Karnavan Rama Kurup and another — Petitioners

v.

Thirunavaya Kalathil Veettil's children Kunhipathumma and others — Respondents.

Civil Revn. Petn. No. 873 of 1941, and Civil Misc. Petn. No. 1519 of 1942, Decided on 19th March 1942, to revise order of Dist. Munsif, Tirur, D/- 9th December 1940.

*** Civil P. C. (1908), Ss. 115, 141 and O. 7, R. 10—Revision petition to High Court cannot be returned for presentation to subordinate Court in province as appeal or revision petition.**

Revisional jurisdiction is peculiar to the High a Court and there can be no question of returning civil revision petition for presentation as a civil revision petition or as an appeal to any other Court in the province. [P 658*b*]

C. P. C. —

('40) Chitaley, S. 115, N. 16; S. 141, N. 9 Pt. 5; O. 7 R. 10, N. 1.

P. Govinda Menon—for Petitioners.

N. R. Sesha Ayyar—for Respondents.

ORDER.—The petitioner asks for return of the memo of civil revision petition for presentation to the District Court as an appeal as in view of the decision in (1942) 1 M.L.J. 390[1] an appeal lies in a case like this to the District Court and civil revision petition is therefore incompetent. Mr. Govinda Menon for the petitioners relies on the provisions of b O. 7, R. 10 read with Ss. 107 (2) and 141, Civil P. C., as supporting the prayer. I do not consider that these provisions are applicable to the case as revisional jurisdiction is peculiar to this Court and there can be no question of returning the civil revision petition for presentation as a civil revision petition to any other Court in the province. The prayer cannot therefore be allowed. There can be no objection to the return to the petitioner of the enclosures he has filed and they will accordingly be returned. The civil revision petition is dismissed with costs.

C.R.K./K.S. *Petition dismissed.*

1. ('42) 29 A. I. R. 1942 Mad. 466 : I. L. R. (1942) Mad. 654 : (1942) 1 M. L. J. 390, Venkayya v. Pullayya.

A. I. R. (29) 1942 Madras 658

c

VENKATARAMANA RAO AND ABDUR RAHMAN JJ.

Madura Municipal Council through its Commissioner, Rajiah D. Paul — *Appellant*

v.

Madura etc., Devasthanams represented by its Executive Officer, R. S. Nayudu — *Respondent.*

Appeals Nos. 293 and 302 of 1939, Decided on 27th October 1941, against decree of Sub-Judge (Principal), Madura, in O. S. No. 34 of 1938.

Madras District Municipalities Act (5 of 1920), S. 83—Shops at Madura temple held assessable to property tax.

d

The shops and stalls in the Madura temple being used for commercial as well as religious purposes are liable to pay the property tax: ('41) 28 A. I. R. 1941 Mad. 185, *Foll.*; 1936 M. W. N. 1088, *Ref.*; ('39) 26 A. I. R. 1939 P. C. 20, *Disting.* [P 658*h*]

B. Sitarama Rao and C. S. Rama Rao Sahib — — for Appellant in No. 293 and for Respondent in No. 302.

K. Rajah Ayyar and T. A. Ramaswami Reddi — for Respondent in No. 293 and for Appellant in No. 302.

ABDUR RAHMAN J. — This appeal arises out of a suit brought by the Madura Devasthanam against the Municipal Council, Madura for a declaration that the building and lands described in the schedule annexed to the plaint were exempt from payment of the property tax to the defendant municipality. The defendant Municipal Council justified the assessment in reply and contended e that in so far as the items contained in the schedules were used for commercial purposes and could not be said to form a portion of the temple property, they could not be exempt from the payment of the tax. The learned Subordinate Judge of Madura held that the items covered by item 1 were not liable to be assessed but those described in items 2 and 3 were so. The Madura Municipal Council has preferred an appeal (No. 293 of 1939) in regard to the items covered by item 1 and the Madura Devasthanam preferred the other appeal (No. 302 of 1939) in regard to the items described in items 2 and 3.

The only question therefore to decide in both the appeals is whether the shops and stalls inside the Madura temple were correctly assessed and were liable to pay the property tax. The view taken by the learned Subordinate Judge finds support from a decision of this Court reported in 1936 M. W. N. f 1088[1] but the matter was considered subsequently by one of us who referred the matter to a Bench and the decision of the Bench in (1940) 2 M. L. J. 897[2] was to the effect that as the power house, which had been assessed to property tax in that case, was being used for supplying electricity to shops and hotels yielding a profit and was not being used for religious purposes alone, although the whole hill on a portion of which it was erected was set apart for religious purposes, it was liable to assessment of property tax.

Learned counsel for the Madura Devasthanam has, however, contended that in view of the decision of their Lordships of the Privy Council in I. L. R. (1939) 1 Cal. 277,[3] the whole of the Madura temple and its adjuncts have to be treated as one unit for the purpose of exemption from taxation under S. 83 of the Act and it would be incorrect to detach certain portions of the temple and consider them to be exempt from paying the property tax while holding others to be liable for the same. The decision of their Lordships of the Privy Council has, in our opinion, no application as it dealt with the question of valuation of the various buildings which had to be valued on a certain basis under S. 127, Calcutta Municipal Act of 1923. We are not concerned in this case with the method of the valuation given in that Act but with the construction of S. 83, District Municipalities Act. g

That there are a large number of shops inside the compound of the Madura temple in which all kinds of commodities are being sold has not been disputed and as long as it is not possible to hold that those commodities were such as could only be h used for purposes of worship in the temple or in other words, the shops or stalls were being used only for the purposes subservient to the worship in the temple, the contention of the Madura Devasthanam that the properties in which those goods were sold were not liable to taxation could not be upheld. The shops and stalls were, like the power house in (1940) 2 M. L. J. 897[2] being used for commercial as well as religious purposes and this makes them taxable. Since on the construction

1. ('36) 1936 M. W. N. 1088, Municipal Council, Srirangam v. Srirangam Devasthanam.
2. ('41) 28 A. I. R. 1941 Mad. 185: 193 I. C. 34: I. L. R. (1941) Mad. 322: (1940) 2 M. L. J. 897, Municipal Council, Palni v. Sri Dhandayuthapani Devasthanam, Palni.
3. ('39) 26 A. I. R. 1939 P. C. 20: 179 I. C. 324: I.L.R. (1939) 1 Cal. 277: 66 I.A. 42: I.L.R. (1939) Kar (P. C.) 73 (P. C.), Corporation of Calcutta v. Motichand Chowdhury.

of S. 83, District Municipalities Act, the items of property contained in item 1 could not be said "to be set apart for public worship," and could not be said to have been actually used for that purpose and no other, the judgment of the learned Subordinate Judge cannot be sustained. In view of what has been said above, the appeal filed on behalf of the Madura Municipal Council must be allowed and the appeal preferred by the Madura Devasthanam dismissed. The appellants in Appeal No. 293 of 1939 will have their costs in respect of item 1 alone. No costs need be paid in Appeal No. 302 of 1939. The costs paid by the Madura Municipal Council to the Devasthanam will be refunded.

C.R.K./R.K. *Order accordingly.*

A. I. R. (29) 1942 Madras 659

KING J.

Bhamidipati Kameswara Rao — *Appellant*

v.

National Movietone Co. Ltd., Kilpauk and another — *Respondents.*

Appeal No. 312 of 1940, Decided on 12th March 1942, against decree of District Court, East Godavari at Rajahmundry, D/- 18th September 1939.

Civil P. C. (1908), S. 20 (c)—Contract of hiring is not complete until article hired is in hands of person to whom it is to be hired—Suit for infringement of copyright against hirer — Part of cause of action arises in place where hiring is completed and Court therein has jurisdiction.

In the absence of any specific terms in the actual contract between the parties to the contrary, it is reasonable and natural to assume that a transaction of hiring cannot be completed until the article hired is in the hands of the person to whom it is to be hired. [P 659*g*]

A suit was brought by the plaintiff for damages for infringement of copyright alleging that a dramatic work written by him has been converted by the defendants into a cinematograph film. He further complained that the defendants entered into a contract with the proprietor of the cinema in R to exhibit this film and to share the profits in a certain proportion and that the film was duly exhibited in R in pursuance of that contract. The question was whether suit lay in R :

Held that the action of hiring out this film was not complete until the film had reached R and was delivered to the proprietor of the cinema. Part of the cause of action therefore arose in R and the suit would lie in the Court in R. [P 660*a*]

C. P. C. —

('40) Chitaley, S. 20, N. 15.

('40) Mulla, Page 120, Note "Cause of action in suits on contracts."

V. Govindarajachari — for Appellant.

K. R. Rangaswami Ayyangar and P. S. Sarangapani Ayyangar — for Respondents.

JUDGMENT. — This appeal arises out of a suit brought by the plaintiff for damages for infringement of copyright. The plaintiff claims to have written the dramatic work which has been converted according to him, by the defendants into a cinematograph film. He further complains that the defendants entered into a contract with the proprietor of the cinema in Rajahmundry to exhibit this film and that the film was duly exhibited in Rajahmundry in pursuance of that contract. A number of issues have been framed, and an important issue of jurisdiction was based upon a contention on the part of the defendants who are a Movietone Company of Madras, and a private individual who is said to have directed the production of the film in Madras on behalf of defendant 1 and who lives in Madras, that the suit did not lie in Rajahmundry but lay only in Madras. The learned District Judge, after an elaborate judgment, has held that the suit did not lie in Rajahmundry and he has returned the plaint to the plaintiff for presentation in the proper Court. The plaintiff has appealed against this order.

It seems to me that although the learned District Judge has gone at a great length into a number of factors in this case the issue is really a very simple one. On the question whether the action of the cinema proprietor in Rajahmundry is the action of an agent of defendant 1, I am in entire agreement with the learned District Judge that there is no such relationship between the two parties. Defendant 1 obviously hired the film in question to the proprietor of the cinema, and the mere fact that the arrangement between them was that profits should be paid to the Movietone Company on a percentage basis instead of in a fixed sum makes no difference to the essential nature of the contract. It was clearly a case of defendant 1 hiring the film. The plaintiff therefore cannot say that he has any direct cause of action against defendant 1 from the fact that the proprietor of the cinema, whom he has not chosen to implead as a defendant, actually exhibited the film. But S. 2 (2) (a) shows that any one who lets for hire any work, which to his knowledge infringes copyright, is deemed to have infringed the copyright himself. It is undeniable that defendant 1 in this case has let this particular film for hire to the proprietor of the cinema. The simple question therefore which arises for decision is whether this action of letting the film for hire is one which was completed in Madras or was completed in Rajahmundry. If it was completed in Madras, then there is no part of the cause of action which arose in Rajahmundry. If it was completed in Rajahmundry, then obviously this part of the cause of action did arise in Rajahmundry and under S. 20 (c), Civil P. C., the District Judge at Rajahmundry has jurisdiction. It seems to me that in the absence of any specific terms in the actual contract between the parties to the contrary it is reasonable and natural to assume that a transaction of hiring cannot be completed until the article hired is in the hands of the person to whom it is to be hired.

A great deal of discussion appears to have centred in the Court below round the question as to where the contract was completed. It seems to me that this question is entirely irrelevant. There may be ground for holding that the contract was completed in either Madras or Rajahmundry but the mere completion of the contract is no part of the cause of action ; for it is only if the contract is carried out by defendant 1 that the plaintiff can have any possible grievance. I therefore return to the question of whether the hiring took place in Madras or in Rajahmundry. On this question the contract is silent. The only reference to the transport of the film from Madras to Rajahmundry is in cl. (5) which says that the "to and fro charges together with the incidental charges" are to be borne by the proprietor of the cinema. Nothing is said as to who shall shoulder the risk if anything happens to the

film in the course of its journey between Madras and Rajahmundry. It seems to me obvious that if the film does not reach Rajahmundry, the whole contract must come to an end because the main terms of the contract are that the film was to be shown in a particular cinema and the profits of the showing of the film were to be divided in a particular proportion between the parties to the contract. If, therefore, the film never reaches Rajahmundry, the main terms of the contract will be incapable of fulfilment.

For this reason and on the general ground that an article cannot be said to be hired until it reaches the hands of the person to whom it is to be hired, I would hold that the action of hiring out this film was not complete until the film had reached Rajahmundry and was delivered to the proprietor of the cinema. Part of the cause of action, therefore, arose in Rajahmundry and this suit will lie in the Court of the District Judge. A separate argument has been addressed to me on behalf of defendant 2 who says that the action of hiring out the picture to the proprietor of the cinema in Rajahmundry was one with which he had nothing to do and that, therefore, that part of the cause of action has no reference to him. It is not however open to me at this stage and in the hearing of this appeal to say that the plaintiff has no cause of action against defendant 2. That is a matter which will be decided by the learned District Judge himself when he proceeds to dispose of the suit according to law. I must for the reasons given set aside the order of the learned District Judge and remand the suit to him for disposal according to law. The costs of this appeal must be paid by the respondents.

C.R.K./K.S. *Case remanded.*

A. I. R. (29) 1942 Madras 660

KING J.

M. A. Subramania Ayyar and another — Appellants

v.

Province of Madras by Collector of Malabar, Calicut — Respondent.

Second Appeal No. 89 of 1940, Decided on 7th April 1942, against decree of Dist. Court, South Malabar, D/- 5th April 1939.

(a) Madras Land Encroachment Act (3 of 1909), S. 14—Notice to levy penalty — Suit for declaring title — Section 14 does not apply — Limitation Act, Art. 120 applies.

The sending of the notice does not of itself constitute any grievance at all. It is only the levying of the penalty (actual collection) that really constitutes the grievance : 23 M. L. J. 162 and ('19) 6 A. I. R. 1919 Mad. 514, *Rel. on.* [P 660*g*,*h*]

Where therefore a person brings a suit on receiving a notice by Government intending to levy penalty, it is the questioning of his title that gives him the right of suit. In these circumstances S. 14 of the Act cannot apply to the case. The only article of the Limitation Act which is applicable is Article 120. [P 660*h*]

Limitation Act —

('42) Chitaley, Art. 120 N. 31 Pts. 2, 6 (b).

('38) Rustomji, Page 1036 Note "Declaratory suits : Other cases."

(b) Alluvion and Diluvion — Accretion by — Accretion due to abnormal floods in single year is not gradual.

Where an accretion has been formed in one season only the process of accretion cannot be described as gradual. The expression "normal action of physical forces" cannot apply to circumstances in which on the occurrence of abnormal floods in a single year the whole of the accretion has been formed : ('36) 23 A.I.R. 1936 Mad. 128, *Foll.*; ('18) 5 A.I.R. 1918 Mad. 1083, *Ref.* [P 661*a*,*b*]

N. R. Sesha Ayyar — for Appellants.

Government Pleader — for Respondent.

JUDGMENT.—This appeal arises from a suit filed by the owner of part of two Islets in the Mammili river in South Malabar against the Government for a declaration of his title to certain other portions of these Islets which have, according to the findings of the learned District Judge, come into existence in more recent times and for an injunction restraining the Government from assessing him to any land revenue on these portions of the Islets. The suit has been dismissed by the first Court and dismissed again in appeal by the learned District Judge of South Malabar on two grounds, firstly on the merits because the plaintiff has failed to prove that he is entitled to the newly formed portions of the Islets, and secondly because the suits were barred by limitation. Both these points were argued in second appeal before me.

It seems to me that on the question of limitation the Courts below are wrong. They say that the suit was barred because it was not brought within six months of 12th February 1931, on which date according to the plaintiff his cause of action arose. That was the day on which a notice was served upon him that the Government intended to levy penal assessment. Section 14, Madras Land Encroachment Act, no doubt says that if any one deems himself aggrieved by any proceedings under the Act he shall not be prevented from applying to the Civil Courts for redress, but that he must do so within six months from the date on which the cause of action arose. If, therefore, the sending of the notice constitutes the plaintiff's grievance, his suit will be out of time, but there is an explanation to S. 14 which says that where the cause of action is in respect of any assessment or penalty it shall be deemed to have arisen on the date on which such assessment or penalty was levied. By the word "levied" is meant collected as has been held in 42 Mad. 451.[1] It is therefore impossible that in this case, if S. 14, Madras Land Encroachment Act, is applied, there can be any question of limitation at all, because, as I have been informed, the assessment has never in fact been paid. The sending of the notice does not of itself constitute any grievance at all. It is only the levying of the penalty that really constitutes the grievance, as has been recognized in 23 M. L. J. 162.[2] Here no doubt the plaintiff has stated that his cause of action arose on this particular day in 1931. In other words, it was by their action in sending the notice that the Government unmistakably intimated to him that they were questioning his title. It is the questioning of his title that gives him the right of suit. It seems to me in these circumstances that S. 14, Madras Land Encroachment Act, cannot possibly apply to the present case and that the only article of the Limitation Act which is applicable is Art. 120 and that under that article the suit was filed well within time.

1. ('19) 6 A. I. R. 1919 Mad. 514 : 51 I. C. 46 : 42 Mad. 451 : 36 M.L.J. 222, Kesava Chetti v. Secy. of State.
2. ('12) 23 M. L. J. 162 : 15 I. C. 257, Narayana Pillai v. Secretary of State.

On the merits, however, I can see no reason to differ from the Courts below. The findings of fact are that the portions of these Islets which are now in dispute were formed in the year 1924 as the result of unprecedented floods in Malabar District. There is nothing to show that there had been any accretion before 1924 over a period of at least thirty years. There is a finding by the learned District Judge of further accretions having taken place in the year 1932 after the suit was filed. But there again the learned Judge has stated that there is no evidence to show that these accretions were natural as opposed to artificial. It seems to me impossible to hold that where an accretion has been formed in one season and one season only the process of accretion can be described as gradual. No doubt as has been pointed out in 40 Mad. 1083[3] different considerations apply to rivers in India from those applicable to rivers in England, and the words "gradual accretion" must be viewed with special reference to the conditions which prevail in Indian rivers. Ayling J. in that case said that where it was the normal action of physical forces which brought about the accretion, then the accretion could come within the English rule of law and this principle was approved subsequently on appeal by the Privy Council. It seems to me, however, as I have already stated in another somewhat similar case reported in 1936 M. W. N. 473[4] that the expression "normal action of physical forces" cannot apply to circumstances like these in which on the occurrence of abnormal floods in a single year the whole of the accretion has been formed. It is perhaps possible that if the attitude of the plaintiff had been different in this case, he might have been able to convince the learned Judges who tried the suit and heard the appeal of his title; but unfortunately for him, his case in the plaint was that there had never been any accretion at all, and that the Islets as they existed in 1931 had always existed. Naturally enough with a case of this kind he made no attempt to prove that there was any gradual accretion and when I find that the learned District Judge on a question of fact has held that the whole of the accretion took place in one season, I am unable to see that he can be said to be wrong when on these facts he says that there has been no gradual accretion. In the result, therefore, I am of opinion that this appeal must fail and is accordingly dismissed with costs.

C.R.K./R.K. *Appeal dismissed.*

3. ('18) 5 A. I. R. 1918 Mad. 1083 : 40 I. C. 896 : 40 Mad. 1083, Secretary of State v. Raja of Vizianagaram.

4. ('36) 23 A. I. R. 1936 Mad. 128 : 161 I. C. 111 : 1936 M.W.N. 473, Narayani v. Krishnan Nambiar.

A. I. R. (29) 1942 Madras 661

BYERS J.

V. Kr. St. Kasi Visvanadan Chettiar — *Petitioner*

v.

Devakottai Municipal Council — *Respondent.*

Civil Revn. Petn. No. 2123 of 1940, Decided on 27th March 1942, to revise decree of Dist. Munsif, Devakottai, D/- 18th June 1940.

Madras District Municipalities Act (5 of 1920), S. 354 (2), Proviso—Relief as to double taxation refused — Suit to recover profession tax paid under protest is not barred.

The refusal of the municipal council to grant the assessee relief in respect of the double taxation is clearly outside the provisions of the Act. A suit for recovery of profession tax paid under protest is not barred by S. 354. [P 661*h*]

R. Gopalaswami Ayyangar and A. M. Krishnaswami Ayyangar — for Petitioner.

V. T. Rangaswami Ayyangar and K. Kalyanasundaram Iyer — for Respondent.

ORDER. — This civil revision petition has been brought against the decision of the District Munsif of Devakottai in S. C. S. No. 17 of 1940. That suit was brought to recover profession tax of Rs. 85 paid under protest by the plaintiff. The learned Munsif found that the suit was not maintainable by reason of S. 354, Madras District Municipalities Act.

The facts of the case present no difficulty. The plaintiff admittedly resided in Devakottai for the statutory period of 60 days during the half year in question and it is also admitted that he exercised his business only at Tinnevelly and Madras during this period. When he was served with an order to give his return of income for the purposes of assessment to profession tax, he stated that he had no income or profession liable to profession tax. This was not correct because, unless he had already paid profession tax elsewhere in respect of the income in Madras and Tinnevelly, he would be liable to pay profession tax in respect of his business under S. 93 (1) (a) (ii) of the Act. He was served with a notice of demand on 10th November 1937 but by that date he had already paid profession tax in excess of the amount now demanded to the Madras Corporation on 10th October 1937, so that under S. 93 (4) of the Act he was not liable to pay again at Devakottai except in respect of any difference. The plaintiff preferred an appeal in which he denied having any income or profession within the municipal limits and he enclosed with his memorandum of appeal the receipt granted by the Madras Corporation for the payment of profession tax for the same half year. He did not specifically plead S. 93 (4) but there can be no doubt that his reference to this payment indicated quite clearly that he was not liable for any further payment. His appeal was summarily dismissed without any attempt to arrive at any findings on the questions raised by the plaintiff. Although S. 93 (4) was not open to the plaintiff when he was first called upon to make a return of his income, it was certainly open to him at the time the assessment order was served, but since the prior payment had not been notified to the Devakottai Municipality the assessment order cannot be criticised on that ground. The learned Munsif has referred in his judgment to the fact that the plaintiff's income-tax papers were also produced before the Municipal Council at the time of his appeal so that there was ample material on which the council could and should have found that the source of the plaintiff's income lay entirely outside the municipality and that he had already paid profession tax elsewhere. The refusal of his appeal under the circumstances was a purely arbitrary proceeding which cannot now be defended.

The only ground which has been urged against the plaintiff is that S. 354 is a bar to his suit, but the argument overlooks the proviso to sub-s. (2). The refusal of the Municipal Council to grant him relief in respect of the double taxation is clearly outside the provisions of the Act. In the result the petition is allowed, the dismissal of the suit is set

aside and the suit decreed for the plaintiff with costs throughout.

C.R.K./R.K. *Revision allowed.*

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* A. I. R. (29) 1942 Madras 662 (1)

LEACH C. J. AND LAKSHMANA RAO J.

Kuchibhotla Venkatasubba Rao — *Appellant*

v.

Chandanmal and another — *Respondents.*

Letters Patent Appeal No. 41 of 1941, Decided on 8th July 1942, against judgment and decree of Somayya J., *Reported in A.I.R. (29) 1942 Mad. 173.*

* Criminal P. C. (1398), S. 345 — Offence of cheating cannot be compounded without Court's leave even if no prosecution is launched — *A* executing pronote in consideration of payee not prosecuting *B* for cheating — Consideration for pronote is unlawful—Pronote cannot be enforced against *A* : (1941) 2 M.L.J. 827 =('42) 29 A. I. R. 1942 Mad. 173=201 I. C. 91, *REVERSED.*

Section 345 expressly prohibits the compounding of the offence of cheating without the leave of the Court. Notwithstanding that no prosecution is launched the offence remains and therefore cannot be compounded without Court's leave. Consequently, where *A* executes a pronote in consideration of the payee undertaking not to prosecute *B* who had committed a criminal offence such as cheating which could not be compounded without the Court's sanction, the consideration for the note so far as *A* is concerned is manifestly unlawful and therefore the promissory note cannot be enforced against him: (1941) 2 M. L. J. 827 = ('42) 29 A.I.R. 1942 Mad. 173=201 I. C. 91, *REVERSED.* [P 662*g*]

Cr. P. C. —

('41) Chitaley, S. 345, N. 12 Pt. 1a.

('41) Mitra, Page 1153, N. 998.

P. Somasundaram — for Appellant.

S. Srinivasachari and K. Bhimasankaram — for Respondents.

LEACH C. J. — This appeal must be allowed. Respondent 1 instituted a suit in the Court of the District Munsif of Bezwada to recover from the three defendants a sum of Rs.2086-14-6, which he claimed to be due on a promissory note, which the defendants had executed in his favour. The instrument was executed in these circumstances. Defendant 1 had borrowed monies from the plaintiff on the security of what were represented to be cases of maketable goods, namely, condensed milk and an ayurvedic medicine put up separately in bottles. The loan was not repaid and the plaintiff, as the pledgee, decided to sell them, which, of course, he had a right to do. The packages were opened for the purpose of sale and it was then found that they contained stones, husk, saw dust, waste paper, etc. A gross fraud had been committed by defendant 1 on the plaintiff and there can be no doubt that the fraud involved an offence of cheating punishable under S. 420, Penal Code. It is not surprising that when the fraud was discovered the plaintiff threatened to prosecute defendant 1. He was, however, induced to refrain from taking this step in consideration of defendants 2 and 3, who are relations of defendant 1 joining in the execution of the promissory note in suit. More than Rs. 2800 was due to the plaintiff but he agreed to accept this sum, of which Rs. 750 was paid in cash and a promissory note given for Rs. 2050. The District Munsif found that defendants 2 and 3 joined in signing the promissory note in order to stifle the threatened prosecution and the finding was concurred in by the Subordinate Judge of Bezwada on appeal. Therefore the finding is not now open to question. When the plaintiff launched his suit defendants 2 and 3 pleaded that they were not liable as the consideration was unlawful. This defence was accepted by the District Munsif who passed a decree for the amount against defendant 1 alone. The District Munsif's decision was upheld by the Subordinate Judge. The plaintiff then appealed to this Court on the ground that the Courts below had erred in holding that the consideration so far as defendants 2 and 3 were concerned was unlawful. Their contentions were accepted by Somayya J. who heard the second appeal. Consequently the learned Judge decreed the suit against defendants 2 and 3 also. Defendant 3 has now appealed under Cl. 15, Letters Patent, the learned Judge having given the necessary certificate.

Section 345, Criminal P. C., states what offences are compoundable. Some of them are compoundable without the leave of the Court and the others can only be compounded with the sanction of the Court. The offences which are not mentioned in the section cannot be compounded under any circumstances. The offence of cheating falls within the list of offences which are compoundable with the leave of the Court. Sub-section (7) states that no offence shall be compounded except as provided by the section. Section 213, Penal Code, makes it a punishable offence to accept a gratification or the restitution of property in consideration of his not proceeding against a person for the purpose of bringing him to legal punishment and S. 214 makes it an offence to "offer" a gratification in such circumstances. The basis of the decision of Somayya J. is that no criminal proceedings had been instituted. He considered that in these circumstances the parties were at liberty to compound. This is contrary to the provisions of S. 345, Criminal P. C., which expressly prohibits the compounding of the offence of cheating without the leave of the Court. Notwithstanding that no prosecution is launched the offence remains. What defendants 2 and 3 did was to execute a negotiable instrument in consideration of the payee undertaking not to prosecute a person who had committed a criminal offence which could not be compounded without the Court's sanction. The consideration for the note so far as defendants 2 and 3 were concerned was manifestly unlawful and therefore the promissory note cannot be enforced against them. It follows that the appeal will be allowed with costs throughout against the plaintiff respondent. Only defendant 3 has appealed but his success means that the suit will be dismissed as against defendant 2 as well.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 662 (2)

PATANJALI SASTRI J.

Muthal Achi — Petitioner

v.

Doraisami Pillai and another — *Respondents.*

Civil Revn. Petn. No. 573 of 1940, Decided on 23rd March 1942, to revise decree of Sub-Judge, Devakottah, D/- 10th October 1939.

Madras Agriculturists Relief Act (4 of 1938), S. 4 (h)—Female assignee from male assignor is entitled to exemption.

It cannot be said that a woman is not entitled to claim the exemption under S. 4 (h) merely because her assignor a male was not entitled to such exemption. Having taken the assignment she becomes the owner of the debt and when she claims the benefit of the exemption provided by the Act for woman creditors, it is no answer to say that the original payee under the suit note was a male.

[P 663*b*]

T. L. Venkatarama Ayyar — for Petitioner.

K. Vinayakam and T. R. Venkataraman — for Respondents.

ORDER. — The view taken by the lower Court that the plaintiff though a woman was not entitled to claim the exemption under S. 4 (h) of Act 4 of 1938, merely because her assignor a male was not entitled to such exemption is clearly unsupportable. Having taken the assignment the plaintiff became the owner of the debt and when she claims the benefit of the exemption provided by the Act for woman creditors, it is no answer to say that the original payee under the suit note was a male. Whether the plaintiff has fulfilled the other conditions necessary for the application of the provision has not been enquired into in the view taken by the lower Court. The decree of the Court below is therefore set aside and the case is remanded for enquiry and disposal according to law. Cost of this civil revision petition will abide and follow.

C.R.K./K.S. *Case remanded.*

A. I. R. (29) 1942 Madras 663

PATANJALI SASTRI J.

Saradambal Ammal and another — *Petitioners*

v.

T. C. Kuppusami Sastrigal — *Respondent.*

Civil Revn. Petn. No. 335 of 1941, Decided on 20th March 1942, to revise decree of Dist. Munsif, Mannargudi in S. C. S. No. 409 of 1940.

Limitation Act (1908), S. 21 (3) (b) — Pronote by mother as guardian of her minor sons — One son attaining majority — Payment by mother subsequently does not bind even other minor son.

Where a minor has separate guardians for his person and for his property an acknowledgment by the guardian of his person does not fall within S. 21 of the Act as there can be no such guardian in respect of a minor's interest in his joint family property, the only person who can bind him by a valid acknowledgment can be the manager. Where therefore a pronote is executed by the mother as guardian for her minor sons, any payment by her after the elder son has attained majority cannot bind even the remaining son, who is a minor : ('40) 27 A.I.R. 1940 Mad. 33 (F.B.), *Disting.*; 25 All. 407 (P.C.) and 30 Bom. 152, *Ref.* [P 663*f*, *g*, *h*; P 664*a*]

Limitation Act —

('42) Chitaley, S. 21, N. 3 Pt. 10; N. 20.

('38) Rustomji, Page 429 Pt. 8; Page 432 Pt. 4.

K. V. Ramachandra Ayyar — for Petitioners.

A. V. Viswanatha Sastri — for Respondent.

ORDER. — Two questions have been argued in this appeal : first, that the suit is barred by limitation so far as defendant 3 is concerned, and secondly, that the payments made have been wrongly appropriated by the lower Court towards interest though they were made towards principal and interest without any specific appropriation to principal or interest. The facts so far as they are material for the first question may be briefly stated. The promissory note on which the suit was brought was executed by defendant 1 on her own behalf and as the guardian of her minor sons defendants 2 and 3 who were members of an undivided Hindu family. Various payments were made by defendant 1 from time to time and endorsed on the note, and the last of such payments was on 9th October 1937. The suit was filed on 9th September 1940. Defendant 2 who was the elder attained majority in 1930, and it was held by the lower Court that payments subsequently made by defendant 1 could not bind him as valid acknowledgments or part payments and that accordingly the suit was barred by time as against him. But the Court held that as defendant 3 was still a minor, the payments by defendant 1 who was the guardian of her minor son was a valid acknowledgment and saved the suit from limitation as far as he was concerned. It is argued for the petitioner that this view is wrong as, after defendant 2 attained majority, he became the manager of the joint family and he alone was competent to make valid acknowledgments or part payments so as to bind defendant 3 and that defendant 1 had no authority to do so as the liability of defendant 3 was only in respect of his share of the joint family properties. It is well established law that in respect of a minor's interest in the joint family properties the manager of the family alone can bind the minor within certain well recognised limits, and that no guardian of property can be appointed or recognised : *see* 30 I.A. 165[1] at p. 170 and 30 Bom. 152.[2] It is therefore difficult to see how defendant 1 could by her acknowledgment or part payment bind defendant 3 after 1930.

Mr. Viswanatha Sastri for the respondent contended that S. 21, Limitation Act, specifically empowered lawful guardians of minors to make valid acknowledgments or part payments, and that inasmuch as the provision does not say that the lawful guardian must be the guardian of the minor's property the acknowledgment by defendant 1 who was the lawful guardian of defendant 3 must be held to be a valid acknowledgment. He placed reliance on the Full Bench decision reported in I. L. R. (1940) Mad. 358,[3] holding that for purposes of S. 21, the father or the mother alone can be the lawful guardian of a Hindu minor. I do not think that the decision has any application here as it dealt with a case of a minor having separate property of his own of which his grandmother claimed to be the guardian. Surely, where a minor has separate guardians for his person and for his property it cannot be said that an acknowledgment by the guardian of his person falls within S. 21 of the Act. The section clearly contemplates the guardian of the minor's property making acknowledgments on his behalf. If so, as there can be no such guar-

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1. ('03) 25 All. 407:30 I.A. 165 : 8 Sar. 483 (P.C.), Gharibullah v. Khalak Singh.
2. ('06) 30 Bom. 152 : 7 Bom. L. R. 809, Bindaji v. Mathurabai.
3. ('40) 27 A.I.R. 1940 Mad. 33:186 I.C. 749 I.L.R. (1940) Mad. 358 : (1939) 2 M. L. J. 884 (F. B.), Chennappa v. Onkarappa.

dian in respect of a minor's interest in his joint family property, the only person who can bind him by a valid acknowledgment can be the manager, and cl. (b) of sub-s. (3) of S. 21 makes provision for such cases. Mr. Viswanatha Sastri has not been able to bring to my notice a single case where a guardian's acknowledgment of liability has been held to bind a minor in respect of a liability enforceable against his interest in joint family properties. I therefore hold that defendant 1's payment after defendant 2 attained majority cannot operate to save the suit from limitation against defendant 3.

On the second question it is no doubt true that it has been held that mere payment towards principal and interest of a debt is not a payment specifically appropriated to either principal or interest. But on the facts of this case, the parties must be taken to have proceeded on the footing that the payments were to go in reduction of the interest so far as there was any interest due and the balance was to be applied towards the principal. On any other view no amount would remain outstanding after 1st October 1934 but payments still continued to be made and the creditor issued a demand Ex. C on 20th June 1935 calling upon defendant 1 to "pay balance of principal and interest remaining due after deducting the payments made." This conduct of the parties is consistent only with an intention that the payments were first to be appropriated towards the interest and the balance to the principal. The decision of the lower Court on this point is therefore right. The civil revision petition is allowed so far as petitioner 2 is concerned. He will have his costs here and below. As against petitioner 1 the civil revision petition is dismissed with costs.

C.R.K./R.K. *Revision allowed.*

A. I. R. (29) 1942 Madras 664 (1)

HORWILL J.

Ramachandra Rao, Municipal Health Officer, Vaniyambadi — Petitioner

v.

Chinnayya Goundan—Respondent.

Criminal Revn. No. 399 of 1941 (Criminal Revn. Petn. No. 378 of 1941), Decided on 31st October 1941, to revise order of Second Class Magistrate, Vaniyambadi, D/- 7th April 1941.

Criminal P. C. (1898), S. 197—Object—Complainant tying cow to tree — Municipal Health Officer coming to complainant, giving smack on neck and telling him that he had no business to tie his cow there — On protest by complainant Health Officer losing temper and giving further blows on cheeks and head—Health Officer held was acting as public servant when he interfered with complainant and struck him.

Section 197 is intended to protect public servants from frivolous complaints made while they are doing their duty as public servants. [P 664*g*]

The complainant alleged that the Municipal Health Officer came to him after the complainant had tied a cow to a tree, gave him a smack on the neck and told him that he had no business to tie his cow there. He said to the Health Officer that if he had been told that he should not tie his cow there, he would not have done so. The Health Officer thereupon lost his temper and gave him some further blows on the cheeks and on the head :

Held that the Health Officer was undoubtedly acting as a public servant when he interfered with the complainant and struck him. It was of course no part of the duty of the Health Officer to strike the complainant on his neck and face but it was because the complainant had done something which the Health Officer thought he ought not to have done, that the Health Officer interfered; although if the complainant's story was true, he exceeded his duty. [P 664*g*]

Cr. P. C. —

('41) Chitaley, S. 197, N. 2 Pt. 3.
('41) Mitra, Page 686, N. 644.

J. Krishnamurthy — for Petitioner.

Public Prosecutor — for the Crown.

ORDER.—One Chinnayya Goundan filed a complaint in the Court of the Second Class Magistrate of Vaniyambadi to the effect that the Municipal Health Officer came to him after the complainant had tied a cow to a tree, gave him a smack on the neck, and told him that he had no business to tie his cow there. He said to the Health Officer that if he had been told that he should not tie his cow there, he would not have done so. The Health Officer thereupon lost his temper and gave him some further blows on the cheeks and on the head. The Health Officer raised a preliminary objection that the Magistrate could not entertain this complaint in the absence of the sanction of the Local Government. The Magistrate, in a considered order, held that the act of the Health Officer could not be said to be one that was done by the petitioner in the exercise of his official duty, and so dismissed the application.

It is of course true that it was no part of the duty of the petitioner to strike the complainant on his neck and face; but the question is whether, in the words of S. 197, Criminal P. C., the Health Officer purported to act in the discharge of his official duty. It was not the case of the complainant that the Health Officer bore any personal animosity against him; it was because the complainant had done something which the Health Officer thought he ought not to have done, that the Health Officer interfered; although if the complainant's story is true, he exceeded his duty. It is of course no part of the duty of any person to commit an offence, but it is clear that S. 197, Criminal P. C., is intended to protect public servants from frivolous complaints made while they are doing their duty as public servants. The petitioner was undoubtedly acting as a public servant when he interfered with the complainant and struck him. I therefore find that the sanction of the Local Government was necessary before this complaint could be filed. The petition is therefore allowed, the proceedings in the Sub-Magistrate's Court are set aside and the Sub-Magistrate is ordered to return the complaint to the complainant. It is of course open to the complainant to re-present the complaint after he has obtained sanction.

C.R.K./G.N. *Petition allowed.*

A. I. R. (29) 1942 Madras 664 (2)

HORWILL J.

In re Tentu Appalaswamy — Petitioner.

Criminal Revn. No. 258 of 1942 (Criminal Revn. Petn. No. 244 of 1942), Decided on 1st July 1942, to revise judgment of Court of Session, West Godavari Division at Ellore, D/- 27th January 1942.

(a) Defence of India Act (1939), S. 2, Rules under—Literature of virulent nature — Possession simpliciter is liable to heavy punishment under rules.

Possession simpliciter of objectionable literature of virulent nature is liable to a heavy sentence under the Defence of India Rules. [P 665*c*]

(b) Defence of India Act (1939), S. 2, Rules under — Sentence — Offence under rules—Accused member of communist party—Court cannot take into account changed attitude of party to Government and of Government towards party—It is matter for executive and not Court.

In dealing with the case of a person who is charged with an offence under the Defence of India Rules and is a member of communist party the Court cannot take into account the changed attitude of the communist party towards the Government and Government's attitude to the communist party. That is a matter for the consideration of the executive rather than of the Court. [P 665*c*]

M. Appa Rao — for Petitioner.

N. Somasundaram for Public Prosecutor — for the Crown.

ORDER. — This revision case was admitted because neither the trial Magistrate nor the Sessions Judge in appeal indicated in any way the nature of the documents that were the subject of the charge and it was therefore impossible to judge whether the sentence imposed was reasonable or otherwise. After going through the various exhibits it is clear that literature found in the possession of the petitioner was of a particularly virulent nature, especially Ex. C-1. It is argued that as only mere possession has been proved and there was no indication that the petitioner owned that literature or disseminated seditious views, the sentence is excessive. Possession simpliciter is however liable to a heavy sentence under the Defence of India Rules, and the manuscript Ex. D indicates that the literature found was intended to be disseminated. The sentence which has been considered reasonable by the two Courts below cannot, therefore, in any view of the matter be deemed to be excessive. I find no cause for interference.

I have been asked to take into account the changed attitude of the communist party, of which the petitioner was a member, towards the Government and the Government's attitude to the communist party. That seems to me, however, a matter for the consideration of the executive rather than of the Court. The petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 665

ABDUR RAHMAN AND SOMAYYA JJ.

K. T. M. Ahmed Kasim Sahib — *Appellant*

v.

Land Acquisition Officer (Sub-Collector) Ramnad Division—*Respondent.*

Appeal No. 147 of 1940, Decided on 11th March 1942, against decree of Sub-Judge, Ramnad at Madura, D/- 18th April 1939.

Land Acquisition Act (1894), S. 15—Sale deed executed shortly after notification for acquisition admitted with Government counsel's consent — Its admissibility cannot be questioned—Even otherwise, it is admissible and can be taken into consideration under S. 15.

When a sale deed executed shortly after the notification for acquisition was issued by the Government was admitted with the consent of the counsel for the Government and without any objection, its admissibility cannot be questioned on the ground that it came into existence after the notification was issued by the Government. But even otherwise, there is no reason why a transaction which came into existence shortly after the notification should not be admitted in evidence and taken into consideration when there is nothing to suggest that it was brought about with the object of supporting the claim regarding the value of the land. When the agreement to sell was entered into and the earnest money was paid by the vendee before the notification although the sale deed was executed a day after and registered five days later, the sale deed is not only relevant but good evidence of the market value of the land on the date on which the notification was issued: ('33) 20 A. I. R. 1933 Bom. 361, *Rel. on.* [P 666*b*, *c*]

K. Bhashyam Ayyangar and T. R. Srinivasan — for Appellant.

The Government Pleader — for Respondent.

ABDUR RAHMAN J. — A notification was issued under the Land Acquisition Act for the acquisition of a strip of land of 861 sq. ft. in the area situate at the junction of the bazaar and the railway feeder roads at Ramnad. This plot belonged to the appellant. Eleven small shops were in existence on the strip of land at the time when the notification was issued. Having regard to the income that was being got by the appellant from them he put forward a claim for Rs. 17-8-0 per sq. ft. The land acquisition authorities however came to the conclusion that a rupee per sq. ft. would be enough for this land and an award was made at that rate. Not being satisfied with the order, the appellant applied to the Subordinate Judge of Ramnad at Madura and again repeated his claim for Rs. 17-8-0 per sq. ft. The Subordinate Judge agreed with the land acquisition authorities and rejected his claim. He has now come up in appeal.

After hearing learned counsel for the parties there is not much room for doubt that the award of the Sub-Collector was unreasonably low and the Court does not seem to have paid sufficient attention to the materials on the record. Even from Ex. K which was the report of the Revenue Inspector made in connexion with the land acquisition proceedings of this very plot it would be clear that on an examination of the various transactions which have been referred to by him in the report, he was of the view that Rs. 7-11-5 per sq. ft. would be the average value for a plot situate in the same locality. This report was before the Collector and no sufficient reasons were given by the Sub-Collector or by the tahsildar for disregarding the estimate of the value suggested by the Revenue Inspector on 30th June 1936. It is admitted in this report that the site acquired was situated in the busiest part of the whole town. The Revenue Inspector was examined as a witness on behalf of the Government and affirmed the contents of Ex. K in his examination in chief itself. Nothing has been brought out either in his statement or in the statement of the other witnesses examined on behalf of the Government which would detract from the value of his evidence on that point.

Reliance was placed on behalf of the appellant on a number of other transactions between 1924 and 1929 in regard to plots marked IV, I, III, II, VII and VIII in the plan Ex. J. According to the

evidence tendered on his behalf the value of land in that locality appears to be ranging between Rs. 7 and Rs. 12 per sq. ft. There is no evidence on the record to show that the value of this type of property had gone down between 1929 and 1935 when the notification for acquisition was issued on behalf of the Government. In fact, a transaction embodied in a sale deed Ex. E executed on the very next day after the notification if read along with the statement of C.W. 3 about the valuation of the buildings situated on those sites would seem to indicate that the value of the sites in the plots numbered as VII and VIII in Ex. J was not less than Rs. 12 per sq. ft. The statement by this witness in regard to his capacity to form a correct estimate of the value of the sites or in respect of the value assessed by him both for the buildings erected on those sites and for the value of the sites was not challenged in cross-examination. If that evidence is accepted and we have no other option in the circumstances but to do so the estimate of the value given by him would compare very favourably with the value deduced from the documents referring to other transactions in the same locality between 1922 and 1929.

It was faintly suggested that the sale deed Ex. E might not be admissible in evidence as it came into existence a day after the notification was issued by the Government. We see, however, no reason to accept that suggestion. This document was first of all admitted with the consent of the counsel for the Government and without any objection. It could not therefore be allowed to be questioned on that ground. But even if it was, there is really no reason why a transaction which came into existence so shortly after the notification should not be admitted in evidence and taken into consideration. There is nothing to suggest that it was brought about with the object of supporting the claim made on behalf of the appellant. The recitals in this document show that the agreement to sell was entered into on 24th May 1935 when earnest money was paid by the vendee. This was before the notification although the sale deed was executed a day after and registered five days later. Had any objection been raised in regard to the relevancy of this document, evidence could have been adduced that the contract had been entered into on 24th May 1935. A document such as this is in our opinion not only relevant but good evidence of the market value of the land on the date on which the notification was issued and but for the fact that the land is situated at a little distance from the site acquired by the Government the value given in the document would have proved a very good guide to arrive at the value of the site acquired by the Government. Referring to the post notification transactions, Broomfield J. in 35 Bom. L. R. 763[1] observed as follows :

" Nevertheless I doubt if anything can be found in these authorities which would justify the conclusion that post notification transactions must necessarily be ignored altogether. All transactions must be relevant which can fairly be said to afford a fair criterion of the value of the property as at the date of the notification. If any considerable interval has elapsed the Court will naturally attach little or no value to subsequent sales just as transactions long prior to the notification will usually be discarded . . . . . But transactions only a month or two after the notification may sometimes perhaps have some value as evidence."

1. ('33) 20 A.I.R. 1933 Bom. 361 : 149 I. C. 271 : 35 Bom. L. R. 763, Assistant Development Officer, Trombay v. Tayaballi.

We find ourselves in respectful agreement with what fell from the learned Judge and hold that the sale deed Ex. E is admissible in evidence. In dealing with this property the learned Subordinate Judge considered the plot to be acquired as one situated on the feeder road. But he overlooked the very important fact which he had himself referred to at the beginning of his judgment that it was situate both on the Bazaar road and on the Feeder road. This enhances the value of the plot to be acquired, and the value of the other properties on the Bazaar road cannot therefore be omitted from consideration. Having regard to the value of the various properties dealt with under Ex. G, Ex. D, Ex. F, Ex. E, Ex. H and the transactions referred to by the revenue inspector in Ex. K and after making allowance for the exaggeration in regard to the undervaluation of the buildings in the statements of the witnesses for the claimant, we are on the whole of opinion that a sum of Rs. 7 per sq. ft. at least should have been allowed to the claimant in regard to the land acquired from him. To that extent the appeal must be accepted. The value of the land acquired would thus be enhanced by Rs. 6 per sq. ft. To this the usual compulsory solatium of 15 per cent. will be added. No objection was raised as to the value of the structure and that will remain the same. This amount will now be deposited following the directions given by the lower Court. As for the costs the claim of the appellant in the present appeal could not be regarded in any way to be extravagant and he would therefore get his full costs in this appeal. As for the costs in the lower Court we are of the opinion that in so far as the claim in that Court was exaggerated the parties should bear their own costs in that Court. Time for payment three months. The appellant is entitled to interest on the excess amount, awarded by this judgment at six per cent. from the date when the Government took possession.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 666

HORWILL J.

V. Balakrishna Naidu — Petitioner

v.

Mrs. B. Sakuntala Bai — Respondent.

Criminal Revn. No. 679 of 1941 (Criminal Revn. Petn. No. 638 of 1941), Decided on 10th December 1941, to revise order of Sub-Divisional Magistrate, Trichinopoly, D/- 27th March 1941.

(a) Criminal P. C. (1898), Ss. 488 and 439 — Finding that wife had proved cruelty against husband is of fact — When it is reasonable on evidence it will not be interfered with in revision.

A finding that the wife had proved cruelty against her husband being one of fact the High Court will not go behind it in revision when the finding is reasonable on the evidence. [P 667*h*]

Cr. P. C. —

('41) Chitaley, S. 439, N. 15 Pt. 1; S. 488, N. 34 Pt. 5.

('41) Mitra, Page 1435, N. 1210 and Page 1589, N. 1293.

(b) Criminal P.C.(1898), S. 488 (8)—Expression 'reside'— Meaning of — Husband and wife held last resided in Bangalore and not Trichinopoly.

The expression "reside" implies something more than "stay." It implies some intention to remain

a at a place and not merely to pay it a casual visit, intending shortly to move on to one's permanent residence : ('40) 27 A. I. R. 1940 Lah. 449, *Rel. on.* [P 667*h*; P 668*a*]

The husband was an Assistant Engineer in the Mysore State for nine years. He then took service with the Ceylon Government; but after some time gave up that post because his wife refused to live with him there. He then returned to his old post in Mysore and rented a house in Bangalore. Although he and his wife had not been getting on well for many years, she consented to come and live with him in Bangalore after panchayatdars had mediated between them. She had been there for about two months, when both the husband and wife went to Ceylon for a short visit. On their return from this short visit to Ceylon, they halted at Trichinopoly
b where both the brother of the husband and the wife's father lived, and went to stay in the house of husband's brother. During the four days they remained there, the husband illtreated his wife and drove her out of the house and returned to his duties in Mysore State. As a result of what happened in Trichinopoly, the wife brought an application for maintenance in the Court of Magistrate at Trichinopoly :

Held that the husband had made Bangalore his home before he visited Trichinopoly and intended to continue to reside there. His visit to Trichinopoly was clearly a casual one, in order that the parties might see their relatives on their way from Ceylon to Bangalore. The residence of husband at the time when he illtreated his wife was therefore Bangalore and not Trichinopoly; and that was where the hus-
c band last resided with his wife at the time when the application for maintenance was filed. The Magistrate at Trichinopoly therefore had no jurisdiction to entertain the petition : 1935 M. W. N. 475, *Disting.* [P 668*b*,*c*]

Cr. P. C. —

('41) Chitaley, S. 488, N. 28 Pts. 3 and 7.

('41) Mitra, Pages 1581 and 1582, N. 1288.

(c) Criminal P. C. (1898), S. 488 (8) — Person can be taken to reside at place even if he lives in rented house.

A person who follows a profession must necessarily have some place of residence in which he can keep his wife and family and store his furniture and goods and to which he can return when he is not on tour. He can as well be said to reside in a rented
d house as in a house of which he is the owner. A person, therefore, can be taken to reside at a place even if he lives in a rented house. [P 668*b*]

Cr. P. C. —

('41) Chitaley, S. 488, N. 28 Pt. 5.

('41) Mitra, Page 1582, N. 1288.

(d) Criminal P. C. (1898), S. 531 — S. 531 applies only to inquiries in British India—It does not condone enquiry by British Indian Court when no British Indian Court would have jurisdiction—Bangalore Courts are foreign Courts.

Section 531 is naturally intended to apply only to inquiries in British India; for the Criminal Procedure Code applies only to British India. Section 531 does not condone the wrongful exercise of jurisdiction by a British Indian Court when no British Indian Court would have jurisdiction in the matter. If it were otherwise, a person by instituting a proceeding in a British Indian Court might obtain a remedy that was not open to him in the Court having jurisdiction : 16 Cal. 667, *Rel. on.* e [P 668*d*,*e*]

Bangalore is within the Mysore State and so the Bangalore Courts even those in civil and military station are foreign Courts. Therefore where a Magistrate in British India tries a case which is triable only by a Court in the Mysore State, S. 531 will not cure the defect in jurisdiction of the Magistrate in British India. [P 668*e*]

Cr. P. C. —

('41) Chitaley, S. 531, N. 5 Pt. 5.

('41) Mitra, Page 1749, N. 1401 : "Other local area."

A. Viswanatha Iyer — for Petitioner.

K. G. Srinivasa Ayyar — for Respondent.

K. Venkataraghavachariar — for the Crown.

f ORDER. — The petitioner was an Assistant Engineer in the Mysore State for nine years. He then took service with the Ceylon Government; but after some time gave up that post because his wife (the petitioner in the lower Court) refused to live with him there. He then returned to his old post in Mysore and rented a house in the Bangalore Civil and Military Station. Although he and his wife had not been getting on well for many years, she consented to come and live with him in Bangalore after panchayatdars had mediated between them. She had been there for about two months, when the petitioner who had left her jewels in Ceylon because he apprehended that he would have to pay customs duty if he brought them back to India with him, persuaded his wife to accompany him back to Ceylon and wear the jewels; for by her so doing they could avoid paying duty on them. On their return from g this short visit to Ceylon, they halted at Trichinopoly, where both the brother of the petitioner and her father live, and went to stay in the house of the petitioner's brother. During the few days they remained there, the petitioner ill-treated his wife—the Magistrate finds — and drove her out of the house. She then went to her father's house. On the following day, the husband, with the help of some friends and servants, attempted to abduct her from her father's house ; but failing in their attempt, assaulted her. The petitioner then returned to his duties in the Mysore State. As a result of what happened in Trichinopoly the wife brought an application for maintenance in the Court of the Sub-divisional Magistrate at Trichinopoly. The Magistrate was satisfied that the wife had proved cruelty against her husband and that she was there- h fore entitled to separate maintenance. He awarded her Rs. 50 a month.

We cannot go behind the finding of fact of the Sub-divisional Magistrate, which is reasonable on the evidence ; and so Mr. Viswanatha Iyer has confined his arguments to the question of the jurisdiction of the Sub-divisional Magistrate of Trichinopoly to award maintenance under S. 488, Criminal P. C. Section 488, cl. (8) says that proceedings under that section "may be taken against any person in any district where he resides or is, or where he last resided with his wife . . . ." The question is whether during those four days in which the petitioner was staying at Trichinopoly, he was residing there with his wife ? I have been taken through the evidence of the husband and of the wife and there can be no doubt that the petitioner intended returning to his house in Bangalore with his wife and resuming his duties as Assistant Engineer in the Mysore State. The expression "reside" implies something

more than "stay." It is defined in the Oxford Dictionary as "to dwell permanently or for a considerable time ; to have one's settled or usual abode ; to live in or at a particular place." The word therefore implies some intention to remain at a place and not merely to pay it a casual visit, intending shortly to move on to one's permanent residence. This is the purport of the decision of a Bench of the Lahore High Court in A. I. R. 1940 Lah. 449.[1] The lower Court considered that the petitioner had no permanent place of residence ; for wherever the petitioner went in the Mysore State he lived in a rented house and it was in a rented house that he lived in Bangalore. The learned Magistrate concluded that as the petitioner had no permanent place of residence, he must be deemed to have resided wherever he stayed. He stayed last at Trichinopoly ; and so last resided in that town. The Magistrate's reasoning cannot however be accepted. A person who follows a profession must necessarily have some place of residence in which he can keep his wife and family and store his furniture and goods and to which he can return when he is not on tour. He can as well be said to reside in a rented house as in a house of which he is the owner. There can be little doubt that the petitioner had made Bangalore his home before he visited Trichinopoly and intended to continue to reside there. His visit to Trichinopoly was clearly a causal one, in order that the parties might see their relatives on their way from Ceylon to Banglore. The residence of the petitioner at the time when he illtreated his wife was therefore Bangalore and not Trichinopoly; and that was where the petitioner last resided with his wife at the time when the application for maintenance was filed.

I have been referred to a decision of Burn J. in 1935 M. W. N. 475[2] in a case something like the present one. The husband in that case had his work in a place other than that in which the enquiry took place; but there were important circumstances then existing which are not to be found in this one which led Burn J. to hold that the husband was residing in the town he visited. The husband's native place was Trichinopoly ; he had two houses and lands there, and he used to visit that town whenever he had sufficient leave. He had left his wife in Trichinopoly at her father's house and he went there and stayed with her for some days. The present petitioner's ancestral house is in Mysore and he has no house or other property in Trichinopoly. The Magistrate therefore had no jurisdiction to try this case ; but the learned Magistrate seems to have thought that even if that were so, the lack of jurisdiction would not nullify his order. He quoted S. 531, Criminal P. C., which says that :

"No order of any Criminal Court shall be set aside merely on the ground .... that the proceeding in the course of which it was arrived at .... took place in a wrong sessions division district, sub-division, or other local area, unless it appears that such error has in fact occasioned a failure of justice."

I agree that in this case there was no failure of justice ; but S. 531 is naturally intended to apply only to inquiries in British India; for the Criminal Procedure Code applies only to British India. It certainly does not condone the wrongful exercise of jurisdiction by a British Indian Court when no British Indian Court would have jurisdiction in the matter. If it were otherwise, a person, by instituting a proceeding in a British Indian Court might obtain a remedy that was not open to him in the Court having jurisdiction. If authority for this position be necessary, it is found in 16 Cal. 667.[3] Bangalore is within the Mysore State and so the Bangalore Courts—even those in the Civil and Military Station—are foreign Courts. Section 531, Criminal P. C., will therefore not cure any defect in jurisdiction in the Sub-divisional Magistrate who passed this order. The order of the Magistrate is therefore set aside as one without jurisdiction.

C.R.K./G.N. *Order set aside.*

1. ('40) 27 A. I. R. 1940 Lah. 449 : 191 I. C. 203 : 42 Cr. L. J. 105 : I. L. R. (1940) Lah. 755 : 42 P. L. R. 470, Charan Das v. Mt. Surasti Bai.
2. ('35) 1935 M. W. N. 475, Krishnasami Iyer v. Subbulakshmi Ammal.
3. ('89) 16 Cal. 667, Bichitrachand Das v. Bhubut Perai.

A. I. R. (29) 1942 Madras 668

HORWILL J.

In re Valavala Pattabhiramayya — Petitioner.

Criminal Revn. No. 534 of 1941 (Criminal Revn. Petn. No. 503 of 1941), Decided on 10th October 1941, to revise judgment of Joint Magistrate, Narasapur, D/- 23rd June 1941.

(a) Criminal P. C. (1898), Ss. 428 and 540 — Power of appellate Court to make enquiry to take additional evidence—In view of allegations in grounds of appeal appellate Court summoning trial Magistrate and recording evidence from him as to circumstances under which judgment was delivered—Magistrate's evidence held was not evidence contemplated by S. 428—But appellate Court held had power to enquire by report or otherwise what transpired in Magistrate's Court — Appellate Court's enquiry from Magistrate held not wrong.

In the grounds of appeal it was alleged that when the Magistrate pronounced judgment he said that the accused had been sentenced to a fine of Rs. 100 and to three months simple imprisonment in default and that on the following day he recalled the accused and told him that he had been sentenced to three months rigorous imprisonment also. In view of this allegation the appellate Court summoned the Magistrate and recorded the evidence from him as to the circumstances under which the judgment was delivered :

Held, that the evidence of the Magistrate could not be regarded as evidence contemplated by S. 428 but it was certainly open to the appellate Court to ascertain by report or otherwise what transpired in the Magistrate's Court; for it was necessary for it to do so in order to properly dispose of the appeal before it. There was therefore nothing wrong in the appellate Court's enquiring what procedure had been adopted in the trial Court. [P 669c,d]

Cr. P. C. —

('41) Chitaley, S. 428 N 6; S. 540 N. 9 Pt. 2.
('41) Mitra, Page 1371 N 1157; Page 1771 N 1412.

(b) Criminal P. C. (1898), Ss. 366 and 367 — Pronouncement not in accord with signed judgment is not pronouncement of judgment and has no validity.

It is necessary for a Magistrate to write a judgment and to pronounce that judgment. A pronouncement that is not in accord with the signed judgment is not a pronouncement of the judgment and has no validity. [P 669d]

Cr. P. C. —
('41) Chitaley, S. 537 N. 12.
('41) Mitra, Page 1209 N 1044.

(c) Criminal P. C. (1898), S. 439—Concurrent findings that evidence of witness was not true must be accepted as correct in revision.

The concurrent findings of fact by the lower Courts that the evidence of a witness was not true must be accepted as correct by the High Court in revision. [P 669*e*]

Cr. P. C. —
('41) Chitaley, S. 439 N. 15 Pt. 2.
('41) Mitra, Page 1435 N. 1210.

G. Gopalaswami — for Petitioner.

Public Prosecutor — for the Crown.

ORDER. — The Stationary Sub-Magistrate of Narasapur found the petitioner guilty of an offence punishable under S. 325, Penal Code, and sentenced him to three months rigorous imprisonment and to a fine of Rs. 100 with a further three months imprisonment in default. That conviction and the sentence were confirmed in appeal. It was alleged in the grounds of appeal that when the Sub-Magistrate pronounced judgment he said that the accused had been sentenced to a fine of Rs. 100 and to a term of three months simple imprisonment in default and that on the following day he recalled the accused and told him that he had been sentenced to three months rigorous imprisonment also. In view of the nature of this allegation, the appellate Magistrate summoned the Sub-Magistrate and recorded evidence from him as to the circumstances under which the judgment was delivered. I agree with the learned advocate for the petitioner that this evidence cannot be regarded as evidence contemplated by S. 428, Criminal P. C.; but it was certainly open to the appellate Magistrate to ascertain by report or otherwise what transpired in the Magistrate's Court; for it was necessary for, him to do so in order to properly dispose of the appeal before him. Every Court has an inherent power to put on record an account of the procedure adopted by it. Even if the appellate Court had had no power of summoning the Sub-Magistrate, the Sub-Magistrate was entitled to put on record what he did and the appellate Magistrate was entitled to ask him to do so and to examine that record to ascertain what procedure had been adopted. Moreover, S. 540, Criminal P. C., gives very wide power to all Courts at any stage in any proceeding to examine witnesses if such evidence appears to be necessary for a just decision of the case. There was therefore nothing wrong in the Sub-Divisional Magistrate's enquiring what procedure had been adopted in the trial Court.

It is next argued that a Magistrate who makes a slip in pronouncing judgment cannot correct it and that the only remedy is to get the conviction and sentence set aside and a fresh trial ordered. It would be an absurd anomaly if that were so. Fortunately, it is not. It is necessary for the Magistrate to write a judgment and to pronounce that judgment. A pronouncement that is not in accord with the signed judgment is not a pronouncement of the judgment and has no validity. The learned advocate for the petitioner has half-heartedly suggested that the Magistrate was not speaking the truth. I should be sorry to think that he was not. The manuscript copy of the judgment shows that the accused was sentenced to three months rigorous imprisonment and to a fine of Rs. 100 with three months imprisonment in default. As there was twice mention of three months imprisonment, the Magistrate may easily have inadvertently omitted to mention one of them. He also points out in his judgment the necessity for a deterrent sentence; but a fine of Rs. 100 is certainly not a deterrent sentence for an offence which is punishable with seven years rigorous imprisonment. I find no reason to suspect that the judgment on record is not the judgment originally written by the Sub-Magistrate. The last point made on behalf of the petitioner is that the doctor who first examined the complainant has given evidence for the accused and deposed that the complainant told him that he had sustained the fracture of his arm by a fall. Both the Courts disbelieved the evidence of that witness for reasons given by them. There being concurrent findings on that point, this Court must accept them as correct. The petition is consequently dismissed.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 669

HORWILL J.

In re Govindan s/o Thimma Chetty — *Petitioner.*

Criminal Revn. No. 197 of 1942 (Criminal Revn. Petn. No. 184 of 1942), Decided on 9th July 1942, to revise order of Bench Magistrates, Wellington, D/- 18th December 1941.

(a) Criminal P. C. (1898), S. 263—Summary trial—Magistrate should give brief statement of reasons for convicting accused—That would necessitate short summary of prosecution evidence—If there be defence evidence Magistrate should also give reasons for preferring evidence of prosecution to that of defence.

Although in a summary trial it is not necessary for the Magistrates to record what the prosecution witnesses actually said, it is necessary for him in convicting the accused to give a brief statement of the reasons. A brief statement of his reasons would necessitate at least a short summary of what the prosecution witnesses had said, so as to indicate that the evidence had made out the case with which the accused had been charged, and also to indicate that the Magistrate had believed that evidence. If there is defence evidence, it would further be necessary for the Magistrate to say why he preferred the evidence of the prosecution to that of the defence. The Magistrates should also make it clear what the defence case was. [P 670*a*]

Cr. P. C.—
('41) Chitaley, S. 263 N. 7 Pts. 1-5a.
('41) Mitra, Page 952, N. 869.

(b) Penal Code (1860), S. 75—Previous convictions when can be acted upon.

A Magistrate can act on previous convictions only if they have been proved or if the accused has admitted them. [P 670*b*]

Penal Code.—
('36) Ratanlal, Page 136 Pts. 7, 8.
('36) Gour, Page 259 Pt. 3.

K. V. Ramaseshan — for Petitioner.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER.—The petitioner has been sentenced to pay a fine of Rs. 25 for an offence punishable under S. 118-I (a) (ii), Cantonment Act, of using threatening, abusive or insulting words; and he has also been bound over for a period of two years. As it was a summary trial it was not necessary that the

Magistrates should record what the prosecution witnesses actually said; but it was necessary in convicting him to give a brief statement of the reasons. It can hardly be said that the Magistrates have done that. All they have said is "We have heard both sides at length and unanimously . . . . convict Govindan (Petitioner)." A brief statement of their reasons would necessitate at least a short summary of what the prosecution witnesses had said, so as to indicate that the evidence had made out the case with which the accused had been charged, and also an indication that the Magistrates had believed that evidence. If there was defence evidence, it would further perhaps be necessary to say why they preferred the evidence of the prosecution to that of the defence. The Magistrates have also not made it clear what the petitioner's case was, except to say that he admitted that there was quarrelling.

It is also not clear how the Magistrates came to the conclusion that the petitioner had been previously convicted; for he denies this. The Magistrates could act on previous convictions only if they had been proved or if the accused had admitted them. The last two sentences in the order under S. 106, Criminal P. C., rather suggest that the police had asserted from the Bar that the accused had been previously convicted, rather than that the accused himself admitted it. As in addition to the fine—which is not unreasonable—the accused has been bound over for a long period with very substantial sureties, I think that this case should be tried again. The conviction and sentence and the order under S. 106 are therefore set aside and a retrial ordered.

C.R.K./G.N. *Retrial ordered.*

A. I. R. (29) 1942 Madras 670

LEACH C. J. AND BYERS J.

P. K. Subramania Ayyar — Appellant

v.

K. T. S. Thandavamurthi Chetty — Respondent.

Appeal No. 6 of 1942, Decided on 20th March 1942, from judgment and decree of Krishnaswami Ayyangar J., in Appln. No. 2941 of 1941, Dated 5th December 1941.

Receiver — *S* by will bequeathed house X to his son *N* and house Y to his minor son *R* — *N* taking possession of both properties—*R's* estate vesting in Official Trustee—Suit by Official trustee on behalf of *R* on basis of *S's* will or for *R's* share by partition—Official Trustee appointed receiver in suit—Property X sold by Court's order to satisfy mortgage created by *N* over it and proceeds paid into Court to credit of suit—*A* suing *N* for specific performance of agreement by *N* to execute mortgage of property X in his favour — Official trustee as receiver not impleaded—*A* granted money decree for amount advanced by him and charge over sale proceeds of X property to extent of decretal amount—In Official Trustee's suit will found valid and *R* held entitled to property Y with mesne profits—Application by Official Trustee as decree-holder for attachment of balance of sale proceeds of property X — *A* held entitled to enforce his charge under decree passed by competent Court — Appointment of Official Trustee as receiver held did not give *R* a charge.

S bequeathed by will house X to his son *N* and house Y to his minor son *R* in 1931. *R's* estate was vested in the Official Trustee of Madras in 1936 and as the guardian of *R's* property he obtained probate of *R's* father's will. *N* had taken possession of both the properties and the Official Trustee filed suit in 1937 to recover possession of the minor's interest in his father's estate on the basis of the will and if the same was found invalid by partition of the father's estate. The Court appointed the Official Trustee the receiver in the suit. It transpired that after his father's death *N* had created a mortgage on the property X left to him. By an order of the Court this property was sold and the mortgage discharged out of the proceeds. There remained a balance of Rs. 1927-5-3 which was paid into Court to the credit of the suit. On 17th February 1938, *A* instituted a suit against *N* without impleading the Official Trustee or receiver for a decree for specific performance of an agreement to execute in his favour a mortgage of X property alleging that he had advanced monies to *N* in anticipation of the mortgage. In the alternative he asked for a charge on the property X to the amount of *N's* indebtedness to him. On 8th August 1938 *A* applied for an attachment before judgment of the Rs. 1927-5-3 lying to the credit of the Official Trustee's suit. The attachment remained effective until 27th July 1939. On 9th January 1939 *A* was granted a money decree for Rs. 760 and a charge on property X to the extent of the decretal amount. The property X having been sold to discharge the mortgage over it the charge could operate only on the balance lying in Court to the credit of the Official Trustee's suit. On 26th January 1940 in Official Trustee's suit the will was found to be valid and *R* was held entitled to property Y with mesne profits from the date on which *N* took possession. The Official Trustee as decree-holder applied for attachment of the balance of the sale proceeds of the property X lying in Court to the credit of the suit filed by him. *A* resisted the claim of the Official Trustee relying upon the charge created in his favour by the decree obtained by him against *N* but his contention was rejected on the ground that the decree creating the charge was invalid against the Official Trustee as receiver:

Held that *A* was granted a charge in a decree passed by a competent Court of jurisdiction and since that decree stood the Official Trustee as representing *R* was not entitled to priority. The appointment of the Official Trustee as receiver did not give *R* a charge. [P 672*b*,*c*]

K. Rajah Ayyar for M. Ramachandran — for Appellant.

R. Thirumalaithathachariar — for Respondent.

LEACH C. J. — The question here is whether a decree passed by the City Civil Court declaring that the appellant is entitled to a charge over the proceeds of the sale of property belonging to one Natesa is effective as against the respondent, who is Natesa's brother. In 1931 Sabapathi Chetti, the father of Natesa and the respondent, died leaving a will dated 15th October 1931 by which he bequeathed to Natesa a house known as 2/46, Erulappan Street, Madras and to the respondent a house known as 17 Kumarappa Mudali Street. The respondent was then a boy of about ten years of age. On 28th October 1936 the estate of the minor was vested in the Official Trustee of Madras and as the guardian of the respondent's property he obtained probate of the father's will. Natesa had taken possession of both the properties and the Official Trustee

was compelled to file a suit (No. 79 of 1937) on the Original Side of this Court to recover possession of the minor's interest in his father's estate. The official trustee based his case on two grounds. In the first place he contended that the respondent was entitled to the property representing No. 17 Kumarappa Mudali Street, by reason of the will. In the second place he said that even if the will were invalid, the respondent was entitled to have the properties partitioned and his share delivered to him. The Court appointed the Official Trustee the receiver in the suit. It transpired that after his father's death Natesa had created a mortgage on the property left to him. By an order of the Court this property was sold and the mortgage discharged out of the proceeds. There remained a balance of Rs. 1927-5-3, which was paid into Court to the credit of the suit. On 17th February 1938 the appellant instituted O. S. No. 244 of 1938 in the City Civil Court against Natesa for a decree for specific performance of an agreement to execute in his favour a mortgage of the Erulappan Street property. He averred that he had advanced monies to Natesa in anticipation of the mortgage. In the alternative he asked for a charge on the property to the amount of Natesa's indebtedness to him. On 8th August 1938 the appellant applied for an attachment before judgment of the Rs. 1927-5-3 lying to the credit of the Official Trustee's suit in this Court. The appellant had not received permission of this Court to apply for the attachment of these monies, and as for the time being they were vested in the Official Trustee in his capacity of receiver in C. S. No. 79 of 1937, the appellant's action amounted to contempt of Court, but his action was not resented and the attachment remained effective until 27th of July 1939.

On 9th January 1939 the appellant was granted a decree in his suit against Natesa. The Erulappan Street property had by this time been sold and therefore it was not possible for the Court to give a decree for specific performance of the mortgage, but it gave a money decree for Rs. 760 with interest and costs, and a charge on the property to the extent of the decretal amount. The property having been converted into money and part of the money spent in discharging the mortgage over the property the charge could only be effected, if at all, on the money lying to the credit of the Official Trustee's suit in this Court. In the meantime, namely on 18th August 1938, the Official Trustee as receiver applied for the payment out to him of the money in Court. On this application, Venkataramana Rao J. passed this order :

"The balance of the amount, deducting the amount of the attachment may be paid to the Official Trustee. I leave it to the Official Trustee whether he should contest the attachment."

The attachment referred to in this order was, of course, the attachment obtained by the appellant in the City Civil Court and it meant that the attachment was to remain effective to the extent of the appellant's claim against Natesa, unless the Official Trustee took steps to challenge it. The Official Trustee took no steps to challenge the attachment until the appellant applied to this Court for an order allowing him to withdraw sufficient of the money in Court to satisfy his decree against Natesa. When this application was made, the Official Trustee objected, and as a result of his objection the Master held that the attachment was invalid, because at the time it was made it had not been decided to whom the balance of the sale proceeds of the Erulappan Street property belonged. On 26th January 1940 Somayya J., gave judgment in the Official Trustee's suit. The learned Judge found the will to be valid and consequently held that the respondent was entitled to the Kumarappa Mudali Street property with mesne profits from the date on which Natesa took possession. As the result of investigation it was found that the respondent was entitled to a sum of Rs. 3150 by way of mesne profits. On 4th March 1941, the Official Trustee, as the decreeholder in C. S. No. 79 of 1937, applied for an order attaching the balance of the sale proceeds of the Erulappan Street property lying to the credit of the suit. It was then the appellant's turn to object. Relying on the charge which the City Civil Court had given him, he resisted the application of the Official Trustee and the Master held that his objection was well founded. The respondent appealed and Krishnaswami Ayyangar J. reversed the decision of the Master. The learned Judge considered that the decree of the City Civil Court was invalid as against the receiver in C. S. No. 79 of 1937, and on this ground he reversed the Master's order. This appeal is from the order of the learned Judge.

Mr. Rajah Ayyar on behalf of the appellant admits that his client was guilty of contempt in applying for the attachment of the monies which the Official Trustee as receiver was entitled to hold in C. S. No. 79 of 1937, but he pertinently points out that no complaint was ever made on this ground and that his client's action in applying for attachment does not affect his present case. He contends that his client was entitled, as against Natesa, to ask for a charge on Natesa's property or the monies realised by the sale without impleading the receiver, but even if he ought to have made the receiver a party, the fact that he did not do so does not mean that the decree passed by the City Civil Court can be regarded as a nullity. The receiver knew of the suit, but he did not seek to be made a party and at no time did he offer any objection to the reliefs which the appellant was seeking. When the Official Trustee himself applied for the attachment of the monies in Court after he had obtained a decree in his suit, he did so not as receiver, but as the Official Trustee. In 5 C. W. N. 27,[1] the Calcutta High Court held that a receiver is not a necessary party to a suit for possession of immovable property where the facts were these. The petitioners claimed to be the absolute owners and had been in possession as howladars of certain land in the district of Khulna. A receiver had been appointed to take charge of these lands but persons claiming adversely to the petitioners were in actual possession. The petitioners desired to bring a suit against those persons for possession and sought to join the receiver as a party. The Court held that the receiver was not a necessary party. In 9 M. L. T. 300,[2] Wallis J. followed this decision and referred to the case in (1843) 7 Beav. 357.[3] In the last mentioned case a receiver had been appointed in a suit in which the priority of different encumbrances on an estate was to be determined. A person who claimed to be the first incumbrancer had not been made a party to that suit and he filed a bill of his own to establish his right. It was held that the receiver was not a necessary party to his suit.

1. ('01) 5 C.W.N. 27, Kumar Satya Ghosal v. Rani Golap Moni Debi.
2. ('11) 9 M.L.T. 300 : 10 I.C. 673, Administrator-General v. Dasai Goundan.
3. (1843) 7 Beav. 357: 8 Jur. 479, Smith v. Earl of Effingham.

a The learned advocate for the respondent relies on the decisions in 14 C. W. N. 560,[4] 47 Mad. 47[5] and 44 M. L. J. 427.[6] In the first of these cases the Calcutta High Court held that the sale of a foreclosure decree without the leave of the Court while the estate was in the possession of a receiver was illegal and liable to be avoided. That case is no authority for the proposition that the decree of the City Civil Court passed in favour of the appellant is a nullity. Whether it could be set aside at the instance of the Official Trustee as such or as the receiver is of course, another matter. In 14 C. W. N. 653,[7] the Calcutta Hight Court held that where property in the hands of a receiver is intended to be affected by the result of the suit the receiver is a necessary party to the suit. Again we do not regard this as an authority for relieving the Official Trustee of the necessity of getting rid of the decree
b obtained by the appellant, if he wishes to secure for the benefit of the younger brother the monies which are in Court. In 47 Mad. 47,[5] the question was whether the Court should have made the receiver a party to certain execution proceedings and 44 M. L. J. 427[6] had reference to an assignment taken in good faith. In our opinion these cases also have no bearing on the question under discussion. It is not necessary for the Court to decide whether the Official Trustee as the receiver in his suit should have been made a party to the appellant's suit or what steps are open to him to take. As far as this appeal is concerned the governing factor is that the appellant was granted a charge in a decree passed by a competent Court of jurisdiction and that decree stands. In these circumstances, can it be said that the Official Trustee as representing the respondent
c is entitled to priority ? We think not. The appointment of the Official Trustee as receiver did not give the respondent a charge. The receiver was an officer of the Court appointed to hold the property in suit for the benefit of the person who could show a title to it. The respondent had no title to the monies in Court. They belonged to his elder brother, and when the Official Trustee was granted a decree the respondent had no greater rights than were conferred by the decree. The appellant was in a better position because a Court of competent jurisdiction had given him a charge over the monies. In these circumstances we consider that the decision of the Master should not have been disturbed. The appeal will be allowed with costs and the Official Trustee will be directed to redeposit the money into Court.

C.R.K./G.N. *Appeal allowed.*

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d **4.** ('10) 14 C.W.N. 560: 5 I.C. 390 : 11 C.L.J. 489, Mrs. Levina Ashton v. Madhabmoni Dasi.
5. ('23)10 A.I.R. 1923 Mad. 144: 71 I.C. 293 : 47Mad. 47 : 43 M.L.J. 211, Fraser v. Krishnaswami Iyer.
6. ('23) 10 A.I.R. 1923 Mad. 567 : 73 I.C. 456 : 44 M. L. J. 427, Kalyanasundaram Ayyar v. Narasimha Ayyangar.
7. ('10) 14 C.W.N. 653 : 6 I. C. 214, Jotindranath Chowdhry v. Sarfaraj Mia.

A. I. R. (29) 1942 Madras 672

HORWILL J.

Allipuram Subbiah — Petitioner

v.

Bojja Venkata Subbamma—Respondent.

Criminal Revn. No. 47 of 1942 (Criminal Revn. Petn. No. 43 of 1942), Decided on 26th March 1942, to revise judgment of Bench of Magistrates, Nellore Town, in S.C. No. 843 of 1941.

e **(a) Penal Code (1860), S. 504—Gross insult is not in itself offence — Object of section explained.**

An insult even if a gross one is not an offence in itself under S. 504. What is punished under this section is some thing very much graver than that. [P 673*a*]

The offence contemplated in the section is a serious one, as is indicated by the fact that it is made punishable with a term of two year's rigorous imprisonment. It is obviously intended to deal with persons who are as responsible for breaches of peace or the commission of offences as those who openly abet or incite them. [P 672*g*]

Penal Code —
('36) Ratanlal, Page 1260, Note "Object" ; Page 1261 Pt. 8.
('36) Gour, Page 1769, Para. 6314.

f **(b) Criminal P. C. (1898), S. 256 — Summary trial of warrant case — Omission to give facilities for further cross-examination by accused is grave one.**

In a summary trial of a warrant case, omission to give proper facilities to the accused for further cross-examination of the prosecution witnesses is a grave one. [P 673*b*]

Cr. P. C. —
('41) Chitaley, S. 537, N. 20.
('41) Mitra, Page 924, N. 837.

K. Umamaheswaram — for Petitioner.

K.R.Vepa for P. V. Rajamannar and K. Subba Rao — for Respondent.

N. Somasundaram for Public Prosecutor — for the Crown. g

ORDER. — The petitioner was convicted by the First Class Bench Magistrates' Court of Nellore Town of an offence punishable under S. 504, Penal Code and sentenced to pay a fine of Rs. 10 in default to a week's simple imprisonment. This case is a very good example of the way in which S. 504, Penal Code, is misused. The offence contemplated in S. 504 is a serious one, as is indicated by the fact that it is made punishable with a term of two years' rigorous imprisonment. It is obviously intended to deal with persons who are as responsible for breaches of peace or the commission of offences as those who openly abet or incite them. Despite this, S. 504, Penal Code, is being constantly used by Courts of summary jurisdiction and by the lower Magistracy to express their disapproval by the imposition of a fine of the use of bad language. I have h never seen in the numerous cases that have come before me any sentence more serious than a fine of a few rupees. The case under consideration illustrates the misuse of this section very well. The complaint against the accused was under S. 352, Penal Code, a petty offence that is punishable only upto three months' rigorous imprisonment. The Court disbelieved part of the prosecution case and found that the alleged assault was not true and that something less than an assault had taken place. The residuary offence, after taking away the greater part of this petty offence of assault, was a serious offence under S. 504, Penal Code, punishable with two years' rigorous imprisonment. That the learned Magistrates did not realise the nature of the offence punishable under S. 504, Penal Code, is made clear by the fact that they have nowhere discussed whether the insults of the petitioner were intended to provoke a breach of the peace or the commission of an offence, or whether the petitioner

knew that it was likely that such provocation would cause a breach of the peace. The Magistrates evidently thought that an insult— at any rate a gross insult — was an offence in itself. That is not so. What is punished under this section is something very much graver than that. The anomaly of the use of this section for the purpose of punishing filthy abuse is further indicated by the fact that to abuse a rowdy or a bad-tempered person who would be sure to respond with violence is much more likely to be an offence than to abuse a helpless woman.

Another indication that the Magistrates did not realise the nature of the offence with which the accused was charged is the procedure that they adopted. The offence punishable under S. 504 can be tried by the summary procedure ; but the rules laid down for the trial of warrant cases must be adopted, unless there are any rules under the summary procedure chapter which modify it. One essential of a warrant trial is that the accused persons should be required to state at the commencement of the next hearing of the case (i.e., a special adjournment has to be given for that purpose) whether he wishes to cross examine, and if so, which of the witnesses of the prosecution whose evidence has been taken. That too was not done in this case. It has been held that the omission to give proper facilities for further cross-examination is an illegality which vitiates the conviction. Although it is not necessary to go as far as some decisions have gone in this direction ; yet the omission is undoubtedly a grave one. That, coupled with the fact that learned Magistrates did not consider the essential ingredients of S. 504 makes it necessary to set aside the conviction and sentence. It is ordered accordingly. The fine, if paid, will be refunded.

C.R.K./K.S. *Conviction set aside.*

A. I. R. (29) 1942 Madras 673

WADSWORTH J.

Majety Satyanarayanamurthy — Petitioner

v.

Koduri Kanakaraju — Respondent.

Civil Revn. Petn. No. 1681 of 1940, Decided on 6th March 1942, to revise order of District Munsif, Rajahmundry, D/- 29th March 1940.

Madras Agriculturists Relief Act (4 of 1938), Ss. 9 and 8 — Suit by plaintiff for Rs. 232-11-0 being balance due under pronote dated 11th April 1937 for Rs. 415-7-3 and subsequent dealings—Indebtedness starting early in 1932 — By 1st October 1932 Rs. 327-15-6 advanced — Between 1st October 1932 and commencement of Act further advances amounting to Rupees 792-14-3 made — Whole of sums advanced before 1st October 1932 held must be deemed to have been discharged before Act came into force—Court held was concerned only with debt starting on 11th April 1937 to be scaled down under S. 9.

The plaintiff filed a suit for a sum of Rs. 232-11-0 being the balance due under a promissory note dated 11th April 1937 for Rs. 415-7-3 and subsequent dealings. The promissory note itself was a settlement in the account of dealings going back to 14th February 1932. The indebtedness started with dealings early in 1932 and by 1st October 1932 a sum of Rs. 327-15-6 had been advanced. Between 1st October 1932 and the commencement of the Act further advances amounting to Rs. 792-14-3 in all had been made:

Held that the fact that the principal amount due had by the time the Act came into force been reduced to a little more than the amount of principal outstanding on 1st October 1932 clearly indicated that the payments in reduction of principal must have amounted to far more than the principal sum outstanding as on 1st October 1932. Applying the general rule that payments towards principal will be deemed to have been appropriated first to the earliest advance, the whole of the sums advanced before 1st October 1932 must be deemed to have been discharged before the Act came into force. There could be no question therefore of scaling down the debt on the basis of renewals and taking it back to a debt anterior to 1st October 1932. Therefore, the Court was concerned only with the debt starting on 11th April 1937 to be scaled down under S. 9 of the Act. This debt must be regarded as one carrying interest at five per cent. and the payments made appropriated to principal and interest. [P 673*h*; P 674*a*]

B. V. Subramaniam — for Petitioner.

N. Gopalakrishnamachariar — for Respondent.

ORDER. — The present petitioner filed a small cause suit for a sum of Rs. 232-11-0 being the balance due under a promissory note dated 11th April 1937 for Rs. 415-7-3 and subsequent dealings. The promissory note itself was a settlement in the account of dealings going back to 14th February 1932. The Court trying the suit in the first instance dealt with it on the basis that it related to transactions subsequent to 1st October 1932 and that the debt was one to be scaled down under S. 9 and it pronounced that the plaintiff was entitled to recover interest at five per cent. down to 22nd March 1938 and at 6¼ per cent. subsequent to that date without expressly stating with effect from what date the interest would begin to run. The decree based on this judgment assumes that interest runs from the date of the settlement of 11th April 1937 and the calculation is made accordingly. After the decree had been drafted the defendant filed an application for the amendment of the decree under Ss. 151 and 152, Civil P. C., contending that interest should not be scaled down only with effect from the date of the settlement of 11th April 1937 but that it should be taken back right through the dealings to 14th February 1932. There were also minor contentions regarding costs and travelling expenses. The learned District Munsif instead of going into the question whether the decree was in accordance with the judgment, really proceeded to retry the whole case and by a process of calculation, which I find it very difficult to follow, has come to the conclusion that the plaintiff is entitled to a decree for Rs. 90 and not Rs. 211-15-0 as embodied in the previous decree. The judgment so far as the figures are concerned is obscure and it is not very profitable to try and ascertain how this figure has been reached. The solution seems to me to be perfectly plain on the material which has been put before me.

The indebtedness started with dealings early in 1932 and by 1st October 1932 a sum of Rs. 327-15-6 had been advanced. Between 1st October 1932 and the commencement of the Act further advances amounting to Rs. 792-14-3 in all had been made. The fact that the principal amount due had by this time been reduced to a little more than the amount of principal outstanding on 1st October 1932 clearly,

indicates that the payments in reduction of principal must have amounted to far more than the principal sum outstanding as on 1st October 1932. Applying the general rule that payments towards principal will be deemed to have been appropriated first to the earliest advance it seems to me that the whole of the sums advanced before 1st October 1932 must be deemed to have been discharged before the Act came into force. There can be no question therefore of scaling down this debt on the basis of renewals and taking it back to a debt anterior to 1st October 1932. It follows therefore that we are concerned only with the debt starting on 11th April 1937 to be scaled down under S. 9 of the Act. This debt must be regarded as one carrying interest at five per cent. and the payments made appropriated to principal and interest. Apparently, there were no specific appropriations made by the creditor or debtor before the plaint was filed. The suit as filed by the plaintiff seems, so far as I can gather, to have been correctly framed in so far as it relates to the amount due for principal and interest, scaling down the debt under S. 9 with reference to payments made. There was a correction made in the lower Court to revised decree in respect of a deduction for travelling expenses disallowed. That this correction was rightly made is not disputed and the further correction made with reference to the costs in the lower Court is also admitted to be justified. In other respects the alteration of the decree as originally passed seems to have no justification. The petition is therefore allowed with costs, and the order of the lower Court will be set aside except in so far as it recognises the defendant's rights to proportionate costs and corrects the deduction for travelling expenses to Rs. 12-1-0.

C.R.K./G.N. *Petition allowed.*

A. I. R. (29) 1942 Madras 674

HORWILL J.

Public Prosecutor — Petitioner

v.

Rajam Ammal — Respondent.

Criminal Revn. No. 231 of 1942 (Criminal Revn. Petn. No. 217 of 1942), Decided on 30th June 1942, to revise judgment of Court of Session, East Tanjore Division at Negapatam, D/- 30th January 1942.

(a) Madras Borstal Schools Act (4 of 1926), S. 2 — Applicability of Act to adolescent girls.

Adolescent girls cannot be sent to a Borstal School. [P 674*f*]

(b) Penal Code (1860), S. 75 — Scope of — S. 39, Madras Children's Act does not prohibit application of S. 75.

Section 75, Penal Code, does not impose any disqualification on persons with previous convictions. It only makes permissible a sentence which exceeds the normal sentence for an offence. Section 39, Madras Children Act, does not prohibit the taking into account of previous convictions under S. 75, Penal Code. [P 674*g*,*h*]

Penal Code —

('36) Ratanlal, Page 133, Note. "Object."

('36) Gour, Page 256, Para. 518.

N. Somasundaram — for Petitioner.

ORDER. — Rajam Ammal was convicted by the Sub-Divisional Magistrate of Mayavaram of an offence punishable under S. 380, Penal Code. She was a young woman of about 16 or 17 years of age at the time of her conviction. As she had had three previous convictions for which she had received three minor terms under the Children Act, the Magistrate realized that it would have been very desirable if Rajam could have been sent to a Borstal School; but he felt himself unable to pass an order to that effect because Borstal Schools are for boys only. He therefore sentenced her to nine months' rigorous imprisonment. In appeal, the learned Sessions Judge seemed to think that the fact that in practice Borstal Schools are only for boys should not be an impediment to the passing of an order by the Court that the girl should be committed to a Borstal School. He passed an order accordingly. When the Sessions Judge made the usual reference to the Government asking them to make arrangements for the custody of this girl in a Borstal School, the Government instructed the Public Prosecutor to file a criminal revision petition in this Court to have the order of the Sessions Judge revised on the ground that it was an illegal order.

Section 2, Borstal Schools Act, says that the Provincial Government may, by notification from time to time, apply the whole or any of the provisions of this Act to adolescent offenders or any class thereof in any local area in the Presidency of Madras .... Bye-law (General) Department Notification No. 64 dated 26th January 1927 published in p. 210 of Part I of the Fort St. George Gazette dated 1st February 1927 the Act was made applicable to adolescent offenders of the male sex. That means that Rajam cannot be ordered to be sent to a Borstal School. As adolescent girls cannot be sent to a Borstal School, some arrangement is presumably made in the women's jail at Vellore for segregating adolescent offenders from the hardened adult ones. In any event, that is a matter for the Government to arrange and the Court can only impose such sentences as it thinks proper and leave the Government to make such arrangements as are possible for the protection of adolescents.

The learned Sessions Judge further seemed to think that the three previous convictions of Rajam Ammal cannot be taken into account under S. 75, Penal Code, because he thought S. 39, Children Act, prohibited that. The scope of S. 39 is however not so extensive. It says that the conviction of a child or young person shall not be regarded as a conviction for the purposes of any disqualification attaching to a conviction for any offence. Section 75, Penal Code, does not impose any disqualification on persons with previous convictions. It only makes permissible a sentence which exceeds the normal sentence for an offence. However, this question does not directly arise here because an offence under S. 380, Penal Code, is punishable with seven years' rigorous imprisonment and the sentence imposed on Rajam is only nine months' rigorous imprisonment. I cannot think of any better sentence than that which the Sub-Divisional Magistrate imposed. A very short term would be out of place. It would not act as a deterrent and would not afford any opportunity for her education or for any corrective treatment to be applied, such as is possible when a prisoner is sentenced to a longer term. The sentence imposed by the Sessions Judge is therefore set aside and that imposed by the Sub-Divisional Magistrate restored.

C.R.K./K.S. *Order accordingly.*

A. I. R. (29) 1942 Madras 675 (1)

HORWILL J.

A. R. Palanisami Gounder—*Petitioner*

v.

Bagavati Gounder — *Respondent.*

Criminal Revn. No. 915 of 1941 (Criminal Revn. Petn. No. 861 of 1941), Decided on 12th December 1941, to revise order of Dist. Magistrate, Coimbatore, D/- 2nd September 1941.

Penal Code (1860), Ss. 206 and 421 — Complainant alleging that he filed suit against *B* with respect to his land and attached crops standing on land and *B's* cattle — That *A* along with *B* had removed crops and cattle claiming them to be his so as to prevent receiver from taking possession thereof—Allegations in complaint held implicated both *A* and *B* — Offence held fell under S. 206 and not S. 421 — Magistrate held could not ignore essential ingredients of complaint and treat offence as one under Section 421.

The complainant alleged that he had filed a suit in the civil Court against *B* with respect to his land, that he had filed an application in the suit for attachment of the standing crops on the land and for distraint of *B's* cattle, and that *A*, joining with *B*, had removed the harvested crops and the cattle to his own field and claimed them as his with the object of preventing the receiver from taking possession of that property. The Magistrate held that an offence punishable under S. 421, had been made out against *B*, but not against *A*. It was argued for the complainant that it was open to a person in filing a complaint to ignore a part of the offence and to file his complaint with regard to the remainder and therefore the Magistrate's conclusion that the offence fell within S. 421 was correct :

Held that the allegations in the complaint and in the sworn statement, which were the only material on which the Magistrate had to act, implicated *A* equally with *B*. [P 675*c*]

Held further that the offence fell under S. 206 and not S. 421 and therefore the Magistrate had no jurisdiction to entertain the complaint. It was not open to the Magistrate to ignore the essential ingredients of the complaint and treat the offence as one under S. 421. [P 675*c*]

Penal Code —

('36) Ratanlal, S. 206 Pts. 14, 15.

('36) Gour, Page 714 Para. 2200.

K. S. Jayarama Iyer for C. K. Venkatanarasimham — for Petitioner.

N. Somasundaram — for Respondent.

Public Prosecutor — for the Crown.

ORDER. — The complainant complained to the Magistrate that he had filed a suit in the civil Court against accused 1 with respect to his land, that he had filed an application in the suit for attachment of the standing crops on the land and for distraint of accused 1's cattle, and that the petitioner, joining with accused 1, had removed the harvested crops and the cattle to his own field and claimed them as his with the object of preventing the receiver from taking possession of this property. The Magistrate came to the conclusion that an offence punishable under S. 421, Penal Code, had been made out against accused 1, but not against the petitioner. The complainant took the matter to the District Magistrate in revision, who very rightly remarked that the allegations in the complaint and in the sworn statement, which were the only material on which the Magistrate had to act, implicated the petitioner equally with accused 1. He therefore ordered the Magistrate to make further enquiry into the case against the petitioner as well as against accused 1. In this Court, the petitioner contends that the offence committed was one punishable under S. 206, Penal Code, which requires a complaint by the Court. The wording of S. 206, Penal Code, is very much the same as that of S. 421, Penal Code, except that the fraudulent removal etc., in S. 206, Penal Code, has to be with the intention of preventing property from being taken by some process of Court. It is argued for the complainant that it is open to a person in filing a complaint to ignore a part of the offence and to file his complaint with regard to the remainder. I do not agree that it is open to a Magistrate to ignore such essential ingredients of a complaint. When the offence complained of obviously had relation to a civil Court and was intended to render fruitless the proceedings of the Court, it is against public policy that a Magistrate should take cognizance of a case that the Legislature clearly intended should be taken cognizance of only on the motion of the Civil Court concerned. The Magistrate therefore had no jurisdiction to entertain this complaint.

Mr. Somasundaram for the complainant points out that it was quite open to the petitioner to raise these points before the Magistrate. The parties are however now all represented in this Court; and as it is clear that the Magistrate had no jurisdiction to take cognizance of this case except on the complaint of the civil Court concerned, it is desirable that the proceedings should be quashed and the complaint ordered to be returned to the complainant, who may move the civil Court to take action if he is so advised. It is ordered accordingly.

C.R.K./G.N. *Proceedings quashed.*

A. I. R. (29) 1942 Madras 675 (2)

KRISHNASWAMI AYYANGAR AND KUNHI RAMAN JJ.

K. S. Nageswara Ayyar — *Appellant*

v.

S. Ganesa Ayyar — *Respondent.*

Appeal No. 129 of 1940, Decided on 24th June 1942, against decree of Sub-Judge, Mayavaram, in O. S. No. 12 of 1939.

Jurisdiction — Want of — Test laid down — Debtor residing in Tanjore — False statement in affidavit and application as to residence in Madras—Madras High Court adjudicating debtor—Order held not nullity — Order held not vitiated by fraud.

If the question which is alleged to create the want of jurisdiction is one which the Court itself is bound to decide, surely, the matter is not one relating to jurisdiction. It is a fact like any other fact which the Court has to decide and if there is an error in the decision, it can only be remedied by an appeal or any other procedure known to law. [P677*d*]

The debtor was really residing in Tanjore District. He falsely stated in his petition and affidavit in the High Court that he was residing within the territorial limits of High Court's original civil jurisdiction. By making this false statement he induced the High Court to entertain the petition and make the order of adjudication :

Held that the High Court was a Court of competent jurisdiction for the purpose. Notwithstanding the fact that the debtor made a deliberately false allegation that he was a resident within the jurisdiction, the order was not rendered a nullity: (1874) 8 C. P. 533, *Rel. on.* [P 676*h*]

The mere fact that a false allegation was made in the petition and affidavit was no ground for holding that the order was procured by fraud or treating it as a nullity. ('16) 3 A. I. R. 1916 Mad. 364, *Rel. on.* [P 677*e*]

C. P. C.—

('40) Chitaley, S. 21 N. 8 Pt. 2.

('41) Mulla, Page 131 Pt. (n).

K. V. Ramachandra Ayyar and S. Thyagaraja Ayyar — for Appellant.

L. S. Veeraraghava Ayyar and N. Panchapakesa Ayyar — for Respondent.

KRISHNASWAMI AYYANGAR J. — This appeal arises out of an interpleader suit instituted by one S. Ramaswami Ayyar who has since been discharged from the suit by the judgment under appeal. This Ramaswami Ayyar purchased the joint family properties belonging to the respondent Ganesa Ayyar and his father Swaminatha Ayyar under a sale deed dated 17th April 1920 for a consideration of Rs. 23,000. Ramaswami Ayyar agreed to discharge the debts of the family to the extent of Rs. 18,000. He was allowed to retain the balance of the consideration, namely, Rs. 5000 in view of the fact that the respondent was at the time a minor. The arrangement was that the money should be paid to the father on his furnishing security in the sum of Rs. 7500 within one year but if he failed to do so, the money could only be claimed after the minor attained majority and executed a release deed in favour of the purchaser. This sum of Rs. 5000 remaining in the hands of the purchaser as the unpaid balance of the purchase money was the subject-matter of the interpleader suit in the Court below. The learned Subordinate Judge has held that the money in Court belonged to the respondent and his father in equal shares and while giving a decree in favour of the respondent for a moiety has directed the other moiety to remain in Court till the expiry of nine months from the date of the decree so that the decree-holder in O. S. No. 121 of 1923 on the file of the District Munsif's Court, Tiruvarur might have sufficient time to put his decree into execution and obtain orders thereon.

Certain other facts have to be referred to in order to understand how the matter came into Court. In O. S. No. 121 of 1923 on the file of the District Munsif's Court, Tiruvarur, a creditor of respondent 1's father instituted a suit for the recovery of a certain sum of money from him. The suit was dismissed by the District Munsif but on appeal his judgment was reversed and a decree was passed in favour of the creditor for Rs. 1389. Execution was taken out for the recovery of the money and respondent 1's father was arrested. He was released on 3rd November 1928 on furnishing security and undertaking to obtain an order from the High Court staying the execution of the decree. He made the application for stay but it was dismissed. On 22nd November 1928 he came to Madras and filed his own petition for being adjudicated an insolvent in this Court. The next day, namely, 23rd November 1928 he was adjudicated. Thereafter, the Official Assignee took out an application for payment to him of the unpaid purchase money remaining in the hands of the purchaser, namely, Rs. 5000 but the application was dismissed by the order of the Court dated 27th March 1930 as one not properly falling within the purview of S. 7. This order was confirmed by the appellate Court on 26th February 1932. The obvious course for the Official Assignee was to take steps to realise money but for reasons which are not known, he chose to sell the outstanding. At the sale held by the Official Assignee the decree-holder in O. S. No. 121 of 1923 purchased the outstanding in the name of his son Ramaswami Ayyar under Ex. 11. This sale was on 20th December 1932. Ramaswami Ayyar in his turn assigned his right to recover the money to the appellant Nageswara Ayyar on 2nd February 1939. There were thus conflicting claims to this sum of money both by the assignee and by the respondent. The purchaser was obliged to file the interpleader suit so that the title to the money may be decided in the presence of the two contesting parties. The money was deposited in the Court below pending the suit. Several contentions were raised in the Court below and they are covered by issues 16 in number which have been framed by the Subordinate Judge. On one point alone the learned Subordinate Judge's finding is in favour of the respondent. That point is covered by Issue 5 and raised the question whether the order of adjudication made by this Court adjudging the respondent's father as an insolvent was a nullity being an order passed by a Court not competent to pass it. It may be mentioned before proceeding further that the findings on Issues 7 and 8 which are also in favour of the respondent are merely consequential on the finding on Issue 5. The other issues were all decided in favour of the appellant.

The ground on which the order of adjudication is attacked as a nullity is this : that whereas the debtor was really residing in the Tanjore District he falsely stated in his petition and affidavit in this Court that he was residing within the territorial limits of this Court's original civil jurisdiction and it was by making this false statement that he induced the Court to entertain the petition and make the order of adjudication. The learned Judge has found that this allegation in the insolvency application was falsely made in order to give jurisdiction to the High Court but that on the real facts the High Court could have had no jurisdiction to entertain the insolvency petition or adjudicate the respondents' father insolvent. This finding so far as it involves a question of fact, not having been challenged, the only question for the Court to consider is whether the High Court which passed the order of adjudication was a Court not competent to pass it. A distinction has always to be made between competency or jurisdiction to make an order and the correctness of the order on the merits where the Court had the jurisdiction to decide the question. We are of opinion that the High Court was a Court of competent jurisdiction for the present purpose and notwithstanding the fact that the debtor made a deliberately false allegation that he was a resident within the jurisdiction, the order is not rendered a nullity. The question has been considered by a decision of the Exchequer Chamber in (1874) 8 C. P. 533.[1] The case arose under the Bankruptcy Act, 1869 (32 and 33 Vic., c. 71). Section 59 of that Act provided that if the person sought to be adjudged a bankrupt resided or carried on business in the London Bankruptcy District, the expression "Court" in that Act should mean the Court of Bankruptcy

1. (1874) 8 C. P. 533 : 42 L. J. C. P. 165 : 29 L. T. 67 : 22 W. R. 96, Revell v. Blake.

in London but that if the person sought to be adjudged a bankrupt did not reside or carry on business within the London Bankruptcy District, the expression should mean the County Court of the District within which he resided or carried on business. In other words, a debtor could not be adjudicated a bankrupt in the County Court even if he resided within the jurisdiction of that Court if he also resided in London or carried on business there. In the case before the Exchequer Chamber which arose out of a creditor's petition, the debtor did in point of fact carry on business within the London District but the creditor's petition contained a statement that he did not reside or carry on business there and was presented to the County Court of the District in which the debtor resided. The County Court made an order of adjudication ex parte in the usual form. On an appeal being filed, the Court of Exchequer Chamber held that the adjudication was not void, notwithstanding the fact that the bankrupt did in fact carry on business in London and could only be questioned at proceedings in the way of application or appeal to the Court of Bankruptcy. The ground of the decision is set out by Kelly C. B. in the following passage :

" The language of S. 59 might, at first sight, appear to make it a condition precedent to the jurisdiction of the County Court that the party petitioned against did not in fact reside or carry on business in the London District. But it appears to me impossible to hold, when a petition, perfectly good on the face of it, is presented, containing allegations that, if proved to the satisfaction of the Judge, would render it imperative upon him to pronounce an adjudication, and such allegations are so proved, that the jurisdiction of the Judge should depend upon whether or not the bankrupt did actually reside or carry on business in the London District, a fact which the County Court can have no means of knowing or ascertaining . . . . . Looking therefore to all the provisions of the Act as a whole to the fact that it is absolutely imperative on the Judge to entertain a petition which is good on the face of it, and that it is obviously necessary that he should determine for himself, to the best of his judgment, in the first instance, on the truth of the allegations of the petition, and among them, where the fact is disputed, whether a debtor carries on business in London or not, and that from a wrong decision on any such question there is a remedy provided by way of appeal—I am clearly of opinion that there was no absence of jurisdiction in this case, and the Judge was bound, if satisfied with the proof before him, to pronounce the debtor a bankrupt."

It is conceded by the respondent's learned counsel that the question whether the petitioner was residing within the jurisdiction so as to clothe the Court with jurisdiction is one which the Court was entitled to decide for itself before making the order. If the question which is alleged to create the want of jurisdiction is one which the Court itself is bound to decide, surely, the matter is not one relating to jurisdiction. It is a fact like any other fact which the Court has to decide and if there is an error in the decision, it can only be remedied by an appeal or any other procedure known to law. It was also attempted to be argued that the order of the learned Judge can be supported on the ground that the order of adjudication is liable to be impeached on the ground that it was procured by the fraud of the debtor. We are not satisfied that this aspect of the case is sufficiently indicated in the written statement of the respondent or has been dealt with by the learned Subordinate Judge. We, however, consider it unnecessary to shut out the respondent from raising this contention. But we are constrained to observe that there is no substance in this point. We have already referred to the concession made by the learned advocate for the respondent that it was competent to the Court to decide whether the debtor was residing within the jurisdiction. If that is so, the mere fact that a false allegation was made in the petition and affidavit is no ground for holding that the order was procured by fraud or treating it as a nullity. In 38 ,Mad. 203,[2] a Bench of this Court consisting of Benson and Sundara Ayyar JJ. examined the law bearing upon the point and laid down the following proposition :

" In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon but not one that has been or must be deemed to have been dealt with by the Court."

We are clearly of opinion that the truth of the allegation about the residence of the debtor was a matter which must be deemed to have been dealt with by the order. We are therefore of opinion that the learned Judge was in error in coming to the conclusion that the order of adjudication is void, and would accordingly set aside his judgment on this point. The result is that there will be a decree in favour of the appellant for the sum originally deposited by the plaintiff into Court less the costs decreed to the original plaintiff. The appellant is entitled to his costs of the appeal against the respondent. The memorandum of cross-objections is not pressed and it is dismissed but without costs.

C.R.K./R.K. *Order set aside.*

2. ('16) 3 A.I.R. 1916 Mad. 364 : 19 I. C. 579 : 38 Mad. 203 : 25 M.L.J. 288, Chinnayya v. Ramanna.

A. I. R. (29) 1942 Madras 677

WADSWORTH J.

Yerranki Papayya Sastri and another — *Petitioners*

v.

Kola Appa Rao and another — *Respondents.*

Civil Revn. Petn. No. 896 of 1940, Decided on 12th February 1942, to revise order of Sub-Collector, Narasapatam, D/- 21st November 1939.

(a) Madras Estates Land Act (1 of 1908), S. 3 (5)—Land granted by zamindar in 1811—Grant "sarva inam" not subject to jodi and in enjoyment of grantee at time of inam settlement — Melwaram held must have been granted to inamdar — Inamdar held land-holder within S. 3 (5).

The land was granted by the zamindar in the year 1811. The grant was a "sarva inam" not subject to jodi and was in the enjoyment of the grantee at the time of the inam settlement.

Held that the word "inam" implied as a rule a grant free of rent or on a favourable rate of rent. If the grant were a grant of the kudiwaram alone, it would not be described or treated as an inam, but as a permanent lease or an ordinary ryotwari assignment. The melwaram must have been granted to the inamdar, for the grant was expressly free of jodi. It was not subject to any demand of the

zemindar and therefore when the zamindar made the grant, he divested himself of the right to collect the rent; that is to say, of the melwaram. The grant being clearly a post-settlement grant, the grantee must be deemed to be a landholder under the Madras Estates Land Act, having regard to the definition in S. 3 (5). [P 678*e*,*f*]

(b) Madras Estates Land Act (1 of 1908), Ss. 52 (3) and 112—Effect—Ryot accepting patta can file suit under S. 112 contesting legality of sale for rent as stipulated — Suit by inamdar holding melvaram right against tenant for rent —Tenant can repudiate patta which he has accepted — Same principles apply to deposit under S. 15, Madras Agriculturists Relief Act and tenant can object that rate of rent stipulated in patta is not correct rate—Court must determine correct rate.

The effect of S. 52 (3) is to enable the landholder to rely on a previously accepted patta for the purpose of instituting summary proceedings, even when there has been no actual exchange of patta and muchilika for the current year. It is certainly open to a ryot who has accepted a patta to file a suit under S. 112 of the Act contesting the legality of the sale for rent as stipulated in the patta on the ground that it represents an enhancement: ('32) 19 A.I.R. 1932 Mad. 729, *Rel. on.* [P 678*h*]

In a suit for rent against his tenant by the inamdar holding a melvaram right the tenant can repudiate the patta which he has accepted and can plead that the rate of rent stipulated in the patta is not the correct rate. In such case the Court is obliged to give a decree for rent not on the basis of the disputed patta but on the basis of the proper rent determined according to the principles laid down in the Act : ('39) 26 A. I. R. 1939 Mad. 971, *Rel. on.* [P 678*g*]

It is equally open to a tenant in proceedings under S. 15, Madras Agriculturists Relief Act, to plead that the rate of rent stipulated in the patta is not the correct rate and the Court dealing with a deposit under S. 15 must necessarily find out what is the correct rate of rent and in deciding that it must be governed by the principles laid down in the Madras Estates Land Act. [P 679*a*,*b*]

B. Jagannadha Das and C. V. Dikshitalu — for Petitioners.

P. Satyanarayana Raju—for Respondents.

ORDER.—This matter arises out of an application under S. 15 (4), Madras Agriculturists Relief Act, 4 of 1938 praying for the cancellation of arrears of rent on the deposit of the rent for faslis 1346 and 1347 at the rate of Rs. 300 per annum. The deposit was accepted and in revision it is contended firstly that the lower Court was wrong in assuming that the applicant was a tenant paying rent to a landholder under the Madras Estates Land Act so as to come within the terms of S. 15 of Act 4 of 1938, and secondly that the lower Court was wrong in finding that the proper rate of rent was Rs. 300 per annum. The argument on the first point rests on the tenure of the land. The documents filed show that the land was granted by the zamindar to the present petitioners in the year 1811, that the grant was a "sarva inam" not subject to jodi and was in the enjoyment of the grantee at the time of the inam settlement. It is contended that on these facts the lower Court was not entitled to assume that the grant was a grant of melwaram so as to make the grantee a landholder within the definition in the Madras Estates Land Act. The contention is that a grant in inam might be a grant of the kudiwaram alone, in which case the tenant under the inamdar would not be a ryot paying rent to a landholder but a mere sub-tenant paying rent to a ryot without occupancy right. No doubt the word "inam" is used with considerable differences in its precise connotation; but it certainly implies as a rule a grant free of rent or on a favourable rate of rent. My attention has not been drawn to any case in which a mere grant of the kudiwaram right has been described as an inam. There are of course very many cases in which there has been a question whether an inam grant was a grant of the melwaram alone or a grant of both warams. But it seems to me that if the grant were a grant of the kudiwaram alone, it would not be described or treated as an inam, but as a permanent lease or an ordinary ryotwari assignment. On the proved facts of the present case it seems to me quite clear that the melwaram must have been granted to the inamdar, for the grant was expressly free of jodi. It was not subject to any demand of the zemindar. From this fact it seems to me to follow necessarily that when the zemindar made this grant, he divested himself of the right to collect the rent; that is to say, he divested himself of the melwaram. The grant being clearly a post-settlement grant, the grantee must be deemed to be a landholder under the Madras Estates Land Act having regard to the definition in S. 3 (5) of that Act as including a person owning a part of an estate or a person entitled to collect the rents of a portion of an estate by virtue of a transfer from the owner of his predecessor-in-title.

The argument with reference to the rate of rent is briefly this. For some years past the tenant had been holding the land under a series of kadapas of which those relating to the years 1923 to 1931 have been put in evidence, stipulating for a rent of Rs. 620. Section 52 (3), Madras Estates Land Act, provides that pattas and muchilikas accepted or exchanged shall remain in force till the commencement of the revenue year for which fresh pattas and muchilikas are accepted, exchanged or decreed. The argument is that when once a patta for a particular rate has been accepted, it is not competent for the tenant to plead in bar of any proceedings for the recovery of the rent that the rate of rent stipulated in the patta is not the correct rate. No authority has been propounded in support of this view which seems to me to run contrary to the principles of the Madras Estates Land Act and contrary to many reported decisions. Section 24 of the Act lays down the basic principle that the rent of a ryot shall not be enhanced except as provided by the Act. Sections 27 and 28 lay down presumptions that the prevailing rate of rent is the correct rate of rent until the contrary is shown. These sections would be meaningless if it were possible for a landholder by getting a muchilika for an enhancement from the ryot to bind the ryot to that enhanced rate until the landholder has been forced to agree to a fresh patta. The argument that S. 52 (3) will have no effect if the tenant is entitled in a suit for rent to repudiate the patta which he has accepted, seems to me to have little force. The effect of S. 52 (3) is to enable the landholder to rely on a previously accepted patta for the purpose of instituting summary proceedings, even when there has been no actual exchange of patta and muchilika for the current year. It is certainly open to a ryot who has accepted a patta to file a suit under S. 112 of the Act contesting the legality of the sale for rent as stipulated in the patta on the ground that it repre-

sents an enhancement: *Vide* 56 Mad. 300.[1] And I have held in a case somewhat similar to the present that when an inamdar holding the melwaram right in a portion of a permanently settled estate, sues his tenant under S. 77, Estates Land Act, for rent on the basis of a kadappa which represents an unlawful enhancement, the Court is obliged to give a decree for rent not on the basis of the unlawful contract, but on the basis of the proper rent determined according to the principles laid down in the Act: *vide* 1939 M.W.N. 903.[2] A contract for an unlawful enhancement cannot be enforced by means of a suit for rent under the Madras Estates Land Act. Equally it seems to me, must it be impossible for a landholder in proceedings under S. 15 of Act 4 of 1938 to insist on the ryot depositing rent at a rate which represents an unlawful enhancement. The Court dealing with a deposit under S. 15 must necessarily find out what is the correct rate of rent and in deciding what is the correct rate of rent, it must be governed by the principles laid down in the Madras Estates Land Act.

On the facts it seems to me that the materials were sufficient to support the decision of the learned Sub-Collector. There is no evidence that the rate of rent of Rs. 620 prevailed before 1923. On the other hand the tenant has produced a kadapa of 1881 showing a rate of Rs. 200 another of 1883 showing a rate of Rs. 250 and another of 1894 showing a rate of Rupees 290. He has produced receipts for 1898 showing a rate of Rs. 290 and for 1906 and 1907 a rate of Rs. 300. Exhibit D is a letter of 1922 by the tenant protesting against the rate of Rs. 450, which was then successfully demanded. These materials seem to make it clear that when the Madras Estates Land Act came into force in 1908 the prevailing rate of rent was Rs. 300 and that since that date a steady process of illegal enhancement has been going on. In this view I agree with the decision of the lower Court and dismiss the civil revision petition with costs.

C.R.K./G.N. *Petition dismissed.*

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1. ('32) 19 A. I. R. 1932 Mad. 729 : 139 I. C. 833 : 56 Mad. 300 : 63 M.L.J. 575, Raghunatha Desikachariar v. Rangaswami Pillai.
2. ('39)26 A.I.R.1939 Mad.971: 188 I.C.881: 1939M. W.N.903, Ramayya v. Satyanarayana Jagapatiraju.

A. I. R. (29) 1942 Madras 679

KING J.

Ismail Rowther

v.

Gomakkani Rowther and another.

Appeal No. 122 of 1940, Decided on 31st March 1942, against appellate order of Dist. Court, Trichinopoly, D/- 3rd November 1939.

(a) Execution — Application returned and retained by decree-holder is deemed not filed at all for purposes of limitation.

Where an application for execution has been presented and returned and retained ever afterwards in the custody of the applicant, it must be considered for the purpose of limitation as if it had never been made. [P 679*h*]

Limitation Act —

('42) Chitaley, Art. 182 N. 10 Pt. 12.

C. P. C. —

('40) Chitaley, O. 21 R. 17 N. 4 Pts. 3-5.

('41) Mulla, Page 776 Note "Sub-rule (2) : Limitation."

(b) Execution—Instalment decree with exigibility clause — On default execution for whole decree — Application not coming to notice of judgment-debtor — Decree-holder can subsequently apply for instalments becoming due — Previous election does not affect as judgment-debtor has not been prejudiced.

No doubt where a decree-holder has definitely elected to proceed in one of two ways permitted him by a decree he cannot be allowed later to go back upon his election and choose the second way instead of the way he originally chose. But the doctrine of election is not a mere legal prohibition to any party against ever changing his mind ; it is an equitable doctrine which is applied in law in order to prevent prejudice being done to the opposite party. Where therefore an execution application making a particular choice (asking for recovery of all instalments relying on a default clause) never came to the notice of the judgment-debtor at all, it cannot in any sense be said to prejudice the judgment-debtor. There can, therefore, be no legal obstacle whatever to the decree-holder deciding subsequently that he will execute the decree for the instalments which have fallen due. [P 680*b*,*c*,*d*]

Limitation Act —

('42) Chitaley, Art. 182 N. 136.

('38) Rustomji, Page 1814 Note "Instalment Decree — Waiver of default."

V. Ramaswamy Iyer — for Appellant.

T. A. Anantha Iyer — for Respondents.

JUDGMENT. — The question at issue in this appeal is whether an application made by the appellant on 19th August 1938 was made within time. The application was to execute a decree passed in April 1934 which provided for the payment of Rs. 400 in three annual instalments, the first of which was due on 10th April 1935. There was a clause in the decree that if default was committed in the payment of any of these instalments the decree-holder should be at liberty to apply immediately for the recovery of the whole of the amount due. Accordingly, on 23rd September 1935, the decree-holder appellant, as no money had been paid to him in regard to the first instalment, presented an execution application to the Court in which he put forward a claim for the whole of the amount of the decree. This execution application was returned to him for the amendment of certain defects and was never represented. The next application is the one now under discussion, presented on 19th August 1938. It was contended originally by the decree-holder that this application was in time, although it was made more than four years after the date of the decree, because of the filing of the previous application. This argument was pressed both in the Court of the first instance and before the learned District Judge but has been no longer pressed before me. It is now agreed by the appellant that when an application like the one of 1935 has been presented and returned and retained over afterwards in the custody of the applicant, it must be considered for the purpose of limitation as if it had never been made. Therefore there can be no question here of relying upon the earlier application of 1935 in order to save the later application from the provisions of the Limitation Act.

The second point, however, made by the learned advocate for the decree-holder is thus : That although his application is no doubt out of time in regard to the first instalment due in April 1935, it is within time with regard to the second and third instalments, and therefore execution must be

allowed to proceed with regard to these two instalments. This point did not commend itself to the learned District Judge on first appeal. He held that by his action in September 1935 in presenting the earlier application, the decree-holder had definitely elected not to proceed to execute the decree for the instalments due but enforce the penalty which it provided and execute it for the full amount of the decree. He therefore had brought it about by that action that the decree became executable in full on 10th April 1935. Consequently, when he applied to execute it for the first time in accordance with law in August 1938, the whole decree must be considered to have become barred. It seems to me that this decision by the learned District Judge cannot be supported. The learned Judge quotes cases which lay it down that where a decree-holder has definitely elected to proceed in one of two ways permitted him by a decree he cannot be allowed later to go back upon his election and choose the second way instead of the way he originally chose. But the learned District Judge has not, it seems to me, really considered what is involved in this doctrine of election. The doctrine of election is not a mere legal prohibition to any party against ever changing his mind; it is an equitable doctrine which is applied in law in order to prevent prejudice being done to the opposite party. If I have two courses open to me, both of which affect some other party, and I make it known to him by some deliberate act of my choice that I am intending to adopt one of these courses and not the other, then I cannot be allowed subsequently to change my mind to his prejudice. He will naturally adjust his future actions to my previous conduct which has become known to him. There can be no doubt therefore that if in this case the execution application of September 1935 had been in any way communicated to the judgment-debtor there would be a case for the application of the doctrine of election. He would have been informed in 1935 in the most formal and solemn way possible that the decree-holder has made his choice, and equitably, the decree-holder in those circumstances would never afterwards have been permitted to change it. But the facts are, as already indicated, that this execution application of September 1935 never came to the notice of the judgment-debtor at all. It amounts in effect merely to a kind of memorandum by the decree-holder of a course which he had decided momentarily to pursue but which he subsequently abandoned. It cannot in any sense be said to prejudice the judgment-debtor. There can, therefore, it seems to me, be no legal obstacle whatever to the decree-holder deciding in 1938 that he will execute the decree for the instalments which may be due, as he now contends. There is nothing in the cases, which were relied upon by the learned District Judge, to show that the doctrine of election was applied to circumstances in which the election of one party was never made known to the other, and it seems to me that it is obviously impossible for any authority to exist which would press the doctrine so far as this.

In the result this appeal must be allowed in part and it be declared that the execution application filed by the appellant is within time so far as his claim for the instalments due in 1936 and in 1937 are concerned, and is out of time so far as the first instalment is concerned. The decree of the learned District Judge will therefore be set aside and the execution application restored and directed to be disposed of by the District Munsif in accordance with law and this judgment. In regard to costs, the order will be that each side will give and take proportionate costs in the lower appellate Court and in this Court and that the costs of the application in the first Court will abide the result. Leave refused.

C.R.K./R.K. *Appeal partly allowed.*

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* A. I. R. (29) 1942 Madras 680

LEACH C. J. AND BYERS J.

Sri Sri Sri Narayana Sooru Devu Garu Rajah of Tarla and another — *Appellants*

v.

Guduru Rama Rao Pantulu Garu — *Respondent.*

Appeal No. 78 of 1940, Decided on 10th March 1942, against decree of Sub-Judge, Chicacole, in O. S. No. 40 of 1938.

Limitation Act (1908), S. 19—Father and son executing pronote — Statement of family liabilities including pronote prepared by son on behalf of himself and his father — Statement initialled by father on behalf of himself and as agent of son, as acknowledgment of its correctness—Pronote subsequently indorsed by payee to plaintiff—Suit on pronote by plaintiff against son after father's death—Statement held amounted to acknowledgment of liability within S. 19 — Initialling of statement by father held full compliance with S. 19—Statement held extended limitation against son as well — Plaintiff held entitled to recover amount due under pronote: 51 M. L. J. 414=('26) 13 A. I. R. 1926 Mad. 827=96 I. C. 700, *OVERRULED.

The father who was the holder of an impartible estate and his son constituted a joint Hindu family. The father and son executed a pronote for Rs. 6000 which the payee had advanced to them in order that they might discharge a mortgage of the family estate which had been created for family purposes. The pronote was indorsed to the plaintiff by the payee on 2nd December 1937. The father continued to be the manager of the family until his death in May 1938 notwithstanding the execution of a power of attorney by him in 1930 in favour of his son to enable the son to help his father in the management of the estate. In January 1937, the son and his father were endeavouring to arrange for a loan of Rs. 300,000 to pay off the debts due by the estate; and in this connexion a statement of the liabilities was drawn up. In this statement was included the amount due on the promissory note and the statement was initialled by the father as an acknowledgment of its correctness. The son prepared the statement of liabilities on behalf of himself and his father and left it to his father to verify it which he did. In the suit on the pronote by the plaintiff on 14th December 1938 against the son after his father's death :

Held that (1) the statement of liabilities amounted to an acknowledgment of liability within S. 19; [P 681 *f*, *g*]

(2) the writing of the initials by the father on the statement of liabilities constituted a full compliance with the requirements of S. 19 : (1826-49) 9 Sim. 219 and ('35) 22 A.I.R. 1935 Mad. 555, *Rel. on*; ('30) 17 A. I. R. 1930 Mad. 867, *Disting.*; 51 M. L. J. 414=('26) 13 A I. R. 1926 Mad. 827=96 I. C. 700, *OVERRULED*; [P 682 *a*]

(3) since it was in evidence that the father had signed the statement on behalf of himself and as agent of his son, the acknowledgment extended limitation against the son as well; [P 682*c*]

(4) plaintiff held entitled to recover amount due under pronote. [P 682*c*]

Limitation Act —

('42) Chitaley, S. 19 N. 18; N. 31 Pt. 5.

('38) Rustomji, Page 332 Note "Signature."

K. V. Krishnaswami Ayyar and B. V. Ramanarasu — for Appellants.

P. Somasundaram for Advocate-General, C. Sambasiva Rao and C. Siva Rao — for Respondent.

LEACH C. J. — The appellant is the Rajah of Tarla and he seeks to escape from liability in respect of a promissory note executed by himself and his father who is now dead. The appellant's case is entirely devoid of merits, but, notwithstanding this, he would be entitled to succeed on technical grounds if the legal arguments advanced on his behalf were sound. The Subordinate Judge of Chicacole, from whose decree this appeal has been preferred, found against the appellant on the facts and on the law and we concur in his findings. The attitude of the appellant towards his creditor is certainly one which does not commend itself to the Court.

On 16th June 1931 the appellant and his father executed a promissory note in favour of the zamindar of patta Tekkali for the sum of Rs. 6,000, which the payee had advanced to them in order that they might discharge in part a mortgage of the family estate. It is admitted that the mortgage had been created for family purposes. The estate is an impartible one within the meaning of the Madras Impartible Estates Act of 1904. On 2nd December 1937 the payee endorsed the instrument to the respondent. The appellant's father died in the month of May 1938 and on 14th December of that year the respondent instituted the present suit to recover a sum of Rs. 9896 which he claimed was then due on the promissory note. The appellant was sued personally and as representing his father's estate. He had been appointed to act as the receiver in a mortgage suit instituted by another creditor. Various defences were raised, but on appeal the appellant's case has been confined to these contentions: (1) the suit is time-barred: (2) the acknowledgment of liability made by the appellant's father on which the respondent relies to save limitation, even if it amounts to an acknowledgment within the meaning of S. 19, Limitation Act, does not bind the appellant; and (3) the respondent cannot maintain the suit against the appellant because he is not the assignee of the debt, but merely the endorsee of the promissory note.

On 15th May 1934 a sum of Rs. 500 was paid towards principal and interest then due on the instrument. The fact of payment was indorsed on the promissory note and the indorsement signed by the appellant and his father. On 15th May 1935 a sum of Rs. 1000 was paid in reduction of the debt and a similar acknowledgment indorsed on the promissory note. In this instance the father alone signed. The promissory note was indorsed to the plaintiff by the payee on 2nd December 1937. The indorsement is in these words:

"The principal and interest due under this pronote is Rs. 9100 (in words rupees nine thousand one hundred). As we have received the said sum from Gudur Rama Rao Garu, resident of Vizianagaram, endorsement of transfer has been made in favour of the said Rama Rao and the pronote delivered. You alone should recover the principal and interest due under the said pronote without our being liable therefor."

Mr. K. V. Krishnaswami Ayyar on behalf of the appellant contends that this cannot be read as an assignment of the debt, but merely as an indorsement of the promissory note. Mr. Somasundaram on behalf of the respondent does not dispute the correctness of this contention, and the case will proceed on the basis that the respondent is merely the holder of the instrument and not the assignee of the debt. In the month of January 1937 the appellant and his father were endeavouring to arrange for a loan of Rs. 300,000 to pay off the debts due by the estate; and in this connexion a statement of the liabilities was drawn up. In this statement was included the amount due on the promissory note in suit and the statement was initialled by the father. The Subordinate Judge has found as a fact, and we agree with him, that the father remained the manager of the family upto the time of his death, notwithstanding that in the year 1930 he gave to his son a power of attorney. This power was executed in order that the son might help his father in the management of the estate. The statement of liabilities drawn up in January 1937 was prepared under the appellant's directions and that he checked it is shown by the fact that he made a correction in green ink.

The first contention raised in connexion with the plea of limitation is that this statement does not amount to an acknowledgment of liability. This contention is entirely devoid of substance. The document is headed "Tarla Estate. Statement of Liabilities." The particulars of the debts are set out in six columns. In the first column is given the date, in the second column the name of the creditor, in the third the nature of the debt, whether on a mortgage or on a promissory note, in the fourth the amount borrowed, in the fifth the payments made in reduction of the debt and in the sixth column the rate of interest. This obviously is a statement of liabilities and as already indicated, it is initialled by the appellant's father as an acknowledgment of its correctness. It is then said that the statement does not fulfil the requirements of S. 19, Limitation Act, because the appellant's father merely initialled it, whereas he should have signed his name in full. This argument is based on two decisions of this Court. The first case is 51 M. L. J. 414.[1] That case was decided by Odgers J. who held that initials were not equivalent to a signature and therefore initials were not sufficient for a valid acknowledgment under S. 19. If this judgment is to be followed, it means that the appeal must be allowed; but we are not prepared to follow it. We consider that it does not express a correct statement of the law. We shall return to this question in a moment. The second case is 54 Mad. 252[2] which was decided by Sundaram Chetti J., also sitting alone. The question there was whether a Magistrate who initialled a judgment could be deemed to have signed it. The learned Judge held that the Code of Criminal Procedure required the signature in full. That case merely concerned the provisions of the Code of Criminal Procedure and it has no application here, where we are merely concerned with what is meant by the word "signed" in S. 19, Limitation Act.

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1. ('26) 13 A.I.R. 1926 Mad. 827 : 96 I.C. 700 : 51 M. L. J. 414, Lakshmanacharyulu v. Venkataramanujacharyulu.
2. ('30) 17 A. I. R. 1930 Mad. 867 : 129 I. C. 633 : 32 Cr. L. J. 430 : 54 Mad. 252 : 59 M. L. J. 674, In re Brahmiah.

In 59 Mad. 72[3] Venkatasubba Rao J. held that the initialling of an acknowledgment was equivalent to having signed. He pointed out that on principle there was no reason for holding that the word "signed" should be construed as meaning "signed in full." It was immaterial whether the statement was initialled or signed so long as there was a writing underneath which verified the acknowledgment. The learned Judge considered the judgments of Odgers J. and Sundaram Chetti J., in the two cases I have mentioned, and he regarded, as I do, the decision is 51 M.L.J. 414,[1] as being erroneous. Here we have a statement of liabilities and at the foot of it, the appellant's father has written his initials in acknowledgment of the correctness of the statement. I have no hesitation in holding that this constitutes full compliance with the requirements of S. 19. It may be mentioned that in 9 Sim. 219=59 E. R. 342,[4] it was held that initials were sufficient. In that case the person who gave the acknowledgment was not able to write himself owing to an attack of gout and the document was initialled by his daughter on his behalf, his name appearing above the initials.

The main question is whether the initialling of the statement of liabilities by the father operates to extend the liability against the son. Sub-s. (2) of S. 21 says that nothing in Ss. 19 and 20 renders one of several joint contractors chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them. Clause (b) of sub-s. (3) states, however, that for the purposes of Ss. 19 and 20, where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorized agent of, manager of the family for the time being shall be deemed to have been made on behalf of the whole family. For the appellant it is said that this clause does not help the respondent. It is acknowledged that it would help him if he were suing on the debt, but he is not and therefore it is said that sub-s. (2) governs the situation. On behalf of the respondent, it is said that as the father was the manager of the family and as it was a family debt his acknowledgment of liability operates to extend the appellant's liability on the instrument. The correctness of the respondent's assertion may be open to doubt, but it is not necessary to decide this question because on the evidence there can be no doubt that the father signed the statement on behalf of himself and as the agent of his son. The son prepared the document on behalf of himself and his father and left it to his father to verify the statement which he did. For these reasons the appeal will be dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

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3. ('35) 22 A. I. R. 1935 Mad. 555 : 156 I. C. 449 : 59 Mad. 72 : 68 M. L. J. 623, Tevudu v. Venkataratnam.

4. (1826-49) 9 Sim. 219 : 59 E. R. 342, Lord St. John v. Boughton.

** **A. I. R. (29) 1942 Madras 682**

FULL BENCH

LEACH C. J., LAKSHMANA RAO AND KRISHNASWAMI AYYANGAR JJ.

Nori Ramasastrulu '— *Appellant*

v.

Teluguntla Balakrishna Rao and another — Respondents.

Letters Patent Appeal No. 47 of 1940, Decided on 28th July 1942, against decree and judgment of Venkataramana Rao J. in S. A. No. 165 of 1938, D/- 25th October 1940.

** **Provincial Insolvency Act (1920), Ss. 2 (d) and 28—Joint Hindu family—Power of manager whether he is father or not to dispose of joint property is not property within Ss. 2 (d) and 28 — Hence it cannot vest in Official Receiver under S. 28 (2) : 52 Mad. 246 = ('29) 16 A. I. R. 1929 Mad. 166 = 114 I. C. 345, *OVERRULED* ; S. A. No. 165 of 1938, *REVERSED.***

In a joint Hindu family the powers of a father-manager are greater than the powers of a manager who is not the father of the other coparceners, because the father has power not only to sell family property in order to discharge a family liability, but also the right to sell his sons' interest in the family estate to discharge his own personal debts, provided that they have not been incurred for any immoral or illegal purposes. Since the father's power to dispose of his son's property is not property within the meaning of Ss. 2 (d) and 28, the right of a manager who is not the father of the other coparceners to sell family assets to discharge debts which are payable out of the joint estate cannot be property within the meaning of Ss. 2 (d) and 28 and therefore cannot vest in the Official Receiver on the insolvency of the manager : ('25) 12 A. I. R. 1925 P. C. 18 and ('36) 23 A. I. R. 1936 P. C. 277, *Rel. on* ; ('26) 13 A. I. R. 1926 Mad. 994 (F. B.) (Both majority and minority view), *Dissent.*; 52 Mad. 246=('29) 16 A. I. R. 1929 Mad. 166 = 114 I. C. 345, *OVERRULED* ; ('37) 24 A. I. R. 1937 Pat. 185 (F. B.), *Dissent.*; ('40) 27 A.I.R. 1940 Mad. 525, *Expl.*; S. A. No. 165 of 1938, *REVERSED.*

[P 683*g*; P 684*a*,*b*,*e*,*f*; P 685*a*]

Hindu law —

('40) Mulla, Pages 306 to 312 S. 365.

('38) Mayne, Pages 453 to 457 Paras. 350 and 350-A.

A. Venkatachalam — for Appellant.

V. Govindarajachari — for Respondents.

LEACH C. J. — This Letters Patent appeal raises the important question whether the right of a manager of a joint Hindu family to sell family assets to discharge debts which are payable out of the joint estate devolves on the Official Receiver when the manager has been adjudicated an insolvent under the Provincial Insolvency Act. Two brothers, Ayodhyaramayya and Raghava Rao, were joint in estate. Raghava Rao died in 1923, leaving a son who is defendant 2. After Raghava Rao's death Ayodhyaramayya and his nephew continued to be undivided. On 24th November 1927 Ayodhyaramayya was adjudicated an insolvent under the Provincial Insolvency Act. On 12th March 1931, in order to discharge debts binding on the family the Official Receiver sold to one Saravayya certain family properties, which included the properties in suit. The properties were subject to mortgages and

the sale to Saravayya was, of course, subject to the rights of the mortgagees. The plaintiff purchased the properties in suit from Saravayya. Ayodhyaramayya and defendant 2 owed monies to defendant 1, who obtained a decree against them. On 28th January 1933 defendant 1 attached the properties in suit, whereupon the plaintiff objected, but his objection was overruled. As the result the Court sold the properties by auction and they were purchased by defendant 1. The plaintiff then filed the present suit in the Court of the District Munsif of Bezwada for a declaration that the properties were not liable to attachment by defendant 1. The District Munsif held that the manager's right to sell properties to meet family debts devolved upon the Official Receiver and consequently a valid title had passed to Saravayya. Accordingly the District Munsif granted the declaration asked for and on appeal the decision was upheld by the Subordinate Judge of Bezwada. Defendant 1 then appealed to this Court. The appeal was heard by Venkataramana Rao J. who, feeling himself bound by decisions of this Court to which reference will be made later, dismissed the appeal, but in the course of his judgment he indicated that the question whether the manager's right to sell joint family property devolved upon the Official Receiver under the Provincial Insolvency Act required further consideration in view of the decisions of the Privy Council in 6 Lah. 1[1] and 17 Lah. 644.[2] Before proceeding to examine the effect of the judgments of the Judicial Committee in 6 Lah. 1[1] and 17 Lah. 644,[2] it is necessary to refer to certain provisions of the Presidency Towns Insolvency Act and the Provincial Insolvency Act. Section 2 (e), Presidency Towns Insolvency Act, states :

" 'Property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit."

The definition of property in the Provincial Insolvency Act is contained in S. 2 (d) and is word for word the same. Section 17, Presidency Towns Insolvency Act, states that the property of the insolvent shall vest in the Official Assignee. Eliminating a proviso which does not apply here the section reads as follows :

"On the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose."

The corresponding provision in the Provincial Insolvency Act is contained in S. 28 (2) which says :

"On the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver as hereinafter provided, and shall become divisible among the creditors, and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

There is slight difference in the wording at the commencement, but this does not alter the meaning. Sub-section (1) of section 52, Presidency Towns Insolvency Act, states that the property of the insolvent divisible among his creditors shall not comprise property held by the insolvent on trust for any other person, and tools of his trade, necessary wearing apparel, bedding, cooking vessels and furniture of himself, his wife and children to the value of Rs. 300. Sub-section (2) states that subject to the provision of sub-s. (1), the property of the insolvent shall comprise the following particulars :

"(a) All such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge ; (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge ; and (c) all goods being at the commencement of the insolvency in the possession, order or disposition of the insolvent, in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof."

Two provisos follow, but it is unnecessary to set them out. There is no section in the Provincial Insolvency Act which corresponds to S. 52, Presidency Towns Insolvency Act. Under the Provincial Insolvency Act the vesting of the property of the insolvent in the Official Receiver is governed only by S. 2 (d) and S. 28 and therefore there can be no vesting of the right of a manager of a joint Hindu family to sell family property for family necessity, unless that right can be regarded as property. The powers of a father-manager are greater than the powers of a manager who is not the father of the other coparceners, because the father has power not only to sell family property in order to discharge a family liability, but also the right to sell his sons' interest in the family estate to discharge his own personal debts, provided that they have not been incurred for any immoral or illegal purposes. In the light of the decisions of the Privy Council to which reference has been made and will be considered in a moment a father's power to sell his sons' property must be taken to be a power falling within S. 52 (2) (b), Presidency Towns Insolvency Act, but the power of a manager who is not the father of the other coparceners to sell family assets to meet a family liability is not a power which he can exercise for his exclusive benefit, and S. 52 (2) (b) may not apply in such a case. That question does not, however, arise in this appeal and therefore nothing further need be said in this connexion.

In 6 Lah. 1,[1] the Privy Council held that when a Hindu father is adjudicated an insolvent under the Presidency Towns Insolvency Act, the property which he and his sons possess jointly does not vest in the Official Assignee, although under S. 52 (2) of the Act, or in some other way the property may be made available for the payment of his lawful debts. Their Lordships considered that the question had to be decided on the wording of the Presidency Towns Insolvency Act alone and observed that cases which have arisen under S. 266, Civil P. C., 1882, or under S. 60, Civil P. C., 1908, depended on different considerations. Therefore decisions in cases

1. ('25) 12 A.I.R. 1925 P. C. 18 : 84 I. C. 883 : 52 I. A. 22 : 6 Lah. 1 (P. C.), Sat Narain v. Behari Lal.
2. ('36) 23 A.I.R. 1936 P. C. 277 : 164 I. C. 6 : 63 I. A. 384 : 17 Lah. 644 (P. C.), Sat Narain v. Sri Kishen Das.

under those sections were likely to mislead a Court which had to construe the Presidency Towns Insolvency Act. This meant the ruling out of consideration of certain earlier decisions of this Court. Having stated that they were satisfied that it was not the intention of the Act that on the insolvency of a father the joint property of his family should vest in the Official Assignee their Lordships proceeded to sum up the position as follows :

"It may be that under the provisions of S. 52 or in some other way that property may in a proper case be made available for payment of the father's just debts, but it is quite a different thing to say that by virtue of his insolvency alone it vests in the assignee and no such provision should be read into the Act."

In other words, the manager's power to sell family property for family debts was definitely not property within the meaning of S. 2 or S. 17. This decision was re affirmed by the Privy Council in 17 Lah. 644.[2] In the course of the judgment in that case their Lordships made it quite clear that the vesting section was S. 52 and this section alone. Therefore it is now settled that apart from S. 52 there is no provision in the Presidency Towns Insolvency Act which enables the Official Assignee to sell joint family property to meet joint family debts when the manager has been adjudicated.

In 6 Lah. 1[1] and 17 Lah. 644,[2] the Privy Council were only concerned with the Presidency Towns Insolvency Act, and no reference was made to the Provincial Insolvency Act. The effect of the judgment in 6 Lah. 1[1] on a case arising under the Provincial Insolvency Act where the father had been adjudicated was considered in 49 Mad. 849[3] which was decided by a Full Bench of this Court consisting of Krishnan, Ramesam and Venkatasubba Rao JJ. The judgment of the Judicial Committee in the later Lahore case, 17 Lah. 644,[2] had not then been delivered. Krishnan and Ramesam JJ. held that the father's power to sell his sons' shares for his proper debts vested in the Official Receiver when the father was adjudicated under the Provincial Insolvency Act by virtue of the provisions of S. 28. They regarded the power as property within the meaning of that section, but not as property under S. 2 (d) of the Act. On the other hand, Venkatasubba Rao J. held that it was property, even within the meaning of S. 2 (d). He was of the opinion that the provisions of the Presidency Towns Insolvency Act should be disregarded when construing the provisions of the Provincial Insolvency Act and therefore the Court was not concerned with anything said by the Judicial Committee in 6 Lah. 1.[1]

We find ourselves unable to share the opinion either of Krishnan and Ramesam JJ. or of Venkatasubba Rao J. We consider that the judgment in 17 Lah. 644[2] makes these opinions untenable. The Judicial Committee in both the Lahore cases were interpreting the Act governing the law of insolvency in the Presidency Towns of India and when, as we have here, decisions of the highest tribunal construing S. 2 (e) and S. 17, Presidency Towns Insolvency Act, the same interpretation must be placed on identical provisions in the Provincial Insolvency Act unless the Act itself contains some additional provision running counter, which is not the case. The decisions of the Privy Council in the Lahore cases undoubtedly negatived what had been regarded as being settled law but if the power of the father is not property under the Presidency Towns Insolvency Act it cannot be regarded as property under the Provincial Insolvency Act, and if the father's power is not property the power of the manager who is not the father cannot be property. The position of a manager who is not the father was considered by this Court in 52 Mad. 246.[4] This case came before Odgers and Curgenven JJ. Odgers J. was of the opinion that in spite of 6 Lah. 1[1] the power to sell family property for family debts vested in the Official Receiver. Curgenven J. was of the opinion that the decision in 6 Lah. 1[1] applied and consequently held that the power did not vest. As the result of the disagreement the case was placed before a third Judge, Devadoss J., who agreed with Odgers J. but indicated that the question called for consideration by a fuller Bench. The judgments in this case were also delivered before the decision in 17 Lah. 644,[2] which we consider puts beyond doubt the question now under discussion.

It is very regrettable that the law of insolvency should be different in cases which fall within the Presidency Towns Insolvency Act and cases which fall within the Provincial Insolvency Act. If we are to have regard to the judgments of the Privy Council in the Lahore cases, as we must, we must hold that under the Provincial Insolvency Act the manager's power to sell does not vest in the Official Receiver. Under that Act, it can only vest if the power is regarded as property, and in the light of what is said in 6 Lah. 1[1] and 17 Lah. 644[2] with regard to the effect of S. 2 (e) and S. 17, Presidency Towns Insolvency Act, the power cannot be regarded as property. The Judicial Committee have made it abundantly clear that it is not property and that the right to sell only vests under the Presidency Towns Insolvency Act by virtue of S. 52, which as we have already indicated, has no counter part in the Provincial Insolvency Act. The remedy is in the hands of the Central Legislature and we trust that it will bring the two Acts into line and will do so without delay. The only High Court which has considered the question since the delivery of the judgment in 17 Lah. 644[3] is the Patna High Court. In 16 Pat. 60,[5] a Full Bench of that Court held that the father's power to sell vested in the Official Receiver under the Provincial Insolvency Act. We have considered that judgment, but we do not find anything in it which tends to shake the opinion which we have just expressed. In the course of the arguments our attention was drawn to the case in 1940-1 M. L. J. 553,[6] which was decided by my learned brother Krishnaswami Ayyangar and myself. That case was argued on the basis that it was well settled law that where a father who is joint with his son becomes insolvent the right of realizing the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or the Official Receiver as the case may be, and the statement to this effect in the judgment merely embodied what counsel there were agreed upon. The question in issue was very different from the question now before us and the Court was not

3. ('26) 13 A. I. R. 1926 Mad. 994 : 97 I. C. 825 : 49 Mad. 849 : 51 M. L. J. 269 (F. B.), Bala Venkata Seetarama Chettiar v. Official Receiver, Tanjore.

4. ('29) 16 A.I.R. 1929 Mad. 166: 114 I.C. 345: 52 Mad. 246: 55 M.L.J. 721, Official Receiver, Anantapur v. Ramachandrappa.

5. ('37) 24 A.I.R. 1937 Pat. 185: 167 I.C. 765: 16 Pat. 60 : 18 P. L. T. 1 (F. B.), Bishwanath Sao v. Official Receiver.

6. ('40) 27 A. I. R. 1940 Mad. 525 : 194 I. C. 803 : (1940) 1 M. L. J. 553, Subramaniam Chettiar v. Annamalai Chettiar.

called upon to consider the bearing of the Lahore cases on the Provincial Insolvency Act. We mention this in case it should ever be suggested that the judgment in the present case is in conflict with 1940-1 M. L. J. 553.[6] The result is that it must be declared that the Official Receiver had no power to sell defendant 2's undivided share of the property, and that the plaintiff merely acquired the interest of the insolvent manager in the properties in suit, his interest being, of course, subject to the mortgages created thereon. The parties will pay and receive proportionate costs throughout.

C.R.K./G.N. *Appeal allowed.*

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* A. I. R. (29) 1942 Madras 685

FULL BENCH

LEACH C. J., LAKSHMANA RAO AND KRISHNASWAMI AYYANGAR JJ.

Narayanan Chetti and others — *Appellants*

v.

Nallammal and others — *Respondents.*

Second Appeal No. 833 of 1940, Decided on 21st July 1942, against decree of Sub-Judge, Devakottai, D/- 18th December 1939.

(a) Transfer of Property Act (1882), S. 82— Liability to contribute is liability imposed upon land and is not personal liability.

Section 82 expressly refers to a case where the mortgaged property is subsequently divided into shares held separately and not merely to a case where several properties are mortgaged, and it is placed beyond question that the valuation for purposes of contribution shall be that at the date of the mortgage. Both before the amendment in 1929 and now the liability to contribute is a liability which is imposed upon the land and therefore is not a personal liability. [P 686*g*,*h*]

T. P. Act —
('36) Mulla, Page 488 Pt. (z).
('34) Mitra, Page 498 N. 497.

(b) Transfer of Property Act (1882), S. 82— Principle of section explained.

The right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that property alone: 31 All. 65, *Rel. on.* [P 687*f*]

T. P. Act —
('36) Mulla, Page 496 Pt. (m).
('34) Mitra, Page 491 N. 491 "Principle."

(c) Transfer of Property Act (1882), S. 82— Portion of property sold and mortgage over whole property paid—Subsequent mortgagee of portion sold is entitled to sue holder of unsold portion for contribution whether he pays cash to discharge first mortgage or not: 24 Mad. 96, *OVERRULED.

A second mortgagee does not stand in the shoes of a mortgagor. Where there is a second mortgage, the second mortgagee holds a mortgagee's interest in the property and the fact that some other person has previously received a mortgagee's interest does not detract from the nature of his interest. When a person agrees to lend money on the security of a second mortgage of a portion of the property he knows that the first mortgagee has the benefit of the whole of the property and that the first mortgagee, if he calls in the mortgage loan, will have the right to cause the whole of the hypotheca to be sold. If the first mortgagee does not cause the whole of the hypotheca to be sold, the second mortgagee has the right to call upon the holder of the unsold portion to contribute his share of the principal debt. [P 687*g*,*h*]

Therefore where a portion of a property is sold and the sale proceeds are sufficient to pay off the mortgage over the entire property, subsequent mortgagee of the portion sold is entitled to sue the holder of the unsold portion for contribution whether he pays cash to discharge the first mortgage or not: 24 Mad. 96, *OVERRULED*; 31 All. 65, *Rel. on*; ('35) 22 A.I.R. 1935 Mad. 456, *Approved.*; 24 Mad. 85, *Disting.* [P 686*c*; P 687*h*; P 688*a*]

T. P. Act —
('36) Mulla, Page 489 Pt. (e).
('34) Mitra, Page 490 N. 491; Page 496 N. 494.

R. Sethurama Sastri — for Appellants.

K. Subramaniam and V. Seshadri — for Respondents.

ORDER OF REFERENCE

King J.—(3rd March 1942.) This appeal arises out of a suit filed for contribution under S. 82, T. P. Act. A single plot of land was mortgaged by one Swaminatha Ayyar to the grandfather of the plaintiffs in 1927. In 1928 the eastern portion of the land was gifted by Swaminatha Ayyar to his daughter, who eventually sold it in 1934 to defendant 1. In 1929 Swaminatha Ayyar executed a puisne mortgage of the western portion to plaintiff's grandfather. In 1934 the first mortgage was assigned by plaintiffs' father to one Chidambaram Chettiar, and earlier in the same year defendant 2 became the owner in a court sale of the equity of redemption in the western portion. Chidambaram Chettiar brought a suit to enforce his mortgage, and when the hypotheca came to be sold it was ordered that the western portion should be sold first. It was sold accordingly and the sale proceeds were sufficient to pay off the first mortgage in full. It is in these circumstances that plaintiffs, as the present owners of the puisne mortgage rights in the western portion, sue defendant 1 as owner of the eastern portion for contribution. Plaintiffs say that the amount due is Rs. 2485, and is payable to themselves and to defendant 2 with priority in their favour to the extent of the money still due to them under the second mortgage. As defendant 2 would not join with them in filing the suit, they have impleaded him as a defendant, and have limited their claim to the sum of Rs. 1600 due to themselves. Both the Courts below have held that in the circumstances of this case where plaintiffs have made no cash payment to discharge the prior mortgage they have no right to claim contribution. Hence this second appeal by the plaintiffs. On an examination of the language of S. 82 there seems no reason at all for rejecting a claim for contribution merely because it is made by a puisne mortgagee. Rights and liabilities are thrown by the section not upon individuals but upon items of property. It is undeniable that the plaintiffs are interested in the western item, just as much as, if not more than, defendant 2. On general principles therefore their right to suit seems clear, and that a puisne mortgagee can so sue as well as an owner, has been recognized by Madhavan Nair J. in 41 M. L. W. 416.[1]

1. ('35) 22 A. I. R. 1935 Mad. 456 : 156 I. C. 715 : 41 M.L.W. 416, Raghavachari v. Venkatanarayana Reddi.

The Courts below however have relied upon 24 Mad. 96,[2] as an authority to the contrary. It seems to me that they could not have done otherwise, as the essential facts in that case are precisely similar to those here. But with great respect I am unable to agree with the reasoning in that case. It is stated on p. 107 that even if the plaintiff in that case had purchased the property instead of merely taking a mortgage on it he would have had no right to contribution. I am frankly unable to understand this. The whole purpose of S. 82 surely is to give the owner of one property out of two comprised in a mortgage the right of contribution against the owner of the second property if the first property and the first property alone is sold to discharge the mortgage. The first property has borne an unfair share of the burden of the mortgage, and this essential fact is not altered by the undoubted right of the mortgagee to proceed against any property which he may choose. 24 Mad. 96[2] if applied to the facts of the present case would appear to be authority for the position that even defendant 2 could not sue, a position which seems to me to reduce S. 82 to a nullity. Now if defendant 2 can sue I see no reason why plaintiffs also should not sue, as they also are interested in the same item of property. And this right of suit seems to me to arise equally whether there has been a payment by plaintiffs in cash, or property in which plaintiffs are interested has been sold in execution: *see* 26 All. 407[3] at pp. 416 and 435 where 24 Mad. 96[2] is dissented from. I accordingly with great respect do not feel inclined to follow 24 Mad. 96[2] in disposing of this appeal, and agree with the opinion of Madhavan Nair J. in 41 M. L. W. 416[1] that a subsequent mortgagee has a right to contribution whether he pays cash or not even though that opinion was given in a case in which cash was in fact paid. I submit the records to my Lord the Chief Justice with a request, that if he thinks fit, the case may be posted before a Bench or Full Bench.

JUDGMENT OF FULL BENCH

This second appeal has been placed before a Full Bench for decision, as King J. before whom the appeal came in the first instance, considered that the judgment of this Court in 24 Mad. 96[2] on which the Courts below had relied required reconsideration. In order to appreciate the application of 24 Mad. 96[2] it is necessary to state the facts in the present case. On 28th June 1927 one Swaminatha Ayyar mortgaged immovable property to the grandfather of the plaintiffs to secure the sum of Rs. 3000. On 14th December 1928 the mortgagor conveyed to his daughter the eastern portion of the property. She took it, of course, subject to the mortgage of 28th June 1927. On 4th November 1929 the mortgagor borrowed Rs. 700 from the plaintiffs' grandfather on the security of a second mortgage of the western portion. On 24th April 1934 defendant 2 bought the western portion in a court auction, subject to the two mortgages which Swaminatha Ayyar had created. On 30th May 1934 Swaminatha Ayyar's daughter conveyed her interest in the eastern portion to defendant 1. On 6th September 1934 the plaintiffs' father, the grandfather being dead, assigned the mortgage of 28th June 1927 to one Chidambaram Chettiar who filed O.S. No. 227 of 1934 in the Court of the Subordinate Judge of Devakottai to enforce payment. On 2nd April 1935 a preliminary decree was passed in favour of Chidambaram Chettiar and a final decree followed on 19th September 1935. On 27th October 1935 the plaintiffs and their father separated and the second mortgage which Swaminatha Ayyar had created on the western portion of the property in suit fell to the plaintiffs' share of the family properties. On 24th August 1936, in execution of the mortgage decree obtained by Chidambaram Chettiar, the western portion was sold for Rs. 8883-6-0 and bought by defendant 1. The price realized was sufficient to discharge the first mortgage, but only Rs. 155-13-2 remained and this was not sufficient to discharge the second mortgage. On the date on which the preliminary mortgage decree was passed in favour of Chidambaram Chettiar there was due on the second mortgage the sum of Rs. 1294-8-0. On 26th March 1938 the present suit was filed to recover Rs. 1600 from defendant 1 as the owner of the eastern portion. The plaintiffs' case was that as the first mortgagee had not brought the whole of his security to sale she was liable under S. 82, T. P. Act, to make contribution. Section 82, T. P. Act, was amended in 1929. Before the amendment paragraph 1 of the section read as follows:

"Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage."

This paragraph now reads as follows:

"Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date."

In deciding 24 Mad. 96[2] the Court was concerned with S. 82 as it stood before the amendment, but the amendment makes no material change so far as this case is concerned. Now the section expressly refers to a case where the mortgaged property is subsequently divided into shares held separately and not merely to a case where several properties are mortgaged, and it is placed beyond question that the valuation for purposes of contribution shall be that at the date of the mortgage. Both before the amendment and now the liability to contribute is a liability which is imposed upon the land and therefore is not a personal liability. At this stage it will be convenient to state the facts in 24 Mad. 96.[2] Certain immovable properties were mortgaged to one Rangayya Goundan. Later some of the lands comprised in the mortgage were, with other lands, mortgaged to the plaintiffs. After the second mortgage had been created Rangayya Goundan obtained a decree on his mortgage and in execution the portion of his security which was subject to the second mortgage in favour of the plaintiffs was sold. As in the present case the amount realised was sufficient to satisfy the full claim of the first mortgagee, and consequently the execution proceedings were carried no further. The mortgagors subsequently sold the surplus security to certain of the defendants. The plaintiffs then instituted the suit which gave rise to

2. ('01) 24 Mad. 96, Sesha Iyer v. Krishna Iyengar.
3. ('04) 26 All. 407 : 1 A. L. J. 148 : 1904 A.W.N. 74 (F. B.), Ibn Hasan v. Brijbhukhan Saran.

the appeal. They based their claim in the first place on the mortgage, and in the second place they claimed contribution from the holders of the properties which were not sold in execution. Shephard and Davies JJ. who heard the appeal, held that S. 82 did not apply and therefore the plaintiffs were not entitled to any contribution. The basis of their decision is to be gathered from the following passage in their judgment which is to be found at p. 107 of the report :

"Paragraph 1" (of S. 82) "does not provide for the keeping alive of the lien after the mortgage debt has been paid, for it merely declares the manner in which the debt shall be borne by the several properties. It would come into effect when the administration of the estate of the mortgagor was under consideration and may be taken to recognise a lien possessed by the person who, being interested in one of the mortgaged properties, pays off the debt and so acquires a right of contribution; but we do not think that the section gives any further right. In the present case, the plaintiffs who certainly cannot be in a better position than they would be if they had simply bought part of the mortgaged property subsequently sold under Rangayya Goundan's decree, had their opportunity, and they might, by paying off the debt and saving the property from sale, have acquired a right of contribution secured by a lien on the other property."

In other words, persons in the position of the present plaintiffs do not come within S. 82 unless they pay off the first mortgagee. The section certainly does not say this, but before taking the matter further we will examine some of the authorities quoted to us in the course of the arguments. The first of these cases is the Bench decision of this Court in 24 Mad. 85[4] where S. 82 was correctly applied. There a joint family consisted of a father and three sons. The father mortgaged certain lands and subsequently the family became divided. By the terms of the partition the father and his sons each took a fourth share in the family estate and each became liable for a fourth of the mortgage debt. One of the sons sold the greater portion of his share in the mortgaged property to the plaintiff, to whom he gave a bond and mortgaged other lands to secure the plaintiff from loss should the original mortgagee bring the property subject to the mortgage to sale. The mortgagee sued to enforce his mortgage and obtained a decree, whereupon a portion of the hypotheca was sold, and the portion sold included the property which the plaintiff had bought. The proceeds of sale proved sufficient to discharge the mortgagee's decree, whereupon the plaintiff sued upon his security bond, and the land hypothecated to him was sold. As the result of this the plaintiff received the amount secured by the bond. It was not sufficient to discharge the debt due to him and he brought a suit under S. 82, T. P. Act, in which he claimed rateable contribution from the portions of the mortgaged property which had not been sold to satisfy the mortgagee's decree. The Court held that he was entitled to recover and that his right to rateable contribution was in no way affected by the security bond or the payment which he had received thereunder. It was contended that the arrangement between the father and the sons under which each son took a fourth share of the family estate, each being liable for a fourth of the mortgage debt created by the father, precluded the application of S. 82, but the Court held that the words "in the absence of a contract to the contrary" in that section apply to contracts between a mortgagor and a mortgagee and that an agreement binding only as between the mortgagors is not a contract to the contrary within the meaning of the section. The facts in that case are different from the facts in the present case and those in 24 Mad. 96,[2] but Madhavan Nair J. in 41 M. L. W. 416[1] criticized 24 Mad. 96[2] on the basis of the judgment in 24 Mad. 85.[4]

The Allahabad High Court has indicated its dissent from the judgment in 24 Mad. 96[2] in more than one case. In 26 All. 407,[3] Banerji J. said that he could see no distinction in principle between a case where the payment in respect of which contribution is claimed is made to avert a legal process and a case in which payment has been enforced by sale of the property of the claimant for contribution. In both cases his claim is based upon the ground that his property has contributed more than what is liable for, and that the defendant is benefited thereby. These remarks were prefaced by the statement that he was unable to agree with the view of the learned Judges who had decided 24 Mad. 96.[2] Stanley C. J. in 31 All. 65[5] pointed out that the right to contribution rests upon the principle that a property which is equally liable with another to pay a debt shall not be relieved of the entire burden of the debt because the creditor has been paid out of that other property alone. The decision in that case certainly runs counter to that in 24 Mad. 96.[2]

The governing factor here is what S. 82, T. P. Act, says, and the learned Judges who decided 24 Mad. 96[2] had not sufficient regard to its wording. That decision if allowed to stand would mean that persons in the position of the plaintiffs would lose everything unless they were sufficiently well off to discharge the prior mortgage. It would not only be most unjust, but it would mean inserting into the section a provision which is not there and a provision which runs counter to its tenor. In order to avoid this conclusion Mr. Rajah Iyer, who represents the respondents, has suggested that a second mortgagee is in the position of a mortgagor and a mortgagor cannot claim contribution. A second mortgagee does not stand in the shoes of a mortgagor. Where there is a second mortgage, the second mortgagee holds a mortgagee's interest in the property and the fact that some other person has previously received a mortgagee's interest does not detract from the nature of his interest. When a person agrees to lend money on the security of a second mortgage of a portion of the property he knows that the first mortgagee has the benefit of the whole of the property, and that the first mortgagee, if he calls in the mortgage loan, will have the right to cause the whole of the hypotheca to be sold. If the first mortgagee does not cause the whole of the hypotheca to be sold, the second mortgagee has the right, as the section stands, to call upon the holder of the unsold portion to contribute his share of the principal debt. All that persons in the position of the present plaintiffs ask is that the holder of the unsold portion of the hypotheca shall bring into Court the proportion of the amount of the first mortgagee's debt which is allottable to the portion held by him. In our opinion the plaintiffs as the second mortgagees of the western portion have an interest in the portion sold and come within the principle stated by Stanley C. J. in 31 All. 65.[5] For the reasons given we consider that 24 Mad. 96[2] was wrongly decided. The appeal will be allowed, which means that the case will be sent back to the trial Court to ascertain the amount

4. ('01) 24 Mad. 85, Ramabadrachariar v. Srinivasa Iyengar.

5. ('08) 31 All. 65 : 1 I. C. 5 : 6 A. L. J. 2 : 1908 A. W. N. 289, Muhammed Yahia v. Rashiduddin.

a which the plaintiffs are entitled to recover by way of contribution from defendant 1. The plaintiffs are entitled to their costs here and below.

C.R.K./K.S. *Appeal allowed.*

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* A. I. R. (29) 1942 Madras 688

FULL BENCH

LEACH C. J., KING AND LAKSHMANA RAO JJ.

Jaldu Balasubramaniam Chetty — *Appellant*

v.

D. Kothandaramaswami Nayanim Varu and others — *Respondents.*

b Appeal No. 576 of 1940, Decided on 19th August 1942, against order of Sub-Judge, Chittoor, D/- 24th January 1940.

(a) Civil P. C. (1908), S. 47—Order definitely allowing or disallowing plea in execution proceedings is appealable notwithstanding that execution petition is not terminated thereby — Executing Court holding claim to execute decreee to be barred under S. 47 and adjourning proceeding to enable claimant to obtain succession certificate which would entitle him to execute decree—Order amounts to disallowance of claim and is appealable (Per *Division Bench in Order of Reference*).

If a claim or plea put forward in the execution proceeding is definitely allowed or disallowed the order is appealable notwithstanding that the execu-
c tion petition is not terminated by it. An order by the executing Court that an inquiry into the claim of a person that he is entitled to execute the decree is barred by S. 47 and adjourning the proceeding to enable the person to obtain a succession certificate which would entitle him to execute the decree amounts to disallowance of the claim put forward in the execution proceeding and is appealable: ('36) 23 A. I. R. 1936 Mad. 801, *Rel. on.* [P 689*d*, *e*]

C. P. C. —

('40) Chitaley, S. 47 N. 86 Pt. 4.
('41) Mulla, Page 198 N. "Appeal".

(b) Practice — Reference to Full Bench — Division Bench dissenting from previous Division Bench ruling must refer question to Full Bench (Per *Full Bench*).

A Division Bench has no power to overrule a
d previous Division Bench decision from which it dissents. The proper course in such a case is to refer the question to a Full Bench: ('40) 27 A. I. R. 1940 Mad. 356 (F.B.), *Rel. on.* [P 690*b*]

C. P. C. —

('40) Chitaley, Preamble N. 15 Pt. 17a.

*** (c) Civil P. C. (1908), O. 21, R. 16 and S. 47 — Decree held by one person as benamidar for another—Holder dying—True owner can apply for execution — Question of his title can be decided in execution proceedings** (Per *Full Bench*).

If *A* in fact holds a decree as benamidar for *B*, on *A's* death his heirs cannot claim it as their property. The decree being the property of *B* and death having removed the nominal holder from the scene *B* can ask the Court to execute the decree at his instance on the ground that by operation of law he has obtained a complete title to it. Consequently, where a decree is held by one person as a benamidar for another and the holder dies, the true owner can apply for execution, and if his title is disputed, the question can be decided in those proceedings: ('27) 14 A.I.R. 1927 Mad. 903, *Foll.* [P 690*e*, *f*]

C. P. C. —

('40) Chitaley, O. 21, R. 16 N. 6 Pt. 10.
('41) Mulla, Page 196 Pt. (g).

(d) Civil P. C. (1908), O. 21, R. 16 — Decree transferred in writing to benamidar — Benamidar living — Whether real owner can claim under O. 21, R. 16 to execute it *(Quære)* (Per *Full Bench*).

Whether it is open to a person who is not *eo nomine* the decree-holder or the transferee of the decree, to apply for its execution on the ground that he is the real owner and the transferee was merely a benamidar for him, when the benamidar is alive. [P 689*f*]

C. S. Venkatachariar and T. K. Srinivasathathachariar — for Appellant.

T. S. Narasinga Rao and R. Venkatasubba Rao — for Respondents.

ORDER OF REFERENCE *(Krishnaswami Ayyangar and Kunhi Raman JJ., 24th July 1942.)*

Krishnaswami Ayyangar J.—On 9th September 1936 Nookala Manickamma obtained a money decree against the respondents for Rs. 6175-3-0 besides costs amounting to Rs. 741-13-4. The decree allowed the judgment-debtors to pay the decretal amount at the rate of Rs. 1000 every quarter, the decretal amount being charged on the properties belonging to them. After decree Nookala Manickamma died. In September 1939 an application for the execution of the decree was made to the Court, but it was ultimately dismissed on 4th October 1939. The present
g application was filed on 8th December 1939 by the appellant. He claimed to be entitled to execute the decree on two grounds: (1) that he was the legal representative of the decree holder, and (2) that he was the real owner of the debt embodied in the decree, and he accordingly claimed that he should be recognized as the legal representative of the deceased plaintiff and the real owner of the debt and permitted to execute the decree. The learned Subordinate Judge in the Court below has refused to hold an inquiry into the question whether the appellant is entitled to the property in the decree in his own right as part of his family properties. He was of opinion that the executing Court cannot go behind the decree and start an investigation regarding the claim of title put forward by the appellant. He also held the promissory note which formed the
h basis of the decree itself cannot be held to have been taken benami in the name of the original decree-holder for the benefit of the appellant's family. In this view he considered that the appellant should produce a succession certificate before proceeding further with the execution petition and accordingly gave him a month's time for the purpose. Failing compliance, he decided that the petition should be rejected.

If the property represented by the decree belonged to the joint family consisting of the appellant and his father—which we understand is his case—it is not necessary for him to produce a succession certificate for realizing it since it has survived to him on the death of his father. Nor can we agree that the principle that the doctrine of benami should not be recognized with respect to a promissory note is attracted to circumstances like those present here as we are here concerned with a money decree charged upon immovable property and not with the enforcing of a promissory note. The promissory note

is merely a historical incident and what the Court is now concerned with is a question of the executability of a decree.

The question therefore arises whether the executing Court is not entitled to enquire into the question whether the real owner of the decree is the appellant. The judgment of the Subordinate Judge appears to proceed on the view that the executing Court has no such power. In 21 Mad. 388,[1] Shepherd and Subramania Ayyar JJ. held that if a decree is transferred to one as benamidar for the actual purchaser, the latter is entitled to execute a decree and his right course is to apply under S. 232, Civil P. C., 1882, corresponding to O. 21, R. 16 of the present Code. In the opinion of these Judges the question whether the party claiming to be the real transferee is or is not such, is a question as to whether he is a representative of the party to the suit in whose favour the decree was given and therefore falls under the last paragraph of S. 244 of the old Civil P. C., corresponding to S. 47 of the new Code. In 48 Mad. 553,[2] Coutts-Trotter C. J. and Srinivasa Ayyangar J. refused to follow the decision on the ground that it was erroneous. In that case there was a transfer of the decree in favour of the agent of one Subramaniam Chettiar. The contention of the petitioner in the execution petition was that the transfer was taken benami in the name of his agent. The view of the Court appears to have been that the Code of Civil Procedure intended to prevent benamidars coming in and making applications to the Court on the general basis of the law relating to benami transactions. In 51 Mad. 219,[3] Odgers and Curgenven JJ. held that the question who is the real owner of a decree can be gone into in execution in cases where all the original parties, namely, the original decree-holder, the original alleged benami transferee and the original real transferee are all dead. The Court was of opinion that the decision in 48 Mad. 553[2] should be limited to a case where a decree has been transferred to a person in writing and another applies to execute the decree as real owner. In I. L. R. (1939) Mad. 1004,[4] a Division Bench of this Court, of which one of us was a member, dissented from the view of the learned Judges in 48 Mad. 553.[2]

Faint mention was made of a preliminary objection to the maintainability of the appeal by the learned advocate who appears for the respondents. The suggestion was that there has been no final order on the execution application which has only been adjourned for the production of a succession certificate by the petitioner. But we understand the order of the learned Judge to mean that an inquiry into the claim of the appellant that he is entitled to execute a decree is barred by S. 47, Civil P. C. We are of opinion that such a decision amounts to a disallowance of the claim put forward in the execution proceeding and is appealable. In 71 M. L. J. 388,[5] an order disallowing a plea of limitation and adjourning the execution proceedings to a later date was held to be an order from which an appeal lay under S. 47, Civil P. C. We understand the correct principle to be that if a claim or plea is definitely allowed or disallowed the order is appealable notwithstanding that the execution petition is not terminated by it. We are of opinion that there is no substance in the preliminary objection which is accordingly overruled. As we are inclined to the opinion that 48 Mad. 553[2] has been wrongly decided we refer the question of the correctness of the decision to a Full Bench. We may formulate the question referred in this form : Whether it is open to a person who is not *eo nomine* the decree-holder or the transferee of the decree, to apply for its execution on the ground that he is the real owner ? The papers will be placed for orders before the honourable the Chief Justice.

OPINION OF THE FULL BENCH

The question which has been referred reads as follows :

" Whether it is open to a person who is not *eo nomine* the decree-holder or the transferee of the decree, to apply for its execution on the ground that he is the real owner ?"

As we intend to confine our answer to a case where the facts are similar to those of the present case, it is necessary for us to state them, in so far as they are relevant to the question. One Nookala Manickamma sued the respondents in the Court of the Subordinate Judge of Chittoor to enforce payment of the amount due on a promissory note which had been executed in her favour and on 9th September 1936, she obtained a decree for the payment of Rs. 6175-3-0 with costs. The appellant who was joint with his father alleges that the promissory note constituted an asset of the family and that Nookala Manickamma held it as the benamidar of his father who was the manager. Nookala Manickamma and the appellant's father died before 8th December 1939. On that date the appellant instituted proceedings in execution in the Court of the Subordinate Judge. He claimed to be entitled to execute the decree for two reasons. In the first place, he said that he was the legal representative of the decree-holder and in the second place, that he had become the real owner of the debt embodied in the decree. The Subordinate Judge held that the Court could not go behind the decree and commence an investigation into the question whether it constituted the property of the family then represented by the appellant. He was also of the opinion that the plea that Nookala Manickamma held it as a benamidar could not in law be advanced. Consequently, the Subordinate Judge held that the appellant was not entitled to institute proceedings in execution until he had obtained, as the representative of Nookala Manickamma, a succession certificate in respect of the decree.

The learned Judges who have made this reference have pointed out in their order that if the property represented by the decree belonged to the joint family consisting of the appellant and his father it was not necessary for the appellant to produce a succession certificate in order to realize it, since it had devolved upon him on the death of his father, and they did not agree with the opinion that a person could not hold a promissory note as a benamidar. They felt constrained to make the reference because of the conflict which exists between the decision of this Court in 21 Mad. 388[1] and 48 Mad. 553.[2] In the former of these two cases Shepherd and Subramania Ayyar JJ. held that if

1. ('94) 21 Mad. 388 : 8 M. L. J. 48, Manikam v. Tatayya.
2. ('25) 12 A.I.R. 1925 Mad. 701 : 88 I.C. 409 : 48 Mad. 553 : 48 M. L. J. 419, Palaniappa Chettiar v. Subramania Chettiar.
3. ('27) 14 A. I. R. 1927 Mad. 903 : 105 I. C. 405 : 51 Mad. 219 : 53 M. L. J. 568, Kristam Naidu v. Durvada Patrudu.
4. ('39) 26 A. I. R. 1939 Mad. 210 : 183 I. C. 699 : I. L. R. (1939) Mad. 1004 : (1939) 1 M. L. J. 379, Minakshi Iyer v. Noor Mahomed Rowther.
5. ('36) 23 A. I. R. 1936 Mad. 801 : 164 I. C. 670 : 71 M. L. J. 388, Ramarao v. Sreeramamurthi.

a decree is transferred to a person acting as the
c benamidar for the actual purchaser, the latter was entitled to execute it under S. 232, Civil P. C., 1882. In that case ond Lakshmisetti Subrayudu obtained a decree for the payment of money and one Patti Subrayudu applied for execution on the ground that he was the transferee of the decree. The appellant alleged that he and his brother were the real transferees and that Patti Subrayudu was merely a benamidar for them. On this footing he himself applied to execute the decree. The learned Judges being of the opinion that the person entitled to the beneficial interest in the decree could apply for execution directed the executing Court to inquire and submit a finding on the question whether Patti Subrayudu was the real transferee or whether the appellant and his brother occupied that position.

Order 21, R. 16 of the present Code corresponds
b to S. 232 of the Code of 1882. Order 21, R. 16 embodies certain amendments, but so far as this case is concerned, the provisions are the same. Order 21, R. 16 provides that where a decree is transferred by an assignment in writing or by operation of law the transferee may apply for execution of the decree to the Court which passed it and the decree may be executed in the same manner and subject to the same conditions as if the application were made by the decree-holder. In 48 Mad. 553,[2] Coutts-Trotter C. J. and Srinivasa Ayyangar J. expressed strong dissent from the decision in 21 Mad. 388[1] and refused to follow it. They had no power to overrule it and the proper course, as was laid down in I. L. R. (1940) Mad. 454,[6] was to refer the question to a Full Bench. They did not, however, do so,
c and proceeded to hold that where a decree has been transferred in writing only the transferee can apply in execution. They considered that it mattered not that the transferee was a benamidar for the person who sought to execute it. It may be mentioned that this decision was followed by the Lahore High Court in 8 Lah. 35[7] and the Patna High Court in 17 Pat. 223;[8] but it was dissented from by the Calcutta High Court in A. I. R. 1928 Cal. 835=55 C. L. J. 82.[9] In 21 Mad. 388[1] and also in 48 Mad. 553[2] the alleged benamidar was alive. Here she is dead and in 51 Mad. 219[3] this Court considered that this distinction avoids the controversy which arose in 21 Mad. 388[1] and 48 Mad. 553.[2] 51 Mad. 219[3] was decided by Odgers and Curgenven JJ. who held that where a transferee of a decree has died, the Court in which execution proceedings have been instituted may inquire whether the transferee was really a benamidar for another and allow the real owner or
d his representative to execute the decree. The basis of the decision is to be gathered from the following passage in the judgment of Curgenven J.:

" Following 48 Mad. 553,[2] it is no doubt true that the real owner of a decree cannot claim under O. 21, R. 16, to execute it where it has been transferred in writing to the name of a benamidar for him. But once the benamidar is dead, this decision does not appear to me to be any authority for the position pressed upon us, that the real owner still e
cannot be heard to say that the decree is his; nor I think, have we been shown any authority for the proposition. Once the benamidar is dead, the question necessarily arises : Who is his representative, or, to use the language of O. 21, R. 16, who is his transferee by operation of law? In the ascertainment of this, there does not appear to be any provision in the Code, or any other authority, requiring the executing Court to exclude the real owner from coming forward and proving that the decree is his property. We have been shown nothing in support of the contention that, in such circumstances, the ostensible owner is to be regarded as the real owner for the purpose of ascertaining his representatives."

We think that this distinction may be accepted. If *A* in fact holds a decree as benamidar for *B*, on *A's* death his heirs cannot claim it as their property. The decree is the property of *B* and death f
has removed the nominal holder from the scene. Why should not *B* in these circumstances ask the Court to execute the decree at his instance on the ground that by operation of law he has obtained a complete title to it? As we are of the opinion that the decision in 51 Mad. 219,[3] should be followed here we answer the question referred in this way: Where a decree is held by one person as a benamidar for another, and the holder dies, the true owner can apply for execution, and if his title is disputed, the question can be decided in those proceedings. The conflict between 21 Mad. 388[1] and 48 Mad. 553[2] remains. It will have to be settled, but this does not appear to us to be the occasion, and consequently we have avoided expressing any opinion on the matter. The costs of this reference will be made costs in the appeal. g

G.N./R.K. *Answer accordingly.*

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6. ('40) 27 A. I. R. 1940 Mad. 356 : 188 I. C. 250 : I. L. R. (1940) Mad. 454 : (1940) 1 M. L. J. 400 (F. B.), Seshamma v. Venkata Narasimharao.
7. ('27) 14 A.I.R. 1927 Lah. 110 : 100 I.C. 545 : 8 Lah. 35 : 28 P. L. R. 239, Gurdial Singh v. Gourbaksh Singh.
8. ('38) 25 A.I.R. 1938 Pat. 457 : 177 I. C. 992 : 17 Pat. 223 : 19 P. L. T. 901, Mohamed Anas v. Bhupendra Prasad.
9. ('28) 15 A.I.R. 1928 Cal. 835 : 114 I. C. 495 : 55 C.L.J. 82, Nilkantha Ghosal v. Ramachandra Roy.

A. I. R. (29) 1942 Madras 690

SPECIAL BENCH

LEACH C. J., MOCKETT AND KRISHNASWAMI AYYANGAR JJ.

In re S. Krishnamurthi Ayyar — *Petitioner.*

O. P. No. 51 of 1941, Decided on 4th April 1941.

(a) Press (Emergency Powers) Act (1931), S. 23 — "Order" means notified order — Two months should be computed from date of notification of order and not from date of passing of order.

It is the duty of the Court to interpret a statute h
according to the ordinary meaning of the words used, unless this would lead to a manifest absurdity. The word "order" in S. 23 must be read as being the notified order because there can be no forfeiture until the declaration has been notified. Therefore the two months should be computed not from the date of passing of the order but from the date when the order is notified in the local Gazette. [P 691c,d]

(b) Press (Emergency Powers) Act (1931), Ss. 19, 4 (1) — Government have power of forfeiture irrespective of action against press.

Section 4 (1) is primarily concerned with printing presses but by reason of S. 19 the Government have the power of forfeiture irrespective of action being taken against the press. [P 691e]

(c) Press (Emergency Powers) Act (1931), S. 4 (1), Expl. 1—Mere fact that certain passage is narrative is no excuse if it incites or encourages crime referred to in S. 4.

If a narrative is written in such a way that it incites or encourages or tends to incite or encourage the crimes referred to, the fact that it is a narrative does not provide any excuse. [P 691*f*]

T. R. Venkatarama Sastri for R. Chakravarthi —for Petitioner.

Crown Prosecutor—for the Crown.

LEACH C. J. — The petitioner is the author of a book written in Tamil and entitled "Vira Savarkar" which has been translated as "Savarkar, the Hero." It purports to be a biography of Mr. V. D. Savarkar, who has been the President of the Hindu Mahasabha since 1937. On 26th November 1940 the Provincial Government declared the book to be forfeited to His Majesty under S. 19, Press (Emergency Powers) Act, 1931, read with S. 4 (1) (a). The petitioner has applied to this Court under S. 23 for an order setting aside the declaration of forfeiture. The learned Crown Prosecutor has raised the preliminary objection that the application is out of time, and therefore it is necessary to decide this question before dealing with the merits of the application.

Section 23 states that a person having an interest in property in respect of which an order of forfeiture has been made may within two months from the date of the order apply to the High Court to set it aside. The order of forfeiture in this case was not published in the Fort St. George Gazette until 3rd December 1940. The petition was filed on 3rd February 1941. If time is to run from the date on which the order was passed the application is out of time, but if the period of limitation runs from the date of the notification of the order the application is in time. The learned Crown Prosecutor says that as the words of S. 23 are "within two months from the date of such order" the Court is bound to hold the petition to be out of time. To accept this contention might lead to an absurd situation. If the Government omitted to notify the order until two months had elapsed, the aggrieved person would have no remedy at all. It is the duty of the Court to interpret a statute according to the ordinary meaning of the words used, unless this would lead to a manifest absurdity and this would be the case here if the word "order" were taken to refer to the document which was signed on 26th November 1940. In my judgment the word "order" contemplates the notified order. Section 19 says that where a book appears to the Provincial Government to contain any words, signs or visible representations of the nature described in S. 4, sub-s. (1), the Provincial Government may, by notification in the local Official Gazette, stating the grounds of its opinion, declare every copy of the book to be forfeited to His Majesty. The word "order" in S. 23 must be read as being the notified order because there can be no forfeiture until the declaration has been notified. For these reasons I hold that the petition has been filed in time. Section 4 (1) (c) states that whenever it appears to the Provincial Government that a printing press in respect of which security has been ordered to be deposited under S. 3 is used for the purpose of printing or publishing a newspaper, book or other document containing words, signs or visible representations which incite to or encourage, or tend to incite or to encourage, the commission of the offence of murder or any cognizable offence involving violence, the Provincial Government may by notice in writing to the keeper of the press, inter alia, declare all copies wherever found in British India to be forfeited to His Majesty. Section 4 (1) is primarily concerned with printing presses, but by reason of S. 19 the Government has the power of forfeiture irrespective of action being taken against the press. There are four explanations appended to sub-s. (1) of S. 4 but it is only necessary to refer to the first which states that no expression of approval or admiration made in a historical or literary work shall be deemed to be of the nature described in the sub-section, unless it has the tendency described in cl. (a), namely the tendency to incite to or encourage, or tend to incite to or to encourage, the commission of the offence of murder or a cognizable offence involving violence.

I will now examine certain passages in the book in order to ascertain whether they can be deemed to incite or encourage, or tend to incite, or encourage, the commission of any of the offences referred to in S. 4 (1) (c). (After doing so the judgment proceeded.) I am unable to read into these passages any condemnation of the violence advocated in the other passages I have quoted. Mr. Sastriar has suggested that the petitioner has merely given a historical narrative and says that he is entitled to say all that he has said. If a narrative is written in such a way that it incites or encourages or tends to incite or encourage the crimes referred to the fact that it is a narrative does not provide any excuse. Moreover, I am not able to accept Mr. Sastri's argument that the passages, which I have quoted must be regarded merely as narrative. Mr. Savarkar is held up to be a hero and a hero who has advocated the use of the sword and the bomb to enforce his political ideas. If there were any real condemnation of this to be found in the book there might be some foundation for Mr. Sastri's argument; but as there is not, I can only regard the book as falling within S. 4 (1) (a) of the Act, which means, that, in my opinion, the Government was acting within its powers in declaring it to be forfeited to His Majesty, and consequently I would dismiss the petition with costs, Rs. 150.

MOCKETT J.—I entirely agree.

KRISHNASWAMI AYYANGAR J.—I agree.

C.R.K./K.S. *Petition dismissed.*

A. I. R. (29) 1942 Madras 691

SPECIAL BENCH

LEACH C. J., BELL AND BYERS JJ.

In re C. S. Venkatachariar, First Grade Pleader and R. S. Second Grade Pleader.

Referred Case No. 2 of 1942, Decided on 23rd February 1942.

(a) Legal Practitioner—Person appearing as counsel in case should not give evidence as witness in same case — If he wants to give evidence, he must retire from case as counsel.

A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so, his proper course is to retire from the case in his professional capacity. [P 692*d*,*e*]

C. P. C. —

('40) Chitaley, O. 3, R. 4, N. 13, Pts. 20, 21.

('41) Mulla, Page 1389, Pt. (m).

(b) Legal Practitioner—Professional misconduct — Misrepresentations made by counsel in open Court but Court knowing real facts not misled — No charge should be made.

Where the misrepresentations which were alleged to have been made by a pleader were made in open

Court in respect of documents before the Court and the facts were all within the knowledge of the Court and the Court was not misled by such representation :

Held that no charge should be made against the pleader. [P 692*h*]

C. P. C. —

('40) Chitaley, O. 3, R. 4, N. 11, Pt. 1.

(c) Legal Practitioners Act (1879), S. 14 — Pleader committing misconduct in course of his professional duty in subordinate Court — Such Court can frame charge and inquire into misconduct.

If in the course of a proceeding a subordinate Court had reason to think that a pleader had committed misconduct in the course of his professional duty, the presiding officer of the Court can under S. 14 institute proceedings against him and inquire into the alleged misconduct : ('36) 23 A. I. R. 1936 Rang. 189, *Expl.*; ('36) 23 A. I. R. 1936 Rang. 158, *Rel. on.* [P 693*b*,*c*]

Advocate-General in support of the notice.

V.V. Srinivasa Ayyangar for C.R. Rajagopalachari — for the Pleader.

The complainant in person.

LEACH C.J.—This case presents some unusual features. The Court is called upon in the first place to consider whether the respondent, Mr. C. S. Venkatachariar, a pleader practising in the Court of the District Munsif of Chidambaram, has been guilty of professional misconduct. In the second place, it is called upon to decide whether the person who lodged the complaint against him, R. S. another pleader practising in that Court, is also guilty of professional misconduct. Charges were framed by the District Munsif of Chidambaram against both the respondent and the complainant. The District Munsif has presented a report to the effect that the respondent is not guilty of the charges framed against him, but that the complainant is. This report is concurred in by the District Judge of South Arcot. The District Munsif considered that the conduct of the complainant had been such as to warrant the cancellation of his sanad. The District Judge considered, however, that suspension for three years would be a fitting penalty. S. Nataraja Ayyar, the complainant's son, is married to one Jayalakshmi Ammal and the marriage has proved to be an unhappy one. On 14th August 1939, on the instructions of Jayalakshmi Ammal, a pleader wrote to her husband demanding the payment of Rs. 15 per month for her maintenance. This demand was not complied with and the wife then instituted proceedings under S. 488, Criminal P. C. On 1st November 1939 the Magistrate ordered the husband to pay to his wife Rs. 5 per month. In those proceedings the complainant, in his professional capacity, represented his son. The passing of this order was followed by the institution of a suit by the husband in the Court of the District Munsif of Chidambaram for a decree setting aside the order on the ground that the wife had committed adultery. The complainant, again acting in his professional capacity, appeared on behalf of his son and gave evidence in support of his son's case. In fact he was the only witness in the case. Why the complainant gave evidence on behalf of his son in a case in which he was appearing in his professional capacity has not been explained. A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so, his proper course is to retire from the case in his professional capacity. The charges framed against the complainant have, however, nothing to do with this incident and there is no need to discuss it further.

On 20th January 1941 the husband's suit was dismissed, but on 27th February he applied for a review of the District Munsif's judgment. This application was dismissed by an order dated 8th March. A month before, the complainant had filed a petition in the District Munsif's Court charging the respondent with professional misconduct in that he had misled the Court and had tutored his client to give false evidence in the suit. On 10th February the complainant filed a second petition in which he charged the respondent with a further act of professional misconduct. On this occasion the charge was that the respondent had filed a certificate in which he stated that he had received his fee, whereas he had not. In affidavits filed in denial of the charges made against him, the respondent alleged that the complainant had intimated that he would drop the complaints of professional misconduct if he would pay a sum of Rs. 75 and that he would be prepared to accept even less than this amount if the respondent did not oppose the application for a review of the judgment dismissing the suit filed by the complainant's son for a decree setting aside the order passed against him under S. 488, Criminal P. C. This allegation of the respondent was supported by the affidavits of four other pleaders practising in the Court. They testified to the fact that the complainant had made these proposals and that the respondent had refused to entertain them. In this state of affairs the District Munsif framed four charges against the respondent of having made misrepresentations to the Court with regard to certain exhibits in the case and a fifth charge of having tutored his client to give false evidence. There was a sixth charge, but this was merely a charge of professional misconduct based on the other charges. Against the complainant the District Munsif framed three charges. The first was that he demanded money from the respondent "as consideration for not presenting or representing or pressing" the petition which he had presented against the respondent in connexion with the alleged false certificate. The second charge was that as additional consideration for not pressing the petition against the respondent he should not oppose the application for review. The third charge was a general charge of professional misconduct, again apparently based on the earlier charges.

It is difficult to understand why the District Munsif framed charges of misrepresentation against the respondent. The misrepresentations which were alleged to have been made were made in open Court in respect of documents before the Court and the facts were all within the knowledge of the District Munsif. He has stated in his report that he was not misled by the respondent. The report also shows that the charge against the respondent of having tutored his client to give false evidence is equally groundless. We have no hesitation in accepting the report of the District Munsif that the respondent is not guilty of any of the charges brought against him in this case, and therefore the charges against him will be dismissed.

After adopting an obstructive attitude the complainant failed to appear at the hearing of the case against him. He had been given far more latitude in the matter of adjournments than he should have been given, and the fact that he did not attempt to refute the allegations made against him in itself

points to the truth of the testimony of the witnesses who were called to prove the charges. The four pleaders who had sworn affidavits all gave evidence, and we agree with the District Munsif that there is no reason to disbelieve them. They are practitioners of standing. In fact the complainant, who has appeared in person before us, has not suggested that their evidence is in any respect untrue. He has confined himself to the contention that the District Munsif had no jurisdiction to frame charges against him or to hold an inquiry. He states that unless a charge is made by a person concerned, a Court subordinate to the High Court has no power to frame a charge against a practitioner. The framing of the charge, he says, must be directed by the High Court in the absence of a formal petition to a subordinate Court. The contention ignores the plain wording of S. 14, Legal Practitioners' Act. The complainant has, however, insisted that the decision of the Rangoon High Court in A. I. R. 1936 Rang. 189[1] assists him. An examination of the judgment in that case shows that the complainant has misunderstood it. There the District Judge of Pyapon framed a charge of professional misconduct against a practitioner because while practising as a pleader, he was carrying on the business as a taxi-cab owner. The Rangoon High Court held that the District Judge had no right to frame the charge as the matter did not arise in Court, the charge concerned something which the respondent was doing outside the Court. In delivering the judgment Page C. J. referred to the decision of the Rangoon High Court in 13 Rang. 737,[2] where it was held that, if in the course of a proceeding a subordinate Court had reason to think that a pleader had committed misconduct in the course of his professional duty, the presiding officer of the Court can under S. 14, Legal Practitioners' Act, institute proceedings against him and inquire into the alleged misconduct. That this is so is really not open to question.

The complainant then says that, in any event, the District Munsif had no right to hold the inquiry against him because he might have been a witness in the charge against the respondent. He was not a witness, nor could he have been a witness. He was lawfully holding an inquiry into the complainant's conduct and therefore he was entitled to take into consideration what had transpired before him in the course of the suit filed by the complainant's son. We consider that the charges against the complainant have been fully proved and as he has shown himself to be unworthy of remaining a member of the legal profession, his sanad will be cancelled.

C.R.K./K.S. *Order accordingly.*

1. ('36) 23 A. I. R. 1936 Rang. 189 : 162 I. C. 485 : 37 Cr. L. J. 617, In the matter of S., a Lower Grade Pleader, Pyapon.
2. ('36) 23 A. I. R. 1936 Rang. 158 : 161 I. C. 958: 37 Cr. L. J. 510 : 13 Rang. 737, U Thein Nyun v. District Superintendent of Police, Maubin.

**A. I. R. (29) 1942 Madras 693

FULL BENCH

LEACH C. J., KRISHNASWAMI AYYANGAR AND SOMAYYA JJ.

Amirthammal and others — Appellants

v.

Vallimayil Ammal — Respondent.

Second Appeal No. 844 of 1938, Decided on 2nd April 1942, against decree of Sub-Judge, Ramnad at Madura in Appeal No. 103 of 1936.

(a) Hindu law—Exclusion from inheritance —Congenital idiot is member of coparcenary in spite of exclusion from enjoyment.

It is a fundamental rule of Hindu law that a son born to a member of a joint family has on birth the right to share in the family estate. The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birth right. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognize that his son, should one be born to him, has the right to share in the family estate is in itself an indication that he is a member of the coparcenary : 9 Mad. 64 (F.B.), *Applied* ; ('41) 28 A. I. R. 1941 P. C. 120, *Rel. on* ; ('23) 10 A.I.R. 1923 Mad. 215 (F.B.), *Dissent.*; ('20) 7 A. I. R. 1920 Mad. 652 and ('35) 22 A. I. R. 1935 Mad. 775, *Ref.* [P 696*f*,*g*]

Hence a congenital idiot has the status of a coparcener notwithstanding that he is excluded from the enjoyment of his share. [P 693*g*,*h* ; P 697*g*]

Hindu law —

('40) Mulla, Page 100 Pt. (t) ; Page 102 S. 102 ; Page 104 S. 110.

('38) Mayne, Page 725 Paras. 595 and 596; Page 729 Para. 602.

(b) Hindu law — Marriage — Idiot's marriage is lawful particularly when his father has arranged marriage and his wife has given birth to sons.

It is undoubtedly abhorrent to a modern mind that a congenital idiot should be allowed to marry, but the Court here can only have regard to the personal law, and the personal law of the Hindu undoubtedly does regard such a marriage as being possible. [P 697*f*]

Where the congenital idiot's father has arranged his marriage and his wife gave birth to two sons he must be held to be lawfully married and as he had issues he has shown that he was capable of transmitting heritable blood; *Case law discussed*; Edn. 6 Mayne preferred to Edn. 10. [P 697*f*,*g*]

Hindu law —

('40) Mulla, Page 499 S. 427.

('38) Mayne, Page 150 Para. 105.

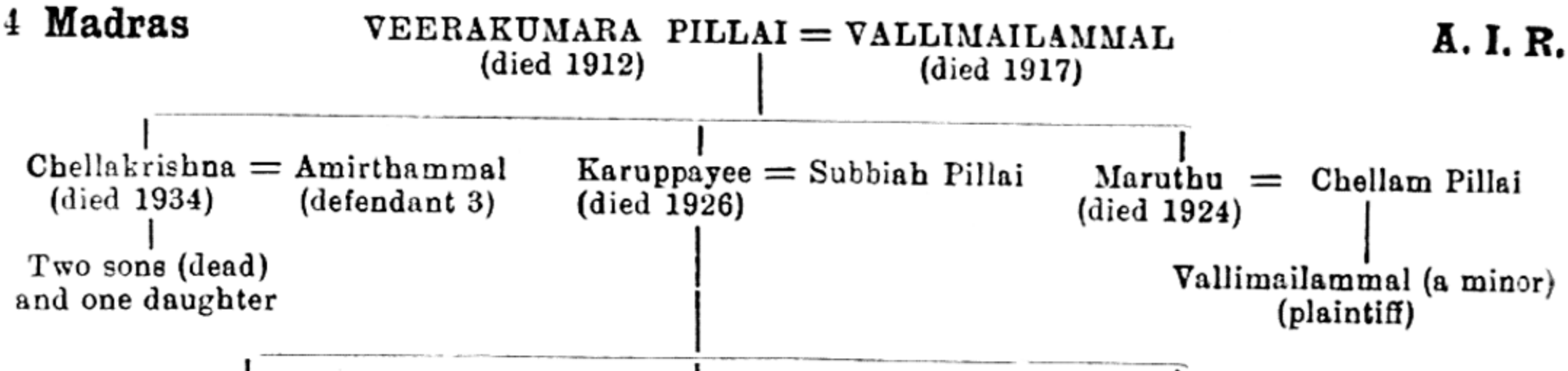
A. Swaminatha Iyer and S. Thayagaraja Iyer — for Appellants.

K. Bhashyam Ayyangar and T. R. Srinivasan — for Respondent.

LEACH C. J.—The question raised in this appeal is whether a congenital idiot has the status of a coparcener notwithstanding that he is excluded from the enjoyment of his share. The following geneological tree will assist in the appreciation of the facts.

(For geneological tree see next page)

Veerakumara Pillai's son Chellakrishna was a congenital idiot, but his father married him to Amirthammal and by her he had two sons and a daughter. Both the sons were born after the death of Veerakumara Pillai in 1912, but both of them had died by 1917. It has not been suggested that either of them was similarly afflicted. Veerakumara Pillai left a will, dated 13th February 1912, by which he bequeathed all his property, which was ancestral, to his widow, to whom he gave full powers to alienate. Veerakumara Pillai had also two daughters, Karuppayee and Maruthu. His widow died in 1917, the younger daughter in 1924 and the elder daughter in 1926. The elder daughter was survived by a son and two daughters, who are res-



pectively, defendants 5, 1 and 2 in the suit. The younger daughter had a daughter, who is the plaintiff. The suit was instituted in the Court of the District Munsif of Ramnad for a decree for partition of the property which Veerakumara Pillai had left to his widow and the delivery to the plaintiff of a half share. Her case was that her grandmother had obtained an absolute estate under the will of her grandfather and that on the death of her aunt, Karuppayee, in 1926 the property devolved by the right of inheritance on her and defendants 1 and 2. The claim was contested by defendants 3, 4 and 5. They averred that Chellakrishna was not a congenital idiot and that the will left by Veerakumara Pillai was invalid. The District Munsif and the Subordinate Judge of Ramnad on appeal held that Chellakrishna was a congenital idiot and this finding is now conclusive. The District Munsif also held that the will was valid and the Subordinate Judge again agreed with him. The appeal is from the decree of the Subordinate Judge and the appellants are defendants 3, 4 and 5.

If Chellakrishna was in law a coparcener with his father, the latter admittedly had no right to bequeath the property held by him to his widow, because in such circumstances, it would constitute the joint property of the father and the son. The answer to the question whether Chellakrishna was a coparcener depends, according to the decision of this Court in 9 Mad. 64[1] on whether he was capable of transmitting heritable blood, and, therefore, it will be necessary to consider whether a congenital idiot can lawfully marry. In order to decide this appeal the Court is called upon to examine certain of the ancient texts and the reported decisions quoted to the Court in the course of the argument. The most important of the texts are to be found in Chap. 2, S. 10 of the Mitakshara. In placitum 1 Vijnaneswara quotes the following text of Yajnavalkya as an exception to the rule of succession "of the son, the widow and other heirs" :

"An impotent person, or outcast and his sons, one lame, a madman, an idiot, a blindman, and person afflicted with an incurable disease, and others (similarly disqualified) must be maintained, excluding them, however, from participation."

In placitum 2, "an idiot" is defined as a "person deficient in understanding, meaning one incapable of discriminating good from bad." In placitum 3 we find this statement :

"Manu likewise ordains, 'impotent persons and outcasts are excluded from a share of the heritage; and so are persons born blind and deaf as well as mad man, idiots, the dumb and those who have lost a sense'."

Placitum 5 reads as follows :

"Those persons are excluded from participation. They do not share the estate. They must be supported by an allowance of food and raiment only; and the penalty of degradation is incurred, if they be not maintained. For Manu says, 'But it is fit, that a wise man should give all of them food and raiment without stint to the best of his power; for he, who gives it not, shall be deemed an outcast.' 'Without stint' signifies 'for life'."

The words "those persons" with which this placitum commences refer to the persons described in placitum 1 as being excluded from participation.

Placitum 7 makes it clear that when the disqualification is removed the right of participation follows. It is in these words :

"If the defect be removed by medicaments or other means at a period subsequent to partition, the right of participation takes effect, on the same principle on which 'when the sons have been separated, one, who is afterwards born of a woman equal in class, shares the distribution' is based."

The placita which have bearing on the rights of the sons of disqualified heirs are placita 9, 10 and 11 which read as follows :

Placitum 9 :

"The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds : 'But their sons, whether legitimate, or the offspring of the wife, by a kinsman, are entitled to allotments, if free from similar defects'."

Placitum 10 :

"The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares; provided they be faultless or free from defects which should bar their participation, such as impotency, &c."

Placitum 11 :

"Of these the impotent man may have issue of the wife; the rest may have legitimate progeny likewise. The specific mention of 'legitimate' issue and 'offspring of the wife' is intended to forbid the recognition of other sons."

Placitum 149 of the Sarasvati Vilasa also has an important bearing, but it is not necessary to quote the whole of it. In explaining the doctrine of exclusion as stated by Manu the commentator states :

"Jatyandhabadhirau : From this coupling together, (a) it follows that they have shares, but that they should, though having shares, be supported as they could marry. From the use of the word 'tadha' (similarly), the secret meaning is that the lame, &c, if capable of the sacrament of marriage take shares, and should be maintained.

Unmaththajamukascha : From this grouping together, it follows that they also should be maintained and do not take shares, it must be understood, if they are not worthy of marriage."

The term Jatyandhabadhirau has been translated as 'congenital blind and deaf' and the term Unmaththajadamuka as 'insane, idiot and dumb.' The

1. ('86) 9 Mad. 64 (F.B.), Krishna v. Sami.

translations of the ancient texts which I have quoted are those given in Setlur, and for the purposes of this case they have been accepted as being accurate, except the word 'not' in the last line of the passage quoted from Sarasvati Vilasa has been omitted. It will be observed that according to Vijnaneswara an idiot, together with other afflicted persons, is excluded from participation in the property of the family while he remains afflicted, the right of participation arises when the disqualification is removed, and an afflicted person is capable of transmitting to his offspring the full rights of a coparcener, if the offspring is not afflicted, notwithstanding that his father remains afflicted. Whether the texts should be read as laying down that a congenital idiot is a coparcener with his rights suspended during the period of his affliction, or whether his rights as a coparcener only commence when his disqualification is removed is another matter and must be decided in the light thrown by the reported decisions, which I will now proceed to examine.

The first case and the most important of the reported decisions of this Court is that of 9 Mad. 64[1] which was heard by a Bench of five Judges. The plaintiff's grandfather, one Sami Reddi, the father of defendant 1, and the grandfather of defendants 2 and 3 were undivided brothers. The plaintiffs' father was born deaf and dumb and the plaintiffs were born after the death of their grandfather. They claimed to be entitled to a share in the family estate as it stood in the lifetime of their father. The District Munsif held that the plaintiffs were not entitled to sue as they were born after the death of their grandfather and in support of his ruling relied on the decisions of the Calcutta High Court in 1 Beng. L. R. A. C. 117[2] which was decided by a Bench, and 2 Beng. L. R. 103,[3] which was decided by a Full Bench. On appeal, the Subordinate Judge reversed the decision of the District Munsif and defendants 1 and 2 appealed to this Court. Their contentions were : (1) that as the plaintiffs' father by reason of his affliction could not inherit and as their grandfather had died before they were born, they acquired no right by birth in the family estate, and (2) that the property having devolved upon the defendants by right of inheritance before the plaintiffs were born their subsequent birth could not divest the defendants of their right to any portion of the property. This Court agreed with the Subordinate Judge that the Calcutta decisions were inapplicable, being decisions under the Dayabagha law, and held that under the Mitakshara law the sons of a deaf and dumb member of an undivided Hindu family are entitled to a share of the estate in the lifetime of their father, notwithstanding that they were born after the death of their grandfather, and that in such a case the estate vests on the death of the grandfather in the qualified heirs, subject to the contingency of its being divested on the recovery of the disqualified brother or the birth of a qualified heir. The judgment of the Court was delivered by that eminent Chief Justice of this Court, Sir Charles Turner, who examined with great care all the texts bearing on the questions raised in the appeal. Turner C. J. pointed out that the decision in 2 Beng. L. R. 103[3] proceeded mainly on two grounds. First, on the rule that an estate once vested in a full and absolute owner cannot be divested, and secondly, on an inference drawn from the texts of the Mitakshara which declare that a disqualified person whose disqualification is removed after partition is entitled to share in like manner as an afterborn son. Turner C. J. then observed :

" Analogy is intended to illustrate and not to limit. The analogy between the case of the disqualified person and the case of the afterborn son is incomplete if the opinion of the Calcutta High Court be adopted, and the true meaning of the analogy appears to be explained by the author of the Sarasvati Vilasa. There are classes of disqualified persons who cannot be relieved of their disqualification and cannot transmit heritable blood ; there are classes who, though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent, or may come into existence at a future time as it does in the case of the afterborn son. When it comes into existence, either in the person of the formerly disqualified heir or of his son, it is to be recognized. If capable of transmitting heritable blood, they are share takers though not at the time share enjoyers. If the son of a disqulified person is born in his grandfather's lifetime and his father dies, he is at once entitled to be recognized as a member of the coparcenary ; the only ground for depriving him of that right, if his father dies after the grandfather's death, is insistence on the rule against divesting an estate once vested."

Turner C. J. proceeded to point out that the rule prohibiting the divesting of an estate once vested in a full owner cannot be laid down without exception, in respect of property governed by the Mitakshara law, and concluded his judgment with this statement :

" The existence of a valid power creates a potentiality of inheritance, which may be likened to that of a son in the womb. The estate is taken conditionally. It is difficult to distinguish these cases from that of the disqualified share taker, who may afterwards become qualified to demand possession or who may beget a qualified son."

Hindu law makes no difference between a person who is born deaf and dumb and a congenital idiot. In the judgment in 9 Mad. 64[1] it is clearly laid down that a disqualified person who is capable of transmitting heritable blood is a share taker, although not while his disqualification lasts a share enjoyer. He only becomes a share enjoyer when the disqualification is removed, but he can transmit a right of enjoyment of the family properties to his issue and it matters not whether the issue is born before or after the grandfather's death. The Court is asked to ignore 9 Mad. 64,[1] but this cannot be done unless it is manifest that it has been overruled by the Privy Council or must be regarded as an obsolete decision, for which I can see no warrant. In 43 Mad. 464[4] the Court had to consider the position in a case of supervening insanity. It was held that the right of a member of a joint Hindu family to share in ancestral property is a right which comes into existence at birth and is not lost, but is only in abeyance, by reason of an affliction which carries with it disqualification. Consequently, on the death of all other members of the joint family the disqualified member takes the whole of the property by survivorship. In delivering the judgment of the Bench, Seshagiri Ayyar J. said :

2. ('68) 1 Beng.L.R. A.C. 117 : 11 W.R.O.C. 19*n*, Parashmani Dasi v. Dinanath Das.
3. ('69) 2 Beng.L.R. 103 : 11 W.R. O.C. 11 (F.B.), Kalidas Das v. Krishna Chandra Das.
4. ('20) 7 A.I.R. 1920 Mad. 652 : 55 I. C. 576 : 43 Mad. 464 : 38 M. L. J. 291, Muthusami Gurukkal v. Meenammal.

" If the exclusion is not based on original sin or a subsequent incapacity to offer oblations and the like, the suggestion that it was due to a belief in the inability of the heir to manage temporal affairs appears more plausible. Very likely the rule is an outcome of a hazy notion that the property should be preserved for the disqualified person by those who are related to him. The law as to guardianship has developed much in later days. Even now it is not perfect. It looks as if the old law-givers by providing for maintenance did not intend to deprive the heir of his inheritance, but only to provide for its management during incapacity."

Seshagiri Ayyar J. discussed the question further in the light of what is stated in the Sarasvati Vilasa and came to the conclusion that the right to a share comes into existence at birth, and subsists all through, although it is incapable of enforcement b at the time of partition, because of the disqualification then existing. This decision is in keeping with the judgment in 9 Mad. 64[1] which was referred to. The decision of this Court in 45 Mad. 949[5] conflicts with 9 Mad. 64[1] and 43 Mad. 464[4] particularly with the latter. In 45 Mad. 949[5] this question was referred to a Full Bench :

" Is a Hindu who is congenitally blind thereby excluded from the inheritance or has the rule become obsolete ?"

One Kanakku Nadan had four sons, the plaintiff, defendant 9, Subbiah Nadan and Ulagamuthu Nadan. The plaintiff separated from his father, who lived with his other three sons, one of whom (defendant 9) was afflicted with congenital blindness. Kanakku Nandan, who had died before the date of the suit, had conveyed his property to his son-in-law, who in c turn conveyed it to defendants 2 and 3. The plaintiff challenged the validity of these transactions. When he filed the suit the only brother alive was defendant 9. The defendants contended that the fact that defendant 9 was alive was a bar to the suit. The plaintiff was by reason of the separation outside the family and if 43 Mad. 464[4] was rightly decided the family estate had devolved upon the disqualified member, as he was the sole surviving member of the joint family, the plaintiff having left it. The Court, which consisted of Schwabe C. J. and Oldfield and Coutts-Trotter JJ. held that the plaintiff, notwithstanding that he had separated from the family, was entitled to maintain the suit, and apparently he was given a decree for possession of the property. The Court considered that the blind brother was excluded from the inheritance and that the rule of exclusion had not become obsolete. d Schwabe C. J. regarded the text of Yajnavalkya quoted by Vijnaneswara in placitum 1 of S. 10 of Ch. 2 of the Mitakshara as authority for the opinion that a person born blind is not a coparcener. He ventured to criticize the judgment of Turner C. J. in 9 Mad. 64[1] in that it placed reliance on the Sarasvati Vilasa. He considered that the word "share" would be better translated as "interest." I do not know on what Schwabe C. J. based his opinion, but it is to be observed that the translation used in 9 Mad. 64[1] by Turner C. J. is an accepted translation and that he was sitting with Muthuswami Ayyar J. who possessed, I understand, a knowledge of sanskrit. My learned brothers who are now sitting with me are in that fortunate position and they tell me that the word "share" is a translation of the Sanskrit word amsa which means "fraction," and therefore in this connexion should be translated as "share." I am not prepared to accept 45 Mad. 949[5] in preference to 9 Mad. 64[1] where the two decisions conflict, but even if I were so inclined I should not be able to follow 45 Mad. 949[5] because the decision in 9 Mad. 64[1] is a decision of a larger Bench and therefore is an overriding authority. e

The only other decision of this Court which calls for mention is that given in 69 M. L. J. 410.[6] It was decided by Varadachariar and Burn JJ. and in delivering the judgment of the Bench, Varadachariar J. said :

"Among members of the joint family, placitum 7 of the Mitakshara does not in terms draw a distinction between cases of congenital disqualification and cases of supervening disqualification. But, here again, the logical application of the theory of right by birth, may justify a differentiation between the two cases, because the congenitally disqualified man f would not have acquired a right by birth at all. The mere fact that the right of maintenance is equally available in both cases does not compel the view that the legal status must be taken to be the same in both cases."

The facts in that case did not call for a decision of the first question raised in this appeal and I do not read the judgment as expressing a definite opinion on the question under discussion. I regard 9 Mad. 64[1] as being binding on the Court, but I go further and say that I respectfully agree with all that is said in the judgment delivered in that case. It is a fundamental rule of Hindu law that a son born to a member of a joint family has on birth the right to share in the family estate. The fact that a son is born with an affliction which disqualifies him from enjoying his share does not rob him of his birth g right. The affliction merely prevents his enjoyment of the right while the affliction lasts. The fact that the ancient texts recognise that his son, should one be born to him, has the right to share in the family estate is in itself an indication that he is a member of the coparcenary. In (1941) 2 M. L. J. 972,[7] the Privy Council expressly recognised that under Hindu law, where the estate is impartible and the holder is joint with his kinsmen, it is the undivided family and not the holder who is the owner of the estate. Only the senior member has the right of enjoyment of the properties forming the family estate, unless there be a custom giving the junior members a subsidiary right of maintenance out of them. I can see no difference in principle here and this provides an additional reason for reading the words "excluding them from participation" used in the quotation from Yajnavalkya in placitum 1 of h S. 10, Chap. 2 of the Mitakshara as meaning exclusion from enjoyment of the share while the affliction continues. The main reason is what is stated in the subsequent placita and in Sarasvati Vilasa.

I turn now to the question whether a congenital idiot can be lawfully married. Placita 9, 10 and 11 of Chap. 10 clearly contemplate the marriage of a disqualified person and Sarasvati Vilasa which is an accepted authority in Madras emphasises this. The learned advocate for the respondent has said that in these days it is unthinkable that a congenital idiot should be allowed to marry, and has pointed to the

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5. ('23) 10 A.I.R. 1923 Mad. 215 : 69 I. C. 313 : 45 Mad. 949 : 43 M.L.J. 596 (FB), Pudiava Nadar v. Pavanasa Nadar.

6. ('35) 22 A.I.R. 1935 Mad. 775 : 160 I. C. 624 : 69 M. L. J. 410, Venkateswar Pattar v. Mankayammal.

7. ('41) 28 A. I. R. 1941 P. C. 120 : 196 I. C. 707 : I.L.R. (1941) Kar. P.C. 155 : I. L. R. (1942) Lah. 1 : (1941) 2 M. L. J. 972 (P. C.), Commissioner of Income tax, Punjab v. Krishnakishore.

observations of the learned editor of Edn. 10 of Mayne embodied in pp. 150 to 153 of that edition. There is to be found there the statement that the marriage of a lunatic, an idiot or an impotent person is invalid under Hindu law and reliance is placed on the decision of the Privy Council in 38 Cal. 700.[8] On the basis of that decision the learned author regards the judgment of this Court in 14 Mad. 316[9] as being erroneous. I shall refer to these cases in more detail in a moment, but before doing so I may point out that at p. 106 of Edn. 6 of the work, the last edited by Mr. Mayne himself there is this statement:

"As the great and primary object of marriage is the procuring of male issue, physical capacity is an essential requisite, so long as mere selection of a bridegroom is concerned; but a marriage with a eunuch is not an absolute nullity as with us. Mental incapacity stands in the same position. While the matter rested in contract, no Court, I imagine, would treat a promise to marry a lunatic or an idiot as binding; but the marriage, if celebrated, would be valid."

In the light of the texts which I have quoted I regard this as the correct statement of the law. Although infant marriages are now prohibited by statute the Hindu law recognised the validity of infant marriages. When a minor is married it means that his father or guardian has arranged the marriage for him. In 38 Cal. 700[8] Sir Arthur Wilson, in delivering the judgment of the Board, observed that the objection to a marriage on the ground of mental incapacity must depend on a question of degree. The Judicial Committee was not however called upon to consider in that case the question whether there could be a lawful marriage of a congenital idiot. Their Lordships were considering whether an adult who had previously married, was so mentally afflicted that he was incapable of entering into a contract for a second marriage. In 14 Mad. 316,[9] Muthuswami Ayyar and Shephard JJ. observed:

"There can be no doubt that a Hindu marriage is a religious ceremony. According to all the texts it is a samskaram or sacrament, the only one prescribed for a woman and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by saptapadi or the walking of seven steps before the consecrated fire creates a religious tie, and a religious tie when once created, cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be a minor even of unsound mind, and yet, if the marriage rite is duly solemnized, there is a valid marriage."

In 43 Mad. 464,[4] Sesbagiri Iyer J. said:

"The view is that, if any of the excluded persons is capable of marriage and of begetting children, their shares should be managed for their benefit, and they should be given maintenance. This seems to follow from Manu, Chap. IX, Sloka 203. The professors of the Science of Eugenics may rightly protest against this tacit assumption by the ancient sages that an insane person can marry; but so long as the state does not prohibit such marriages the law cannot be abrogated. The ancient law-givers even provided for the begetting of children on the wife of the incapacitated person. They seem to have been as anxious for giving facilities for the procreation of children as some of the sanest publicists and the heads of states after the Great War are to recognise and encourage the rearing up of offspring however begotten. However that may be, the view of the author of Sarasvati Vilasa is more in consonance with the view that the right exists, but is only obscured for the time being. Mr. Srinivasa Iyengar suggested that the parenthetical clause about capacity for marriage, suggested by the author of the Sarasvati Vilasa, does not destroy the root doctrine that the right is enforceable only, if and when there is full mental capacity at the date of partition. But the author distinctly says that the share should be managed because of the possibility of marriage, thereby indicating that it exists and is not lost altogether."

I consider that the opinions expressed in 14 Mad. 316[9] and 43 Mad. 464[4] and by Mr. Mayne in the sixth edition of his work are preferable to the opinion expressed by the learned author of the tenth edition. It is undoubtedly abhorrent to a modern mind that a congenital idiot should be allowed to marry, but the Court here can only have regard to the personal law, and the personal law of the Hindu undoubtedly does regard such a marriage as being possible. In the present case Chellakrishna's father arranged his marriage and his wife gave birth to two sons. For the reasons given, I hold that Chellakrishna was lawfully married and as he had issues he has shown that he was capable of transmitting heritable blood, which means that the case comes completely within 9 Mad. 64.[1] In these circumstances his father had no right to bequeath the family estate to his widow and as the plaintiff's case rests entirely on the will her suit fails. My learned brothers agree with this conclusion and consequently, the suit will be dismissed with costs throughout.

KRISHNASWAMI AYYANGAR J.—I agree.

SOMAYYA J. — In view of the importance of the question arising in this case, I wish to add a few words. The question for decision is whether a disqualified person is a coparcener and has a title to his legitimate share of the family property notwithstanding the disqualification, being only excluded from enjoyment during the period of disqualification. On this difficult question we derive no help from Mitakshara, the well known commentary of Vignaneswara on the text of Yajnavalkya. The point is clarified in Sarasvati Vilasa, a work of very high authority in Southern India. The author elucidates the position in placita 148 and 149:

"*148.* Manu also describes those who are ineligible for heritage: 'Impotent persons and outcasts do not take shares; so also those who are blind and those who are born deaf, madman, idiots, and the dumb, and those who are memberless.'"

The commentator's remarks on this text are set out in placitum 149. He takes each word in Manu's text and gives his own commentary. First he takes impotent person and outcasts, the corresponding Sanskrit expression being क्लीवपतितौ a compound noun in which both the impotent person and the outcasts are mentioned together. As regards these persons (impotents and outcasts) the commentator states that they do not take shares. The Sanskrit expression is अनंशौ. Amsa means a share derived from the Sanskrit root अंश्=to divide. The commentator says that these two classes of persons are पोष्यौ "to be maintained by their brothers who are eligible for the heritage, or by those who take

8. ('11) 38 Cal. 700 : 11 I.C. 502 : 38 I.A. 122 : 15 C. W. N. 790 : 14 C. L. J. 72 (P.C.), Mouji Lal v. Mt. Chandrabati Kumari.
9. ('91) 14 Mad. 316 : 1 M. L. J. 85, Venkatacharyulu v. Rangacharyulu.

the estate, or by those who take the woman." Then he takes the born blind and the born deaf. In the corresponding Sanskrit text these two are mentioned in a compound noun जात्यन्धबधिरौ. The commentator says what their status is. This is important and the original of the commentary runs thus :

जात्यन्धबधिराविति द्वित्वोक्त्या तयोरंश : अस्त्येव किं त्वंशयुक्त्वावपि पोष्यौ विवाहसद्भावानौ.

Foulkes translates this passage thus :

"'Those who are born blind and those who are born deaf,' the pair thus mentioned, though a share certainly belongs to them, are to be nourished and cherished, notwithstanding their being endowed with a share, because they are marriageable."

He further explains the meaning : By the use of the word "so" the inner meaning is that deformed persons, if they are eligible for marriage, are share-takers, and are to be nourished and cherished. The word "share-taker" is here obviously used in contrast with "share enjoyer," i.e., they are not share enjoyers because they are excluded from participation. But as the commentator says, a share undoubtedly does exist. अंशोऽस्त्येव The word एव is a very significant one. Then he takes madmen, idiots and the dumb, these three being comprised in one compound noun in Sanskrit उन्मत्तजडमूकाश्च. This is translated by Foulkes thus : "Madmen, idiots and the dumb, by being mentioned in a group these also are to be nourished and cherished, but they are not share-takers. "Even if they are eligible for marriage" is to be supplied etc. etc., "Even if they are eligible for marriage" as given in Foulkes' translation is not a correct one. The original Sanskrit expression is विवाहार्हानचेत् and means "if they are not eligible for marriage, is to be supplied." The letter "न" denoting "not" is omitted in the translation. So the meaning is : If these people, madmen, idiots and the dumb, are not eligible for marriage, then they are not share-takers implying that if they are eligible for marriage, they are certainly share-takers. We are not concerned with the rest of this chapter. The expression "astyeva" means they do take shares. The word एव is a very significant expression. Apte in his Sanskrit-English Dictionary page 316 explains the word एव "eva" thus : "This particle is most frequently used to strengthen and emphasize the idea expressed by a word 'just—quite—exactly.' " According to this author, therefore, if the persons who are disqualified are capable of contracting a marriage, they are undoubtedly sharers. I agree generally with the judgment just delivered by my Lord, the Chief Justice.

C.R.K./R.K. *Suit dismissed.*

A. I. R. (29) 1942 Madras 698

KUPPUSWAMI AYYAR J.

A. L. N. Sathappa Chetti and others — Appellants

v.

Thayyanayaki Ammal — Respondent.

Second Appeal No. 978 of 1940, Decided on 2nd July 1942, against decree of Dist. Court, Chingleput, in A. S. No. 322 of 1938.

(a) Evidence Act (1872), Ss. 114 and 35 — Receipt granted by Revenue Inspector reciting that delivery of property was effected in pursuance of Revenue Court's order being report of officer in discharge of his duty must be presumed to be true.

A receipt given by a Revenue Inspector reciting that delivery of property was effected in pursuance of the Court's order being a report of an officer made in the discharge of his duty it must be presumed that what he stated therein was true.

[P 699*a*]

(b) Limitation Act (1908), Art. 144—Sale for arrears of rent — Auction purchaser obtaining receipt of delivery of property from Revenue Inspector without physically evicting tenant— Suit for possession within 12 years of delivery of receipt is in time.

Where the plaintiff is entitled to take actual possession of the property but instead he gets only symbolical possession, the fact that he obtained only symbolical possession interferes with the possession of the defendant who can start his adverse possession only from the date of the symbolical possession. Consequently, where the auction purchaser at a sale held for arrears of rent instead of obtaining actual possession obtains a receipt of the delivery of property from the Revenue Inspector without pbysically evicting the tenant a suit for possession filed within 12 years of delivery of receipt is in time : ('27) 14 A.I.R. 1927 Mad. 849, *Rel. on.*

[P 699*a*]

Limitation Act —

('42) Chitaley, Art. 138, N. 8 Pt. 2; Arts. 142 & 144, N. 65 Pt. 6.

('38) Rustomji, Page 1237 Pt. 1.

N. G. Krishna Ayyangar — for Appellants.

M. S. Venkatarama Iyer — for Respondent.

JUDGMENT. — Plaintiffs 2 to 5 are the appellants. They are the legal representatives of plaintiff 1 who died subsequent to the filing of the suit. The appeal is against the decree dismissing the plaintiffs' suit. The properties in dispute were purchased by plaintiff 1 on 1st May 1924 at a sale held for arrears of rent. The revenue Court granted a sale certificate on 10th November 1924. Subsequently there was an application for delivery of possession of the property and we find from a receipt granted to the party with the endorsement of the Revenue Inspector thereon that there was delivery of the property on 12th May 1925. This suit was filed on 3rd May 1937 for recovery of possession of the property. There was a building on the site and the defendant has all along been living in it. She pleaded that as she had been in possession for over 12 years the suit was barred by limitation that the delivery of possession on 12th May 1925 was only a paper delivery in the sense that nothing more was done than the giving of a receipt by the auction purchaser and it would not interfere with her possession and enjoyment. Both the lower Courts held that there was adverse possession for over 12 years and the suit was barred by limitation.

I do not think the view of the lower Courts is one that could be accepted. The auction purchaser it is true could have obtained actual possession after removing the defendant, but he did not choose to do so. Instead, he went to the locality with the Revenue Inspector and got the property delivered in the presence of witnesses there without physically evicting the tenant. It is urged for the respondent that there was absolutely no evidence to show that

a there was delivery of possession. The report of the Revenue Inspector is the report of an officer made in the discharge of his duty and it has to be presumed that what he stated there was true. The receipt specifically recites that the delivery was effected in pursuance of the Court's order and it is a certified copy granted by the revenue Court. In a very nearly similar case in 53 M. L. J. 339[1] where the plaintiff was entitled to take actual possession of the property but instead he got only symbolical possession it was held that the fact that he obtained only symbolical possession interfered with the possession of the defendant and that the defendant could start his adverse possession only from the date of the symbolical possession. This suit which has been filed within 12 years of the delivery of receipt is hence in time. The lower appellate Court's decree is set aside and the appeal is remanded to the lower b Court for disposal of the other points arising in the appeal. Respondent will pay appellants their costs.

C.R.K./G.N. *Decree set aside.*

1. ('27) 14 A.I.R. 1927 Mad. 849 : 105 I. C. 243 : 53 M. L. J. 339, Kamayya v. Mahalakshmi.

A. I. R. (29) 1942 Madras 699

PATANJALI SASTRI J.

D. Anjaneya Sastri — Appellant

v.

T. R. Rajagopala Chettiar, trustee of Chinnaramanuja Koodam —

Respondent.

c Second Appeal No. 856 of 1939, Decided on 13th March 1942, against decree of Dist. Court, West Tanjore at Tanjore, in A. S. No. 208 of 1936.

Adverse possession—Trustee and another by enjoyment in adverse possession for statutory period—Another can acquire title to extent of his enjoyment—Such persons are members of joint family is immaterial.

Where two persons are in joint enjoyment of property belonging to another adversely to the latter but one is disabled by his fiduciary relationship (e. g., a trustee) to the owner from acquiring any interest in the property by adverse possession, the other who is under no such disability can acquire title to the property to the extent of his enjoyment. The fact that the two persons happen to be members of a joint Hindu family owning other properties as a d unit with no defined shares therein can make no difference to the application of the principle : ('37) 24 A.I.R. 1937 P. C. 185, *Applied.* [P 700*f*]

Limitation Act —

('42) Chitaley, Arts. 142 & 144, N. 46 Pt. 5; N. 49 Pt. 3.

('38) Rustomji, Page 189 Pt. 6; Page 190 Pt. 5; Page 1212 Pt. 5; Page 1489 Pt. 4.

S. Panchapagesa Sastri and T. V. Muthukrishna Ayyar — for Appellant.

K. V. Sesha Ayyangar — for Respondent.

JUDGMENT. — This appeal arises out of a suit brought by the respondent for recovery of a house in Kumbakonam. His case is that the house was dedicated to a charity known as Chinna Ramanuja Koodam and that as the trustee appointed under a scheme decree passed in 1931 he is entitled to recover it from the appellant who claims title to it under an auction purchase in execution of a decree obtained against one Malayaperumal Chetty and his son. It was alleged that Malayaperumal held the e property as the trustee of the charity prior to the appointment of the respondent and had no beneficial interest therein, and that therefore the appellant did not acquire a valid title under his purchase in court auction. On the other hand, the appellant denied the alleged dedication of the property and claimed that in any event Malayaperumal and his sons having been in possession and enjoyment of it as beneficial owners they acquired by prescription an absolute title which passed to the appellant under the execution sale. The Courts below negatived the contentions and decreed the suit. In this appeal, however, the appellant has limited his claim to a half share only in the suit property conceding that the property had been dedicated to the trust and that Malayaperumal as the previous trustee could not acquire any interest therein by adverse possession; but he urged that Malayaperumal's son Sitha- f rama Chetty having also been in possession and enjoyment of the property along with Malayaperumal and, unlike his father, being under no disability, acquired a half share therein by prescription which passed to the appellant as auction purchaser.

The facts so far as they are material here may be briefly stated. The house in question was constructed for purposes of a Chatram charity by Abhayambal the adoptive mother of Malayaperumal in 1885. The latter sued her in 1887 for the recovery of the house and other properties in her possession and the suit ended in a compromise whereby it was agreed that the house should be set apart as a choultry and that one Krishnaswami Chetty during his life and thereafter Malayaperumal, should manage the charity as trustee. Krishnaswami Chetty died in 1893 but the property continued in g the possession of his sons till 1897 when Malayaperumal took possession of the house on behalf of the trust, and continued to manage the charity till 1903. In that year however he began to deny the trust and purported to lease the house under Ex. 7 as the property of his family. Thereafter the house was enjoyed by Malayaperumal and his sons along with the other properties admittedly belonging to the family, and in 1916 one of Malayaperumal's sons executed a release deed (Ex. 13) relinquishing his interest in all the properties to his father and brothers and the deed referred to the house as their family properties. Malayaperumal and his other two sons mortgaged family properties in 1917 to one Sivagurunatha Chetty and included the house in question in that mortgage. In 1918, another son of Malayaperumal separated himself from the family releasing his interest in the family properties in- h cluding the house in favour of Malayaperumal and his third son Sitharama Chetty who continued undivided, and in 1920 Malayaperumal and Sitharama Chetty again effected a mortgage of their family properties including the suit house therein. It will thus be clear — and indeed it was not seriously disputed — that from 1903 onwards the house was treated and enjoyed by Malayaperumal and his sons as part of their family properties in derogation of the rights of the trust. The appellant, as already observed, purchased the house when it was brought to sale in execution of a decree obtained against Malayaperumal and Sitharama in 1928 and obtained delivery of possession in due course. Thereupon Abhayambal brought a suit under S. 92, Civil P. C., alleging that the house was charity property and praying that a scheme should be settled for the management of the property and due performance of the charity. The appellant herein who was impleaded in that suit denied that the property had been dedicated to

a the charity but the Court found that there had been a valid dedication and passed a decree settling a scheme for the management of the property and the proper conduct of the charity appointing the respondent herein as the trustee for the purpose. As the appellant herein, however, continued in possession, the respondent has brought the present suit for its recovery on behalf of the trust.

Mr. Muthukrishna Ayyar for the appellant contended that although Malayaperumal being himself the trustee of the charity was under a fiduciary disability in the matter of acquiring the property adversely to the trust, his son Sitharama was under no such disability and as the latter was in enjoyment of the property through Malayaperumal who was in possession on behalf of himself and his sons, he (Sitharama) acquired title by adverse possession. In support of this contention the learned counsel b placed strong reliance upon the decision of the Privy Council in I.L.R. (1937) 2 Cal. 447[1] on appeal from the decision of the Calcutta High Court in 60 Cal. 54.[2] That was also a case where a person claiming to be a shebait of a family deity sued to recover properties alleged to have been dedicated to the deity and a plea of limitation and adverse possession was raised. It appears that the properties had been originally dedicated but in a partition suit among the members of the family a consent decree was passed providing that the dedication should be set aside and the properties were to be divided and enjoyed as ordinary family properties. One of the branches of the family entitled to a half share in the properties consisted of two brothers who however continued to hold their share without actual division as between themselves. Such enjoyment continued for more c than 12 years before the suit was brought and the question arose whether the claim put forward on behalf of the deity was barred by the adverse possession of the brothers. It was common ground that according to the terms of the original dedication, the office of shebait devolved upon the elder brother alone and the younger brother was never a shebait of the idol. On these facts, it was decided by the Calcutta High Court, and the decision was upheld by their Lordships on appeal, that so far as the younger brother's share in the properties was concerned, the title of the deity was extinguished by adverse possession although the elder brother being the shebait was under a fiduciary disability in the matter of possessing adversely to the trust. Lord Macmillan who delivered the judgment of the Board observed:

"From 1904 onwards for at least 12 years Satya d (i. e., the younger brother) openly and without any fraudulent collusion enjoyed continuous possession of his share of the thukurbarhi and shebait's house on the basis that the consent order of 1904 was effective and that the property was not subject to dedication. . . . . True, the possession of Satya for the 12 years from 1904 was jointly with Pulin, but Satya was not affected by the fiduciary disability attaching to Pulin and there was nothing to prevent his possession of his half being adverse to the appellant idol."

It will be seen that the facts of the case before their Lordships are closely analogous to the facts of the present case and I find it difficult to accept the e contention of Mr. Sesha Ayyangar for the respondent that the decision has no application here. He attempted to distinguish that case by pointing out that the brothers held the properties in several shares, whereas here Sitharama Chetty had no defined share in the joint family properties and the house in suit having been enjoyed as part of such properties, he could not be deemed to have acquired any specific share therein by adverse possession when the manager Malayaperumal was disabled by reason of his trusteeship from holding the properties adversely to the trust. But if the possession of the elder brother in the case before their Lordships could be regarded as the possession of the younger to the extent of the latter's share of the properties and as having been held to that extent adversely to the trust notwithstanding that the former was the f trustee, it is difficult to see why the same principle should not be applied to the case of a junior member of a joint family who is in enjoyment of property adversely to the trust through the manager trustee. The decision of their Lordships would seem to proceed on the broad principle that where two persons are in joint enjoyment of property belonging to another adversely to the latter but one is disabled by his fiduciary relationship to the owner from acquiring any interest in the property by adverse possession, the other who is under no such disability can acquire title to the property to the extent of his enjoyment, and it seems to me that the fact that the two persons happen to be members of a joint Hindu family owning other properties as a unit with no defined shares therein can make no difference to the application of this principle. In this view, the g further point raised on behalf of the appellant does not call for consideration. The appeal succeeds and the respondent will have a decree for partition and delivery of only a half share in the suit property together with proportionate mesne profits. The appellant will have his costs of this appeal. In the Courts below, the parties will pay and receive proportionate costs. The costs of the respondent will come out of the trust estate. Leave granted.

C.R.K./R.K. *Appeal allowed.*

1. ('37) 24 A.I.R. 1937 P.C. 185 : 168 I.C. 765 : 64 I.A. 203 : I.L.R. (1937) 2 Cal. 447 : 31 S.L.R. 538 (P.C.), Ishwaree Bhubaneswari Thakurani v. Brojo Nath De.
2. ('33) 20 A.I.R. 1933 Cal. 295 : 144 I.C. 792 : 60 Cal. 54, Surendra Krishna Ray v. Ishwar Bhubaneswari Thakurani.

A. I. R. (29) 1942 Madras 700

KING AND HAPPELL JJ.

In re Shanmuga Kone.

Referred Trial No. 185 and Criminal Appeal No. 672 of 1941, Decided on 2nd December 1941, referred by Sess. Judge, Tinnevelly Division, D/- 26th September 1941.

Criminal P. C. (1898), S. 288—Sessions Judge making up his mind that witness was not giving true evidence before him —He can admit under S. 288 evidence of witness before Committing Magistrate — Before acting under S. 288 Sessions Judge need not conduct enquiry to satisfy himself that evidence before him was false.

There is no legal objection to a Sessions Judge admitting under S. 288, the evidence of a witness before the Committing Magistrate when the Sessions Judge has made up his mind that the witness was not giving true evidence before him. It is not necessary for him before taking action under S. 288 to conduct an inquiry to satisfy himself that the evidence given by the witness before him was false and the evidence given before the Committing Magistrate was therefore likely to be true: 4 C.W.N. 49 and 7 C. W. N. 345, *Expl.* [P 701*d*,*e*]

a Cr. P. C. —
('41) Chitaley, S. 288 N. 5.
('41) Mitra, Page 994 N. 897.

N. T. Raghunathan — for Prisoner.

Public Prosecutor — for the Crown.

KING J. — The appellant has been convicted of the murder of his wife Valliammal by the learned Sessions Judge of Tinnevelly and has been sentenced to death. The prosecution case is that the appellant recently married Valliammal as his second wife and that there were misunderstandings between them because he had not taken back property which he had delivered to his first wife in order to make over some of it to Vallaimmal. There is, however, no evidence of any actual quarrel preceding the offence. Valliammal was killed on the afternoon of 10th March 1941. She was then out in a cholam b field near a well. At the well P. W. 5 was bailing water. In the field next to that of the deceased, according to the evidence given by her in the Committing Magistrate's Court, was a young girl P. W. 4. There is no direct evidence of the offence. Evidence is given by P. W. 5 which proves the presence of the appellant near where the deceased's body was found and P. W. 4's evidence before the Committing Magistrate was that she saw the appellant running away immediately after she had heard cries from the deceased and that the appellant's clothes were stained with blood. In her evidence before the Sessions Judge P. W. 4, however, denied that she was anywhere near the spot on the afternoon of 10th March and she said that she had been induced by one Vedikara Kone and others whose names she did not remember to give evidence before the Magistrate. The learned Judge believing that c the witness was not giving true evidence before him admitted her evidence before the Committing Magistrate under the provisions of S. 288, Criminal P. C.

The appellant denied having committed the offence and denied the whole story of the misunderstandings between himself and Valliammal. He said indeed that he had never been married to her and that in all probability Valliammal's former husband Kottiappa Kone must have killed her. The question of the relationship between the appellant and Valliammal has not been seriously pressed before us. It was contended at the trial that in the caste to which the parties belong divorce and remarriage are not permitted and therefore it would have been impossible for the appellant to have married Valliammal. It has, however, been pointed out by the learned Sessions Judge that when ques- d tions were put to him by the Committing Magistrate to the effect that witnesses gave evidence that he had killed his wife, the appellant in replying did not deny that she was his wife and it has been further pointed out that even in the evidence of the defence witnesses who were examined to speak to this point only, instances were not scarce of remarriages being permitted in the caste.

It was argued for the appellant that the learned Sessions Judge ought not to have admitted the evidence of P. W. 4 before the Committing Magistrate. The learned advocate even went so far as to say that such evidence was essentially inadmissible on the ground that the Judge had not conducted an inquiry to satisfy himself beforehand that the evidence given by P.W. 4 before him was false and the evidence given before the Committing Magistrate was therefore likely to be true. Our attention was called to two rulings from Calcutta, 4 C. W. N. 49[1] and 7 C. W. N. 345,[2] in support of this argu- e ment that the evidence of P. W. 4 before the Committing Magistrate was without some such preliminary inquiry inadmissible. We do not find, however, the learned Judges of the Calcutta High Court laying down any such proposition. In those rulings all that they have indicated is that they did not agree with the view of the trying Court and that the trying Court ought to have realized that the evidence of the witnesses in question before the Committing Magistrate was not in fact true. Quite clearly, there can be no legal objection to the Sessions Judge in this instance taking action under S. 288. It is quite clear that the Sessions Judge had made up his mind that the witness was not giving true evidence before him.

As to the question whether the evidence before the Committing Magistrate was in fact true, we think the learned Sessions Judge was justified in f accepting it. It has been further confirmed by the statement taken by the Taluk First Class Magistrate of Sankarankoil under S. 164, Criminal P. C., six days after the offence occurred and we find P. W. 5 in her evidence in the Sessions Court referring to the presence of P. W. 4 which P. W. 4 denied before the Sessions Judge and P. W. 4's informing her that the appellant had been seen by her running away with bloodstained clothes. Finally, there is a clear reference in the report which P. W. 5 made to the Village Magistrate within a couple of hours or so of the occurrence that she had seen P. W. 4, that she had heard her crying out and that P. W. 4 had told her that it must have been the appellant who had committed the offence. In these circumstances we think that the evidence which P. W. 4 gave before the Committing Magistrate and which was admitted g by the learned Sessions Judge under S. 288 can safely be relied upon. That evidence corroborated as it is by P. W. 5, to some extent and by the report to the Village Magistrate is, we think, sufficient to bring the offence home to the appellant. There are no extenuating circumstances in this case and we confirm both the conviction and the sentence and dismiss the appellant's appeal.

C.R.K./G.N. *Appeal dismissed.*

1. (1900) 4 C. W. N. 49, Bajrangi Lal v. Empress.

2. ('03) 7 C. W. N. 345, King-Emperor v. Bhuthnath Ghose.

** A. I. R. (29) 1942 Madras 701

SPECIAL BENCH

LEACH C. J., LAKSHMANA RAO AND KRISHNASWAMI AYYANGAR JJ.

In re a Pleader, Rayadrug (Bellary District).

Referred Case No. 18 of 1942, Decided on 5th October 1942.

** Legal Practitioner—Professional misconduct — Tutoring of witness inside or outside Court amounts to professional misconduct — It is all the greater when done inside Court in spite of warnings.

The tutoring of a witness by a legal practitioner inside or outside Court amounts to professional misconduct and when the tutoring takes place in Court and in spite of warnings the professional misconduct is all the greater. [P 702b]

Cr. P. C.—
('41) Chitaley, Let. Pat. Cl. 10 N. 4 Pt. 1.

C. P. C.—
('40) Chitaley, O. 3, R. 4 N. 11 Pt. 1 ; Let. Pat. (Cal.) Cl. 10 N. 4 Pt. 1.
('41) Mulla, Page 1388 Pt. (e).

Advocate-General in support of the Notice.
Respondent in person.

LEACH C. J. — The respondent is a pleader practising in the Bellary District. He was convicted by the Stationary Sub-Magistrate of Rayadrug of an offence under S. 228, Penal Code, and sentenced to pay a fine of Rs. 15, or in default to undergo simple imprisonment for a week. The nature of his offence was this. His client was in the witness box under cross-examination and he was tutoring her with regard to the answers she should give. He was warned by the Magistrate, but he persisted in his improper conduct. The conviction and sentence were concurred in by the District Magistrate of Bellary on appeal and by this Court in revision. As the result of this conviction the respondent has been charged with professional misconduct. That he was guilty of gross professional misconduct is not now open to question. It is very improper for a legal practitioner to tutor a witness inside or outside Court and when the tutoring takes place in Court and in spite of warnings the professional misconduct is all the greater. The respondent has tendered an apology to this Court and has undertaken not to repeat his offence. His offence is, however, so grave that we cannot allow the matter to end with a mere censure on him. We have taken into consideration his apology and his promise with regard to future behaviour, but his sanad will be suspended for one month from today.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 702

HORWILL J.

In re M. K. Rangai Goundan — *Petitioner.*

Criminal Revn. No. 916 and Revn. Petn. No. 862 of 1941 and Criminal Appeal No. 20 of 1942, Decided on 11th March 1942, to revise judgment of Court of Session, Coimbatore Division, D/- 30th September 1941.

(a) Companies Act (1913), Ss. 236 and 282 — Company going into voluntary liquidation — Accused appointed liquidator — Accused as liquidator filing periodical returns during 1934 —In 1935 accused writing against debt of Rs. 33,600 due by him to company as many individual items of shares and debts as he could think of and writing off balance—Writing off of his own debt being false and dishonest accused held properly convicted under S. 236 — If other entries against his debt of Rs. 33,600 were true accused held guilty also under S. 282.

The company went into voluntary liquidation on 15th June 1934 and appointed the accused, who was the secretary of the company as the liquidator. He performed the duties of the liquidator, and in accordance with those duties he had to send in periodical returns of the position of the company as required by S. 244 of the Act. He showed the assets of the company as Rs. 53,010-12-0 and liabilities as Rs. 36,465-2-2 in all of his returns. On 19th June 1935 he made certain entries in the accounts which rendered the subsequent periodical statements incorrect. He owed to the company a sum of Rupees 33,600, on a promissory note, and in 1935 had written off against his own debt of Rs. 33,600 as many individual items of shares and debts as he could think of and wrote off the balance as bad debts :

Held that (1) since the writing off of his own debt by the accused was false and dishonest the accused was properly convicted under S. 236 ; [P 703*f*]

(2) if the other entries showing individual items of shares and debts against the accused's own debt of Rs. 33,600 were true, then the accused was also guilty of an offence under S. 282. [P 703*g*]

(b) Companies Act (1913), Ss. 236 and 208A (2)—Company going into voluntary liquidation — Director does not cease to be director when liquidator is appointed—Liquidator is officer of company — S. 236 held applied to liquidator whether as contributory, director or officer.

The liquidator of a company which had gone into voluntary liquidation was prosecuted under S. 236. He was also a contributory. It was argued that though the accused was once a director of the company he ceased to be so when once liquidation proceedings had begun :

Held that (1) the wording of S. 208A (2) indicated that although a director lost most of his powers on the appointment of a liquidator he did not cease to be a director ; [P 703*h*]

(2) the liquidator was an officer of the company ; [P 703*h*]

(3) therefore whether as director, officer or contributory S. 236 applied to the accused. [P 703*h*]

(c) Companies Act (1913), S. 282—S. 282 applies to de facto liquidator.

Section 282 applies to a de facto liquidator. A person who accepts an appointment as liquidator of a company and who has acted in accordance with the powers granted to him, must be deemed to have accepted the duties and responsibilities of that office and so any wrongful act done by him is a wrongful act done by him as liquidator even though his appointment was irregular such as by reason of want of a proper quorum at the general meeting at which a resolution appointing him was passed : ('17) 4 A. I. R. 1917 All. 93, *Rel. on* ; ('34) 21 A. I. R. 1934 Rang. 271, *Expl.* [P 704*a*]

K. S. Jayarama Iyer and G. Gopalaswami — for Accused.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER. —The Okkaliga Mahajana Bank Ltd., Karamadai, went into voluntary liquidation on 15th June 1934 on an extraordinary resolution passed by it; and the company appointed the accused, who was the secretary of the company, as the liquidator. He performed the duties of the liquidator, and in accordance with those duties he had to send in periodical returns of the position of the company as required by S. 244, Companies Act. He showed the assets of the company as Rs. 53,010-12-0 and liabilities as Rs. 36,465-2-2 in all of his returns. On 19th June 1935, he made certain entries in the accounts which rendered the subsequent periodical statements incorrect. He owed to the company a sum of Rs. 33,600, on a promissory note ; and on 19th June 1935, he showed that amount on the credit side. On 20th March 1935 he showed on the debit side as share capital — K. Kampai Gounder Rs. 2000 and share capital—K. Ramaswami Gounder Rs. 2000, these persons being his uncle and brother respectively. Against the date 19th June 1935 he showed a debit entry of Rs. 6000 for his own shares, Rs. 1125 for his own current

account, Rupees 3000 as having been paid to the Karamadai Ranganathaswami Devasthanam, a fixed deposit of Rs. 6000 to the Coimbatore Janopakara Nidhi ; and another item of Rs. 400 towards a fixed deposit in the Okkaliga Mahajana Bank (possibly his own). He also showed various other payments by way of interest, then debited the Bank with Rs. 660 as unpaid salary due to himself and the remainder necessary to balance these various items against the credit item of Rs. 33,600, he entered as "bad debts written off"—Rs. 11,974-2-0.

The accused was first prosecuted in the Court of the Sub-Divisional First Class Magistrate of Coimbatore under S. 282, Companies Act, for sending a false periodical return and again before the Sessions Judge of Coimbatore under S. 236 of the Act, for falsifying the accounts. He was convicted by both the Sub-Divisional Magistrate and by the Sessions Judge of these offences, and was sentenced to six months rigorous imprisonment and a fine of Rs. 250 with a further period of three months rigorous imprisonment in default of payment of the fine, and two years rigorous imprisonment respectively, the Sessions Judge making his sentence to run concurrently with the sentence imposed by the Sub-Divisional Magistrate. The accused appealed against the conviction by the Sub-Divisional Magistrate ; and the appeal was heard by the Additional Sessions Judge of Coimbatore, who affirmed the conviction and sentence. These two matters have now come up before this Court in revision against the order of the Additional Sessions Judge of Coimbatore dismissing the appeal and also by way of a regular appeal against the conviction and sentence by the Sessions Judge of Coimbatore.

It is not quite certain from the records in the Courts below what exactly the case of the accused was. He stated before the committing Magistrate "I did not do anything fraudulently. I did so for the benefit of the bank." As the learned Sessions Judge says, this reads as if the accused admitted that he was responsible for these entries ; but that he pleaded that he had done so in the best interests of the bank. In the Sessions Court he said :

"There was a proposal for holding a general meeting for winding up the bank, but as there was no quorum nothing could be done. Subsequently I did no transaction on behalf of the bank. I do not know who made the entries in the books after 1934."

The learned Sessions Judge naturally took this to be a plea that he did not know anything about it. In this Court, the learned advocate for the accused has made it clear that the case of the accused is that although he did not actually write these accounts, he did know what was written, that they were written with his authority, that those entries were correct even though some of the transactions were unauthorised, and that the accounts were not false. The balance sheet he admits to be incorrect, but pleads that it was sent in negligently in the same form with the same figures without any dishonest motive. There is no doubt in my mind that looking at the accounts as a whole, the accused did intend to write off his own debt by making the entries he did in the accounts, that he knew that he had no authority to do so, and that he made those entries with the dishonest purpose of avoiding payment of his debt. I have no doubt too that the purpose of sending in the periodical returns in the same form throughout was to conceal from the Registrar and persons likely to see those periodical returns the fact that he had made these dishonest entries in the accounts. That is what the Sub-Divisional Magistrate found ; and I have no doubt that he was right.

It is argued that the charges in these two cases were inconsistent ; because if the entries in the accounts were false, then the periodical return was true ; and so the accused could not be found guilty of both offences. It is also argued that there is no reason to believe that the entries in the accounts of 20th March 1935 and on 19th June 1935 were not true. It is pointed out that the prosecution has not let in any evidence to show that the creditors mentioned therein were not actually paid. It is further contended that although the accused as a liquidator had no authority either to write off share capital and credit it against debts or to write off the balance of his own debt against sums due to creditors and to share-holders ; yet the entries corresponded with real transaction, and so cannot be false entries. There is something to be said for this last argument as far as the debts, and perhaps also the writing off of share capital and the sum due to the accused on current account are concerned ; but I do not agree that the writing off as a bad debt the balance of Rs. 11,974-2-0 due by the accused is a real transaction. I do not believe that the accused even purported to exercise an authority to write off a part of his own debt. He had written off against his own debt of Rs. 33,600 as many individual items of shares and debts as he could think of ; and if he was to balance his accounts he had to enter this sum of Rs. 11,974-2-0. Something had to be written against that figure ; and "Bad debts written off" was apparently the best that the accused could think of. At least with regard to this sum of Rs. 11,974-2-0, therefore, the account of 19th June 1935 was false as well as dishonest; and the accused was therefore properly convicted by the Sessions Judge. If, as the accused contends, the other entries are true entries, then the accused was also guilty of an offence under S. 282 of the Act. The latter conviction, however, is of little importance; because the sentence was six months rigorous imprisonment and a fine of Rs. 250 with rigorous imprisonment for three months in default of payment, which was to run concurrently with the larger sentence imposed by the Sessions Judge.

It has been argued with regard to the offence under S. 236 read with S. 282, Companies Act, that the accused was not a director or manager or an officer or contributory and therefore could not be found guilty under that section. It was argued that although he was once a director of the company, he ceased to be one when once liquidation proceedings had begun. Section 208A (2) says that on the appointment of a liquidator all the powers of a director cease except so far as the company in general meeting or the liquidator sanctions the continuance thereof. The wording of this section thus indicates that although the director loses most of his powers, he does not cease to be a director. Moreover, the liquidator is an officer of the company. That was held in (1929) 1 Ch. 151.[1] The accused was also a contributory. So whether as director, officer, or contributory, S. 236 would apply to the accused.

With regard to the conviction under S. 282, it is argued that the accused was not legally appointed as liquidator, because at the extraordinary general meeting at which a resolution was passed there was no proper quorum, the quorum being ten and only nine persons attending. The accused explained in

1. (1929) 1 Ch. 151 : 98 L. J. Ch. 147: (1929) B. & C. R. 32 : 140 L. T. 80, In re Windsor Steam Coal Co. Ltd.

reply to a letter from the registrar on this point that he held a proxy from another director which made the quorum. Even if there had been no quorum, I still think that the accused was properly convicted under S. 282; for the liquidator referred to in that section is presumably the de facto liquidator. A person who accepts an appointment as liquidator of a company and who has acted in accordance with the powers granted to him, must be deemed to have accepted the duties and responsibilities of that office and so any wrongful act done by him was a wrongful act done by him as liquidator. This view was held by Walsh J. in 39 All. 412.[2] A. I. R. 1934 Rang. 271[3] has been quoted as an authority for the opposite view; but the question that calls for decision here did not arise in that case however. There, there was scarcely any pretence of an extraordinary resolution that the company should go into voluntary liquidation. No notice had been sent to the directors or to the members; and the agenda made no reference to the bringing up of this subject. During the course of the winding up, the liquidator applied to the Court for directions to examine the directors; and it was held by the learned Judge that as the company had not passed any valid resolution that it could not, by reason of its liabilities, continue its business and that it was advisable to wind up, the company was not in voluntary liquidation at all; there was therefore no liquidation, and the liquidator had no authority to do any of the acts ordinarily permitted to a liquidator. The application to the Court was then opposed by members of the company; but in the present case, as far as we know, all the members of the company approved of the voluntary winding up, everything was regular with the possible exception of the quorum, for which the accused gave a reasonable explanation. There can be no doubt that the accused always acted as if he was the liquidator; and every act he did purported to be done in the exercise of that power freely conferred by the members of the company at a meeting properly convened for the purpose of winding up the company.

The only remaining question is that of sentence. There can be no doubt that the accused committed a serious offence by making these entries in his account books. He was able to secure himself against all action for the recovery of the large debt due by him; and there can be no doubt that throughout he was actuated by a dishonest motive in concealing the fact that this debt was shown as paid off. Had it not been for the fact that another liquidator was subsequently appointed by this Court because of the unsatisfactory manner in which the company was being wound up by the accused, this fraudulent transaction of the accused would never have come to light. On the other hand, it is argued that this offence took place nearly six years ago and that the accused could easily have avoided liability by filing an insolvency petition for he had no money with which he could have met his obligation. The accused has already been subjected to two trials and has served more than six months in jail ; and I do not think the interests of justice require a further long term of imprisonment. There is still due from him a fine of Rs. 250 in default of payment of which he will have to undergo a further period of three months rigorous imprisonment. The conviction and sentence of the Sub-divisional Magistrate under S. 282, Companies Act, are affirmed and the revision petition dismissed. The conviction by the Sessions Judge under S. 236 of the Act is affirmed and the sentence reduced to the period already undergone. The accused will undergo the default sentence imposed by the Sub-divisional Magistrate under S. 282 of the Act if he does not pay the fine within a month of this date.

C.R.K./G.N. *Order accordingly.*

2. ('17) 4 A.I.R. 1917 All. 93 : 39 I. C. 478 : 18 Cr. L. J. 510 : 39 All. 412 : 15 A. L. J. 346, Emperor v. Satis Chandra Ghose.
3. ('34) 21 A.I.R. 1934 Rang. 271 : 151 I. C. 987, J. C. De v. K. B. Roy.

A. I. R. (29) 1942 Madras 704

KING J.

M. R. M. N. Chockalingam Chettiar — *Appellant*

v.

Government of Madras — *Respondent.*

Second Appeal No. 140 of 1940, Decided on 25th March 1942, against decree of Dist. Court, Madura, in A. S. No. 153 of 1938.

Sea Customs Act (1878), Ss. 188, 191—Goods seized on suspicion of smuggling — Inquiry by Inspector of Customs — Collector passing order on evidence recorded by Inspector — Central Board of Revenue on revision confirming Collector's order of confiscation — Suit in civil Court held barred.

Certain silk goods were seized by the customs authorities as they were suspected by the customs authorities to be smuggled; an inquiry was held by the Inspector of Customs at which the owner of the goods was heard and was represented by the advocates. No facility was refused to him to put forward whatever evidence he had to adduce or arguments he wished to present in support of his case. The records of the case were sent to the Collector of Customs and Salt Revenue who passed an order confiscating the goods which had been seized, holding that they had been smuggled. This order was passed without any further hearing being afforded to the owner. The owner thereupon applied under S. 188 to the Central Board of Revenue which held on revision that the order of the Collector of Customs was right and could not be interfered with. On a suit by the owner for a declaration that the order of the Central Board of Revenue was not valid and binding on him :

Held that even if it be true that the procedure of the Collector of Customs was not in accordance with the Act or with the principles of justice, there was a definite remedy provided by the Act and hence the owner had no right of suit : ('41) 28 A. I. R. 1941 Mad. 530 (F. B.), *Rel. on*; ('40) 27 A. I. R. 1940 P. C. 105, *Expl. and Disting.* [P 705g]

K. Rajah Ayyar and K. S. Ramamurthy — for Appellant.

Government Pleader — for Respondent.

JUDGMENT. — The appellant was the owner of certain silk goods seized by the customs authorities at a place near Madura on 16th October 1935. These goods were suspected by the customs authorities to be smuggled and an inquiry was held by the Inspector of Customs, Negapatam, at which it is conceded that the appellant was heard and was represented by the advocates of the Tanjore Bar and that no facility was refused to him to put forward whatever evidence he had to adduce or arguments he wished to present to the Court in support of his case. The records of the case were sent to the Collector of

Customs and Salt Revenue who passed an order in January 1936 confiscating the goods which had been seized, holding that they had been smuggled. This order was passed without any further hearing being afforded to the appellant. The appellant thereupon applied under S. 188, Sea Customs Act, to the Central Board of Revenue which on 5th May 1936 held on revision that the order of the Collector of Customs was right and could not be interfered with. This second appeal arises out of a suit by the plaintiff for a declaration that the order of the Central Board of Revenue is not valid and binding on him. Both the learned Subordinate Judge of Madura and the learned District Judge of Madura have held that there was no right of suit and this is the subject-matter of the second appeal. Section 188, Sea Customs Act, provides that every order passed under that section shall, subject to the power of revision conferred by S. 191 be final. It is argued for the appellant that the use of the word "final" does not necessarily mean that in all circumstances the jurisdiction of civil Courts is barred, and I have been referred to a recent decision of the Privy Council reported in I. L. R. (1940) Mad. 599[1] in which the following words occur :

"It is also well settled that even if jurisdiction is so excluded, civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

The argument is that in the present case the provisions of the Act have not been complied with and also that the fundamental principles of judicial procedure have been violated. A very interesting argument has been developed on this question, but it seems to me that it is unnecessary for me to consider it. The argument is based upon the fact that the word "adjudged" in S. 182 requires that the official who is adjudging confiscation must do so by a judicial order and cannot pass a final order without personally hearing the person against whom it is to be passed. Therefore, in refusing to give a personal hearing to the appellant, the Collector of Customs was infringing the provisions of the section. The fundamental principles of judicial procedure also include the right of the appellant to be heard and to be heard not only by a subordinate official but by the official who is to pass the order against him. In the present case, there is no doubt at all that the appellant was heard, but he was heard not by the Collector of Customs but by the Inspector of Customs; nor can there be any suggestion that he was prevented in any way from adducing all the evidence which he wished to adduce and proving any fact which he wished to prove. As the learned District Judge has held, all the records of the case must be assumed to have been before the Collector of Customs when he passed his order and it cannot be said that the order was passed without the appellant having had an opportunity of putting forward his case, even though he was not present in person or by advocate before the Collector of Customs. It has been found that the written arguments that were submitted to the Inspector of Customs must have been before the Collector of Customs also. I have been referred to certain Calcutta cases dealing with S. 36, Legal Practitioners' Act, which I think are distinguishable from the facts of the present case, because there is a specific sub-section of that Act which requires that before any person's name is included in the list of touts, he must be given an opportunity to show cause why his name should not be included. The existence of that sub-section is a clear justification for the finding of the Calcutta High Court that before any Court can include the name of any person as a tout, that Court and not a Court subordinate to it must hear his objection to that course. There is no such provision in S. 182.

As I say, however, I do not think it necessary for me to give any finding whether the use of the word "adjudged" in S. 182 requires that the actual official who passed the order of confiscation must hear the person whose goods are being confiscated. There is another remedy provided by the Act and that is an application to the Central Board of Revenue under S. 191. In the present case such an application was made and failed, and although all the arguments before me have been concentrated upon the failure of the Collector of Customs to observe the procedure laid down by the Act, the suit is not to set aside his order but to set aside the order of the Central Board of Revenue. Against that order no criticism at all has been put forward. The order shows that it was passed after the appellant's counsel had been duly heard and no attempt whatever has been made to suggest that in passing that order the Central Board of Revenue has in any way infringed the principles of justice or the provisions of the Act. As has been laid down in a recent Full Bench decision of this Court in I.L.R. (1941) Mad. 850[2] at p. 859 where by an act of Legislature powers are given to a person for a public purpose from which an individual may receive an injury, if the method of redressing the injury is indicated by the statute the ordinary jurisdiction of civil Courts is ousted and a suit does not lie. It seems to me clear on the principles there enunciated that even if it be true that the procedure of the Collector of Customs was not in accordance with the Act or with the principles of justice, there is a definite remedy provided by the Act and because that is so the appellant had no right of suit. In the result, this appeal must fail and is dismissed with costs. Leave to appeal is refused.

C.R.K./R.K. *Appeal dismissed.*

1. ('40) 27 A. I. R. 1940 P. C. 105 : 188 I. C. 231 : I. L. R. (1940) Mad. 599 : 67 I. A. 222 : I. L. R. (1940) Kar. P. C. 194 (P. C.), Secretary of State v. Mask & Co.

2. ('41) 28 A. I. R. 1941 Mad. 530 : 196 I. C. 353 : I.L.R. (1941) Mad. 850 : (1941) 2 M.L.J. 47 (F.B.), Secretary of State v. Jagannadham.

A. I. R. (29) 1942 Madras 705

HORWILL J.

Kuppala Krishtappa — Petitioner

v.

Premaleelamani, minor by mother Subbamma — Respondent.

Criminal Revn. Case No. 723 of 1941 (Criminal Revn. Petn. No. 678 of 1941), Decided on 30th October 1941, to revise order of Joint Magistrate, Penukonda, D/- 28th April 1941.

Criminal P. C. (1898), S. 488 — As long as child is with mother, she must be given sufficient to maintain child — If father has right to custody of child he can at any time institute proceedings for that purpose—It is improper for Court to refuse maintenance for child merely because it was of opinion that mother had no right to custody of child.

a As long as a child is with the mother, the mother must be given sufficient to maintain the child. If the father has a right to the custody of the child, he can at any time institute proceedings for that purpose. An adult can be coerced into coming into proper custody by refusing maintenance; but a child has no such choice ; it must remain with whomsoever takes it. So that it would be improper for the Court to refuse maintenance for the child merely because it was of opinion that the mother had no right to the custody of the child. [P 706*d*]

Cr. P. C. —

('41) Chitaley, S. 488, N. 9, Pts. 6, 8.

('41) Mitra, Page 1556, N. 1276 " Children in custody of mother."

A. Gopalacharlu — for Petitioner.

J. V. Srinivasa Rao — for Respondent.

b *Public Prosecutor* — for the Crown.

ORDER.—This petition arises out of an application by the wife of the petitioner for maintenance under S. 488, Criminal P. C., for their child, which is in the custody of the mother. The husband and wife separated because they did not get on well together and because the petitioner contemplated taking another wife which he eventually did. The elders of the village met together and effected a compromise, by which the wife was to get land worth Rs. 400 for her maintenance and a house to live in. The compromise refers to the petitioner's undertaking to bring the child up and protect it and to get it married. I think this language would be more appropriate to the retention of the child by the father rather than by the mother ; but whether this is what the panchayatdars decided is not quite clear. The learned Magistrate seemed to think this c reference quite consistent with the child's staying with its mother. Some time after the settlement was effected, the petitioner sent a notice to his wife telling her that she should return the child or he would not be responsible for its maintenance or for its marriage. She replied to the effect that she was under no obligation to return the child and that he must maintain it. Eventually, the present application was filed by the wife for an allowance of Rs. 15 monthly as maintenance for the child. The Magistrate ordered payment of Rs. 10 a month. Two points have been raised by the learned advocate for the petitioner. One is with regard to the custody of the child and his right to refuse maintenance unless the child is returned to his care, and the second is with regard to the quantum of maintenance. Whatever may be the correct construction of the settle- d ment deed, it seems to me clear that as long as the child is with the mother, the mother must be given sufficient to maintain the child. If the father has a right to the custody of the child, he can at any time institute proceedings for that purpose. An adult can be coerced into coming into proper custody by refusing maintenance; but a child has no such choice; it must remain with whomsoever takes it. So that it would be improper for the Court to refuse maintenance for the child merely because it was of opinion that the petitioner had no right to the custody of the child.

It seems to me that the rate of maintenance awarded by the learned Magistrate is rather high. Evidence has been adduced in which it is said that the petitioner is doing some money-lending business, but the Magistrate has not said that he accepts that evidence. Without discussing the proper rate of maintenance he says, "From the evidence it is apparent that the counter-petitioner is not a poor man. He owns 2 acres of wet land and 6 acres of dry land. I therefore order that he pay Rs. 10." If e that land is the only property of the petitioner he clearly cannot afford to give his child Rs. 10 a month. Those who arranged the compromise between the husband and wife thought that land worth Rs. 400 would yield a sufficient income for the maintenance of the wife. That land would not yield more than Rs. 30 or Rs. 40 a year. To award Rs. 10 a month for the child would therefore be grossly excessive. On the other hand, it is equally clear that the mother, from such a small allowance, would have nothing to spare for the child. I reduce the rate of maintenance awarded from Rs. 10 a month to Rs. 5 a month.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 706

LEACH C. J. AND LAKSHMANA RAO J. f

Valliappa Chettiar — Petitioner

v.

Arandi and others — Respondents.

Civil Misc. Petn. No. 2038 of 1942, Decided on 11th August 1942, to issue a writ of certiorari.

(a) Madras Hindu Religious Endowments Act (2 of 1927), S. 44B (2) (d) (i) — Appeal under— District Collector can reverse Collector's order —But notice to respondents is condition precedent to District Collector's right to exercise jurisdiction.

In an appeal under S. 44B (2) (d) (i) the District Collector has power to reverse an order passed by the Collector but before he exercises this power he must serve notice on the respondents and give them g an opportunity of being heard. In other words, notice to the respondents is a condition precedent to his right to exercise jurisdiction in the matter. An order passed without notice to the respondents being without jurisdiction will be quashed by the High Court by the issue of a writ of certiorari. [P 707*b*]

(b) Madras Hindu Religious Endowments Act (2 of 1927), S. 44B (2) (d) (i) — Application to High Court for writ of certiorari to quash District Collector's order opposed by District Collector — District Collector can be made liable for costs as public officer.

Where an application to the High Court for a writ of certiorari to quash an order passed by the District Collector in an appeal under S. 44B (2) (d) (i) is opposed by the District Collector and the application is allowed the District Collector can be h made liable for costs as a public officer. [P 707*d*]

K. Rajah Ayyar — for Petitioner.

S. Ramachandran for M. Krishna Bharathi — for Respondents.

Government Pleader — for the Government.

ORDER.—This is an application for the issue of a writ of certiorari to quash an order of the Collector of Coimbatore. The application arises out of a petition filed under S. 44B, Madras Hindu Religious Endowments Act, 1926, asking for an order directing the resumption of certain Devadayam inam lands granted to the Kariakaliamman, Athanur Amman and Mariamman temples in the villages of Alambadi. The petition was filed by the trustees of these temples. The petitioner now before us and six other persons were made respondents, as they were in possession of the lands as alienees. The respondents raised the contention that the section had no

retrospective effect and this was accepted by the Revenue Divisional Officer. Consequently, he held that the application filed by the trustees was not maintainable. Thereupon, the trustees appealed to the Collector of Coimbatore under S. 44B (2) (d) (i) which says:

"Any party aggrieved by an order of the Collector under cl. (a) may appeal to the District Collector within such time as may be prescribed, and on such appeal the District Collector may, after giving notice to each of the persons and bodies mentioned in cl. (b) and after holding such inquiry as may be prescribed, pass an order confirming, modifying or cancelling the order of the Collector."

Without issuing notice to the respondents in the proceedings before the Revenue Divisional Officer and despite the fact that they had obtained an order in their favour, the District Collector directed the Revenue Divisional Officer to re-open the case and decide it on its merits. He disagreed with the opinion of the Revenue Divisional Officer that the section had retrospective effect. In passing this order the District Collector acted without jurisdiction. He has power to reverse an order passed by the Revenue Divisional Officer under S. 44B (2), but before he exercises this power he must serve notice on the respondents and give them an opportunity of being heard. In other words, notice to the respondents is a condition precedent to his right to exercise jurisdiction in the matter. The learned Government Pleader, as he must, concedes that notice should have been issued, but he suggests that a writ of certiorari should not issue as the order was substantially right. This is not the question. A party has a right to be heard and that right was denied to the respondents in the proceedings instituted by the trustees of these temples. The District Collector has emphasized his disregard of the law in the affidavit which he has filed in opposition to the application for a writ of certiorari. In para. 4 of his affidavit he says:

"As the appellate tribunal was of opinion that the first tribunal erred on a question of law, it was entitled in law to pass orders remanding the case for fresh disposal, without sending notices to the respondents and without holding an inquiry."

In para. 5 he says:

"No fundamental principles of natural justice have been violated, in the course of the proceedings in L. Dis. No. 7652 of 1941. The powers of an appellate tribunal are wide enough to pass appropriate and suitable orders, according to the circumstances of each case."

Such an attitude cannot be allowed to pass without the strongest condemnation. The District Collector is there to administer the law and not to ignore it. His action in deciding the appeal made to him under S. 44B (2) (d) without notice to the respondents was most high handed and he aggravates the situation by claiming a right to act in this manner. The order of the District Collector will be set aside and he will be directed to hear the appeal after proper notice has been given to the respondents in the proceedings before the Revenue Divisional Officer. The petitioner is entitled to his costs and so are the trustee-respondents. As the Collector has chosen to oppose the application the order for the payment of costs must be made against him as a public officer. The costs will be paid within two months.

C.R.K./G.N. *Order quashed.*

A. I. R. (29) 1942 Madras 707

KUPPUSWAMI AYYAR J.

S. A. Abdul Subhan Sahib — Appellant

v.

M. Abdul Ravoof Sahib — Respondent.

Second Appeal No. 924 of 1941, Decided on 29th June 1942, against decree of Dist. Court, Trichinopoly in A. S. No. 304 of 1940.

Partnership Act (1932), S. 69 — Construction — Unregistered firm dissolved and accounts taken—Subsequent contract between partners—Suit to recover money due under contract—Bar of S. 69 does not apply.

Section 69 has to be strictly construed. The bar in S. 69 does not extend to suits for recovery of money due on a contract entered into between the partners of an unregistered firm in pursuance of an agreement entered into after dissolution and the taking of accounts: ('37) 24 A.I.R. 1937 Bom. 225 and ('38) 25 A. I. R. 1938 Bom. 108, *Disting.*

[P 708*a*,*b*]

K. P. Ramakrishna Ayyar — for Appellant.

B. Pocker — for Respondent.

JUDGMENT. — The only point for consideration in this second appeal is whether the contract sought to be enforced in the suit is one to which the provisions of S. 69, Partnership Act, apply and the suit is hence not maintainable. Both the lower Courts have held that, though the partnership had not been registered, the contract did not come within the purview of S. 69, Partnership Act, and that the suit is maintainable. The suit was for the recovery of money agreed to be paid by one partner to another under an agreement entered after the partnership was dissolved and accounts were looked into. It is an agreement entered into after the dissolution and in the course of the settlement of accounts as between the partners. It is true that the dissolution and the taking of accounts were contemporaneous but it cannot be said that the taking of accounts was not subsequent to the dissolution because there could have been no taking of accounts unless there was a dissolution.

The two decisions relied on for the appellant and referred to by the learned District Munsif in his judgment, viz., I.L.R. (1937) Bom. 628[1] and A.I.R. 1938 Bom. 108[2] have no application to the facts of the present case. The first was a suit for recovery of money paid by one of the partners as income-tax payable by the firm subsequent to the dissolution. The assessment itself was subsequent to the dissolution. The liability to pay that amount was not a liability arising under the contract entered into at the time of the dissolution but the enforcement of a right conferred under the Act. The second was a suit for the recovery of money due to a dissolved partnership filed by the original partners suing for and on behalf of the firm. But this is altogether a different case. This is a suit for the enforcement of an agreement entered into after the dissolution or at the time of the dissolution between the partners under which some definite amount was payable by one partner to another. Section 69 (2) has no application because it relates to a suit on behalf of a

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1. ('37) 24 A. I. R. 1937 Bom. 225 : 169 I.C. 424 : I.L.R. (1937) Bom. 628: 39 Bom. L. R. 260, S. H. Patel v. Husseinbhai Mohamed.
2. ('38) 25 A.I.R. 1938 Bom. 108 : 173 I. C. 766 : I. L. R. (1938) Bom. 102 : 39 Bom. L. R. 1214, Appaya Nijlingappa v. Subrao Babaji.

partnership and this is not such a suit. With regard to sub-s. (1) it may be said that it applies to a suit by a partner and that the partner may be one of a dissolved partnership. There are observations in I. L. R. (1937) Bom. 628[1] to indicate that the suit contemplated by S. 69 may be a suit by a partner of a dissolved firm. But then, as pointed out already, that was a case not of a partner enforcing a contract entered into after dissolution as between the partners but a suit by a partner of a dissolved firm claiming rights conferred upon him under the Act or enforceable by him under the terms of the partnership contract.

The section has to be strictly construed and I do not think on reading the section as it stands I will be justified in holding that the bar extends to suits for recovery of money due on a contract entered into between the partners of an unregistered firm in pursuance of an agreement entered into after dissolution and the taking of accounts. As a matter of fact S. 69 (3) (a) states that sub-ss. (1) and (2) shall not affect the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm. This is a case in which the firm was dissolved, the accounts were taken and in pursuance of the taking of the accounts certain amounts found due to the respondent plaintiff were agreed to be paid by the appellant defendant. I do not think it can be said that it was contemplated by the Legislature that the prohibition under S.69 should apply to enforcement of contracts of this kind. In the result the appeal fails and is dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 708

WADSWORTH J.

Somayajulu Venkatanarasimham by General Power of Attorney holder, Tarlade Appala Ramanna —

Petitioner

v.

Govindu Suryanarayana, minor represented by maternal grandfather and next friend, Nadiminti Ganeswara Rao and others—Respondents.

Civil Revn. Petns. Nos. 1333 and 1663 of 1940, Decided on 2nd April 1942, to revise order of Special Deputy Collector, Chicacole Division, D/- 27th January 1940.

Madras Agriculturists Relief Act (4 of 1938), S. 23—Rent decree — Judgment-debtors' mortgagee applying under S. 23 and impleading one of judgment-debtors as counter petitioner—On objection being raised as to mortgagee's competency to file application Court allowing judgment-debtor to be transposed as petitioner —At time of transposition application by judgment-debtor would have been time-barred — O. 1, R. 10, Civil P. C., held not applicable — Court held had no jurisdiction to order transposition.

The mortgagee from the judgment-debtors under a rent decree applied under S. 23 and impleaded one of the judgment-debtors as a counter petitioner. On an objection being raised as to the competency of the mortgagee to file the application, the Court allowed the judgment-debtor who was impleaded as a counter petitioner to be transposed in the array of applicants. At the time when the judgment-debtor was transposed an application by him under S. 23 would have been time-barred :

Held that the Court had no jurisdiction to order the transposition merely in order to enable the original applicant to overcome a valid objection to the maintainability of his application. More especially so when the person transposed had separately filed a petition claiming substantially the same relief, which petition had been dismissed and against which dismissal an appeal was pending. [P 709*a*]

Held further that O. 1, R. 10 had no application to the case as there was no question of a bona fide mistake in filing the application in the name of a wrong person for the benefit of the right person. The application was filed by the wrong person (mortgagee) for his own benefit and without any idea of saving the land for his mortgagors and the Court had no jurisdiction to order the transposition with a view to overcome the statutory provisions of S. 23 regarding limitation. [P 708*h*; P 709*a*,*b*]

C. P. C. —

('40) Chitaley, O. 1 R. 10, N. 3 Pt. 14.

('41) Mulla, Page 514 N. "Scope of sub-r. (1)."

C. V. Dikshitalu—for Petitioner.

V. Govindarajachari and S. Ramamurthi — for Respondents.

ORDER.—These revision petitions both contest the correctness of an order passed in an application under S. 23 of Act 4 of 1938 whereby in November 1938 one of the judgment-debtors under the decree in a rent suit, who had been impleaded as counter petitioner, was transposed as a petitioner when a doubt was raised as to the competency of the original petitioner to maintain the application. The petitioners under C. R. Ps. Nos. 1663 and 1333 are the landholder and the auction purchaser respectively. The sale was held in January 1938. The contesting respondent who was a mortgagee from judgment-debtor 1 filed an application under S. 23 on 10th June 1938 less than a fortnight before the expiry of the period allowed in S. 23. An objection being raised to the maintainability of the application on the ground that the applicant was not a judgment-debtor, the applicant seems to have sought to get round the difficulty by getting one of the judgment-debtors to join him in the array of applicants. The basis of an application under S. 23 is firstly a sale in execution of a decree of land in which an agriculturist had an interest, and secondly, an application within 90 days of the commencement of the Act by a judgment-debtor who is an agriculturist entitled to the benefits of the Act, to have that sale set aside. It is not therefore possible for a person who does not possess the necessary qualifications to move the Court to set aside the sale on behalf of someone else who does possess the necessary qualifications. The application by the respondent cannot be regarded as an application on behalf of judgment-debtor 2; nor, in fact, did the application purport to be on behalf of the pattadars or to rest on their qualifications in any way. At the time when judgment-debtor 2 was transposed an application by him would have been time-barred by some four months.

This is not in my opinion a case to which O. 1, R. 10 has any application. There is no question of a bona fide mistake in filing the application in the name of a wrong person for the benefit of the right person. The application was filed by the wrong person for his own benefit and without any idea of saving the land for his mortgagors. I am of opinion

that the Court had no jurisdiction to order this transposition merely in order to enable the original applicant to overcome a valid objection to the maintainability of his application. More especially is this so if, as appears to be the case here, the person transposed had separately filed a petition claiming substantially the same relief, which petition had been dismissed and against which dismissal an appeal was pending. I have not got before me the papers in this other matter; but from the recitals in the lower Court's judgment it would appear that counter petitioner 2 had applied under S. 15 to have the sale set aside. It seems not improbable that S. 15 was quoted when the proper section should have been S. 23. Counter petitioner 2 in whose interests this order is alleged to have been made has not thought fit to appear in this Court and support the order, the civil revision petitions being contested only by the original applicant. In the result therefore I am of opinion that the lower Court had no jurisdiction to order this transposition with a view to overcome the statutory provisions of S. 23 regarding limitation. The revision petitions are allowed with costs, payable by respondent 1 in C. R. P. No. 1333 and respondent 5 in C.R.P. No. 1663, and the order of the lower Court is set aside.

C.R.K./G.N. *Petitions allowed.*

A. I. R. (29) 1942 Madras 709 (1)

MOCKETT AND HAPPELL JJ.

Firm of Patnam Lakshminarayana Chetti, represented by managing partner, Patnam Lakshminarayana Chetti — Appellant

v.

Grandhe Seshamma and others — Respondents.

Appeal No. 34 of 1940, Decided on 30th July 1942, against order of Dist. Court, Kurnool, D/- 8th November 1939.

Succession Act (1925), S. 373 — Application for succession certificate — District Judge cannot dismiss it under S. 373 on ground that complicated questions of law or fact have to be gone into — Application disclosing ground for entertaining it—Right to certificate contested—District Judge must grant certificate to one party or other.

The District Judge is no doubt entitled to dismiss an application for succession certificate under S. 373 if he is satisfied that there are no grounds for entertaining it. But he cannot dismiss it on the ground that complicated questions of fact and law would have to be gone into before it could be decided which party had the right to the succession certificate as is clear from S. 373 (3) read with S. 373 (2). If there are grounds for entertaining an application but the right to a certificate is contested the District Judge must make an order for the grant of the certificate to one party or the other. Under S. 373 (2) he can make an order after going into the merits of the case. But under S. 373 (3) although again he must make an order he need not determine question of law or fact which are too intricate and difficult for determination in summary proceedings. [P 709e,f]

Ramanujam, Venkatasubbayya and N. Jaganmohana Rao—for Appellant.

HAPPELL J. — The appellant was directed by the District Munsif of Kurnool in whose Court he had filed a suit for recovery of a sum due under a promissory note to produce a succession certificate. He accordingly filed a petition in the Court of the District Judge of Kurnool under S. 372, Succession Act. This petition was opposed by one of the defendants in the suit on the promissory note, who was also the wife of the assignor of the promissory note to the appellant. She claimed that the debt in question together with other properties had been left to her husband and herself jointly and that her husband had no right to assign the promissory note to the appellant. The learned District Judge, taking the view that complicated questions of fact and law would have to be gone into before it could be decided which party had the right to the succession certificate proceeded to refer the parties to a suit, if so advised, and dismissed the petition. The learned District Judge was no doubt entitled to dismiss an application under S. 373 if he was satisfied that there were no grounds for entertaining it. The District Judge, however, has not dismissed the application for that reason, but for the reason that he thought the case was too complicated to be decided in summary proceedings. This is not a valid reason as is clear from S. 373, sub-s. (3) of the Act read with sub-s. (2). If there are grounds for entertaining an application but the right to a certificate is contested, it is plain that the District Judge must make an order for the grant of the certificate to one party or the other. Under S. 373 (2) he can make the order after going into the merits of the case. But under S. 373 (3), although again he must make an order, he need not determine question of law or fact, which are too intricate and difficult for determination in summary proceedings. The appeal must therefore be allowed and the application will be returned to be determined by the learned District Judge in the light of these observations. He will be at liberty to make an order under S. 373, sub-s. (2) or (3) or to dismiss the application if he thinks that there are not grounds for entertaining it. Costs of this appeal and of the petition in the lower Court will abide the result.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 709 (2)

CHANDRASEKHARA AYYAR J.

P. R. Subramania Pattar — Petitioner

v.

Porathana Andi — Respondent.

Civil Revn. Petn. No. 2061 of 1941, Decided on 9th April 1942, to revise decree of Sub-Judge, South Malabar at Calicut, D/- 29th March 1941.

(a) Negotiable Instruments Act (1881), S. 87 —Alteration apparent on face of pronote—Onus is on plaintiff to explain it and show that it is not material.

When the alteration is apparent on the face of a pronote the onus is on the plaintiff suing on the pronote to explain it and to show that it is not a material alteration which renders the instrument void and unenforceable. [P 710c]

(b) Negotiable Instruments Act (1881), S. 87— Material alteration—Meaning of — Whether alteration material—That alteration does not ultimately involve change in rights and liabilities of parties is not germane — Whether change is beneficial or prejudicial to maker does not matter — Pronote — Addition of words "Proprietor of Karthika Stores" above signature of executant held material alteration.

The fact that an alteration does not ultimately involve any change in the rights and liabilities of the parties is not very germane to the consideration of the question whether it amounts to a material alteration within the meaning of S. 87. Whether the change be prejudicial or beneficial to the maker does not in the least matter. Any alteration of any instrument is material which would alter the business effect of the instrument if used for any ordinary business purpose : (1892) 9 Q.B.D. 555, *Rel. on.* [P 710*d*,*e*]

If the legal identity or character of the instrument has been affected or if the liability has been attempted to have been extended by the alteration, it must be held to be material irrespective of the fact whether the alteration is to the prejudice of the promisor or executant of the instrument or not : ('40) 27 A.I.R. 1940 Mad. 62, *Rel. on.* [P 710*f*]

But an immaterial alteration would not affect the binding nature of the instrument: (1844) 13 M. & W. 343, *Expl.* [P 710*f*]

[Addition of the words "Proprietor of Karthika Stores" above the signature of the executant of the pronote by the plaintiff was held to be a material alteration though the plaintiff had ultimately made up his mind to sue the executant in his individual capacity and had accepted his case that he had nothing to do with the Karthika Stores at any time.] [P 711*a*]

C. S. Swaminatha Iyer — for Petitioner.

S. Ranganatha Iyer and R. S. Swaminathan— for Respondent.

ORDER.—The Subordinate Judge held that the suit promissory note, Ex. A, was materially altered after it was executed and that certain words were introduced later. The words appear above the signature of the defendant and below the date and their translation is "the Proprietor of the Karthika Stores." The plaintiff is the assignee from defendant 2 who was the original payee. As the alteration is apparent on the face of the document the onus is on the plaintiff to explain it and to show that it is not a material alteration which renders the instrument void and unenforceable. The plaintiff has made no such attempt. The learned Subordinate Judge has held that the alteration is material in that the defendant Andi was sought to be converted into "Andi, Proprietor of the Karthika Stores." The answer given by the plaintiff is that it does not amount to anything more than a mere description and that in this case it happens to be a wrong description because Andi was not the Proprietor of the Karthika Stores, either according to the plaintiff or according to himself. Therefore, he contends that it is an immaterial alteration which does not affect the legality of the note. Mr. Swaminatha Iyer also contended that a mere description of that kind which is not found in the body of the document cannot absolve the personal liability of the executant under the note, as has now been held by a Full Bench of our Court.

The fact that an alteration does not ultimately involve any change in the rights and liabilities of the parties is not very germane to the consideration of the question whether it amounts to a material alteration within the meaning of S. 87, Negotiable Instruments Act. Whether the change be prejudicial or beneficial to the maker does not in the least matter. To use the language of Brett L. J. in (1892) 9 Q.B.D. 555[1]: "Any alteration of any instrument seems to be material which would alter the business effect of the instrument if used for any ordinary business purpose." One cannot definitely predicate what was at the back of the person who made the alteration and why it was considered necessary to have the words inserted in this note. It is not the plaintiff's case that it was some inexplicable or frolicsome act of a stranger. It may be, whatever the law was or is, that the plaintiff or the payee thought that the insertion of these words would widen the liability of the executant. It is also possible that the Karthika Stores were intended to be affected by this change. So long as it is not the same instrument as the defendant executed and there has been an alteration which might well be considered material even though ultimately it may not have the consequence that was intended, it is open to the defendant to say that the instrument that he gave has ceased to be of any force by reason of the alteration. To quote from the decision in 50 M. L. W. 746[2] of Abdur Rahman J. : "If the legal identity or character of the instrument has been affected or if the liability has been attempted to have been extended by the alteration, it must be held to be material and this would be so irrespective of the fact whether the alteration is to the prejudice of the promisor or executant of the instrument or not."

Mr. Ranganatha Iyer for the respondent relied on (1844) 13 M. & W. 343[3] for the position that even an immaterial alteration would affect the binding nature of the instrument and he said that in that case the addition of two seals by and near to the respective signatures of the defendants was held sufficient to discharge the liability of the maker under the instrument. In urging this argument the learned advocate overlooked the fact that the addition of the seals was not an empty formality but was apparently intended to convert the document of guarantee into what is technically called the deed of the defendants. A deed technically so called imports certain liabilities and obligations of a wider nature than if it had remained an ordinary instrument of guarantee. This is apparent from the argument of Mr. Watson who appeared for the defendant in that case who pointed out that the addition of the seals was most material if it was a deed, sealed and delivered. If the attesting witness was dead, upon proof of his handwriting, it would have been taken to be a deed of the defendant and it would have been difficult for the defendant to negative the fact by evidence. If it was a document under hand only the consideration must have appeared on the face of it, but if it was under seal that objection would have been obviated. Again the period of limitation would be more or less according as the document were a deed or not. It was on such considerations that the Court of Exchequer held that the alteration was material and its decision was confirmed. Lord Denman C. J. says : "That the addition gives a different legal character to the writing and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it." So it is not right to say that it was a case where a mere addition of seals had rendered the instrument void and of no effect, apart from the question whether the alteration by reason of this addition was material or not. I agree how-

1. (1892) 9 Q.B.D. 555 : 51 L.J.Q.B. 401 : 47 L.T. 146 : 30 W. R. 932 : 46 J. P. 500, Suffell v. Bank of England.

2. ('40) 27 A. I. R. 1940 Mad. 62 : 189 I. C. 795 : 1939-2 M. L. J. 686 : 50 M. L. W. 746, Krushna Charana Padhi v. Gouro Chandro Dyano Sumanto.

3. (1844) 13 M. & W. 343 : 13 L. J. Ex. 276 : 1 Dowl. & L. 377: 67 R.R. 638, Davidson v. Cooper.

ever with the lower Court in thinking that the alteration in this case by the addition of the words "Proprietor of Karthika Stores" was a material alteration intended to be such though it might be that the plaintiff had ultimately made up his mind to sue the defendant in his individual capacity and has accepted the defendant's case that he had nothing to do with the Karthika Stores at any time either as Proprietor or in any other capacity. This revision petition is dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

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* A. I. R. (29) 1942 Madras 711 (1)

SPECIAL BENCH

LEACH C. J., LAKSHMANA RAO AND KRISHNASWAMI AYYANGAR JJ.

Advocate General, Madras — Petitioner

v.

Sri Ramanatha Goenka, Editor, Printer and Publisher of the Indian Express — Respondent.

Criminal Misc. Petn. No. 514 of 1942, Decided on 23rd September 1942, to punish respondent for contempt of Court of Third Presidency Magistrate, Madras.

***Contempt — Contempt of Court — There cannot be contempt more gross than allegation that once Magistrate knew that Government had instituted prosecution there was bound to be conviction.**

There cannot be contempt of Court more gross than an allegation that as the Magistrate was told that Government was behind the prosecution there was not and there could not be any proper judicial trial, that the proceedings before the Magistrate were an empty formality, that the Magistrate had made up his mind to convict the accused even before the trial was over with a view to conform to what he believed to be the wishes of the Government. In other words, once the Magistrate knew that the Government had instituted the prosecution there was bound to be a conviction. The High Court will not allow attacks of this nature to be made against the subordinate Courts without taking serious action. [P 711*e,f*]

Cr. P. C. —

('41) Chitaley, S. 480, N. 4.

('41) Mitra, Page 1540, N. 1262.

Petitioner in person.

B. Sitarama Rao for V. V. Srinivasa Ayyangar and V. C. Gopalaratnam — for Respondent.

LEACH C. J. — The respondent is the editor, printer and publisher of "the Indian Express." He has been called upon to show cause why he should not be punished for contempt of the Court of the Third Presidency Magistrate, Madras. On 14th August he was convicted by the Third Presidency Magistrate of having published in his newspaper an obscene advertisement and was sentenced to pay a fine of Rs. 100 or in default to undergo simple imprisonment for a week. The respondent had the right to challenge the correctness of the conviction and sentence in an application to this Court but he accepted the decision and consequently no application for revision was filed. On 16th August he published a leading article in his newspaper in the course of which he said :

"The prosecution clearly stated that the case was filed as the result of 'correspondence from Government' but with the blessings of the Magistrate refused to produce the correspondence and the statement had to go untested. Without meaning any disrespect, we doubt whether in any case where opinions count, any subordinate Magistrate will give a judgment contrary to what he believes the Government of the day has decided. The fate of this case was sealed the minute the police told the Magistrate that the Government was behind the prosecution."

We accept the statement in the affidavit filed in support of this application that this passage suggests that there was not and there could not be any proper judicial trial, that the proceedings before the Magistrate were an empty formality, that the Magistrate had made up his mind to convict the accused even before the trial was over with a view to conform to what he believed to be the wishes of the Government. In other words, once the Magistrate knew that the Government had instituted the prosecution there was bound to be a conviction. It is difficult to imagine a contempt more gross than this. In his affidavit in reply to the one filed in support of the petition the respondent states that he had no intention of committing contempt of Court. His affidavit is merely an attack on Government and the Special Press Adviser whom he suspected of having caused his prosecution to be launched. He expresses no apology for the gross contempt which he has committed. Mr. Sitarama Rao, in his address to the Court, has however supplemented the affidavit by stating that his client does tender an unconditional apology. The matter cannot be allowed to end with the tender of this apology. The contempt is too grave and this Court has a duty to perform in the matter. This Court cannot allow attacks of this nature to be made against the Subordinate Courts of this Province without taking serious action. The respondent will have to be punished and the sole question is what shall be the punishment. If the apology had not been tendered the only proper course would have been to commit the respondent to prison, but as he has tendered an unqualified apology we will not take this course. The respondent will be directed to pay a fine of Rs. 250 and in default of payment to undergo simple imprisonment for a period of two months. In addition he will pay the costs of these proceedings, which we fix at Rs. 150.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 711 (2)

CHANDRASEKHARA AYYAR J.

Sheshamma Shedthi — Appellant

v.

Vasudeva Bhatta and others — Respondents.

Second Appeal No. 376 of 1941, Decided on 10th April 1942, against decree of Dist. Court, South Kanara in A. S. No. 185 of 1940.

Charge — Enforceability—Partition between Hindu brothers *A* and *N*—Charge created in favour of *A* on properties allotted to *N's* share for meeting expenses of certain religious ceremonies, mahalaya and sradhas of maternal grand-father and grand-mother of *A* and *N*—Step brothers of *A* and *N* purchasing property allotted to *A*—Vendees of *A* held could enforce charge against purchaser of *B's* properties—*A's* vendees held could perform mahalaya and sradhas.

In a partition between *A* and *N* a charge was created in favour of *A* over the properties allotted to the share of *N* for the purpose of meeting the expenses of certain ceremonies namely the samaradhana of Srinivas Devaru, Navarathri Puja, the Mahalaya and the Sradhas of the maternal grandfather and grand mother of *A* and *N*. Subsequently, the step brothers of *A* and *N* purchased the property allotted to *A* :

Held that the charge could be enforced by the vendees of *A* against the purchaser of the properties allotted to *B*. There was no prohibition under the Hindu law that persons other than those in the direct line of descent could not perform the Mahalaya and the Sradha ceremonies and therefore the step brothers could perform the same. Even if those ceremonies were performable only by certain persons in certain degree of relationship only, the difficulty could be got over by *A's* vendees getting them done by competent persons so as to entitle them to enforce the charge in respect thereof.

[P 712*f*,*g*]

T. P. Act—

('36) Mulla, Page 550 Note "Notice of charge."

('34) Mitra, Page 550 N. 534.

K. Y. Adiga and S. Ramayya Nayak — for Appellant.

K. P. Sarvothama Rao — for Respondents.

JUDGMENT.—The question that arises in this second appeal is whether the charge created under the partition deed Ex. 'C' between the two brothers Anni Bhatta and Narayana Bhatta over the properties allotted to Narayana Bhatta's share and in favour of Anni Bhatta can be enforced by the plaintiffs who have got a sale of the properties from Anni Bhatta against the defendant, who is a purchaser of Narayana Bhatta's properties. The charge was created for the purpose of meeting the expenses of certain ceremonies, namely the samaradhana of Srinivasa Devaru, Navarathri Puja, the Mahalaya and the sradhas of Narayana Bhatta and his wife Venkamma. It may be mentioned that Narayana Bhatta is the maternal grandfather of Anni Bhatta and Narayana Bhatta, the brothers. He made a will Ex. B, appointing his son-in-law Rama Bhatta as the executor and directing him to get the ceremonies performed perpetually by himself and his sons. At that time, the son-in-law Rama Bhatta had two sons, Anni Bhatta and Narayana Bhatta through his first wife, Yamunmma. Later on, he married a second wife and the plaintiffs are his second wife's sons.

The plaintiffs' claim to enforce the charge on the ground that they have purchased Anni Bhatta's share of the properties and are getting the ceremonies performed is resisted by the defendant on two grounds, firstly, that the plaintiffs are not competent to perform these ceremonies as they are not in such line of descent from Narayana Bhatta and his wife which would enable them to do the ceremonies for the repose and the benefit of their souls, and secondly that the performance of the ceremonies under the partition deed was personal to Anni Bhatta and could not be transferred by him to any others. It is conceded that Anni Bhatta and Narayana Bhatta could do the ceremonies and that as between them they could enter into an arrangement as to who should do them and who should pay for the performance and how much. It is also conceded that so far as the Navarathri Puja and Srinivasa Devaru samaradhana are concerned, anyone can do it or get it done. To this extent there can be no legal objection to the charge created under the deed being enforced against the defendant who has purchased Narayana Bhatta's share of properties with notice of and subject to the charge. But Mr. Adiga contended that the Mahalaya and sradha ceremonies can be performed by certain persons only who are recognised in the shastras as competent to perform them and that the plaintiffs who are not in the direct line of descent from the first Narayana Bhatta and his wife cannot perform those ceremonies and consequently cannot enforce the charge even though Anni Bhatta had asked them in the sale deed to perform the ceremonies and get payment out of Narayana Bhatta's properties. The shastras recognize the competency of particular persons to perform such ceremonies and say that if they perform them, they will earn merit by propitiating their ancestors. The recognition of the competency involved also an obligation to do ceremonies, though in these days of advanced views with rationalistic ideas prevailing everywhere many people seem to think that such ceremonies are utterly meaningless and involve a sheer waste of time, money and energy. So far as I have been able to gather there is no prohibition that other persons could not perform such ceremonies. On the other hand, in the absence of persons in the direct line of descent, the shastras contemplate associates, friends, sishyas or pupils and co-students doing such ceremonies and as a matter of fact when oblations of water known as the tharpanam are offered on sacred days like the Amavasya or Rathasapthami orthodax Brahmins offer oblations even to unknown persons whose lines have become extinct or who have remained as brahmacharis or whose gotras are not known. If oblations of water are permissible under such circumstances, I am not able to see why more substantial offerings should be regarded as prohibited.

The difficulty urged by the defendant can be got over by the plaintiffs getting the ceremonies conducted through persons competent. The plaintiffs' case is that they were getting the ceremonies so conducted and this has not been contradicted. As pointed out by the Courts below the real spiritual efficacy of ceremonies is beyond the province of the defendant to judge. The defendants purchased the properties subject to the charge in favour of Anni Bhatta and the plaintiffs claim under Anni Bhatta. After all, it should be remembered that the plaintiffs are not utter strangers or belong to castes whose attempt to do the ceremonies for the benefit of a deceased Brahmin would be ridiculed. The plaintiffs are the sons by another wife of Rama Bhatta on whom the duty was cast by the testator Narayana Bhatta to do the ceremonies and so they were done perpetually by him and his sons from generation to generation. Anni Bhatta was alive when the suit was filed, but he died subsequently. The suit relates to a claim that arose during Anni Bhatt's lifetime. Whether after Anni Bhatta's death the claim could be enforced because there is nothing in the partition deed, Ex. C, providing for the performance of the ceremonies by Anni Bhatta's heirs, executors and transferees is a different question and need not be decided in these proceedings. The decrees of the lower Courts are right and this second appeal is dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

a **A. I. R. (29) 1942 Madras 713**

KING AND KUNHI RAMAN JJ.

Katragadda Rajabapayya — Appellant

v.

Devineni Basavayya and another — Respondents.

Appeal No. 213 of 1941, Decided on 14th August 1942, against decree of Sub-Judge, Tenali, D/- 10th December 1940.

(a) Limitation Act (1908), S. 14 — Defendant executing pronote in plaintiff's favour in 1929 —Plaintiff in 1932 filing petition to adjudicate defendant as insolvent on ground that alienation by defendant of greater portion of his property amounted to fraudulent preference and was intended to defeat interests of other creditors — Petition dismissed in 1939 as facts not proved — Suit on pronote in 1940 — S. 14 held did not save limitation.

The defendant executed a pronote in favour of the plaintiff in 1929. In 1932 the plaintiff filed an insolvency petition to adjudicate the defendant as insolvent on the allegation that he had alienated a greater part of his property in order fraudulently to prefer certain creditors and to defeat interest of others. The petition remained pending for eight years and was dismissed in December 1939, as the alienations did not amount to fraudulent preference. The plaintiff filed a suit on the pronote in 1940 contending that limitation was saved by S. 14:

Held that S. 14 did not save limitation. The words "unable to entertain it" in S. 14 could not apply to the action of the insolvency Court. The case was not one in which the insolvency Court was debarred from entertaining an application filed by the plaintiff. The insolvency Court which after considering all the merits of the case had held that the facts alleged by the plaintiff were not proved and therefore dismissed the application of the plaintiff could not be said to have been "unable to entertain it" within S. 14 : ('35) 22 A. I. R. 1935 Lah. 736 and 1937 M. W. N. 465, *Disting.*

[P 713*g*,*h*]

Limitation Act —

('42) Chitaley, S. 14, N. 25.

('38) Rustomji, Page 250, Pt. 7.

(b) Civil P. C. (1908), S. 35—Trial Court has full discretion in matter of costs — Mere reference to circumstances of case with no further detail is not sufficient compliance with S. 35 (2) — Defendant succeeding on plea of limitation and suit dismissed — Defendant is entitled to costs.

A full discretion is vested in the trial Court with reference to the matter of costs. But under S. 35 if the Court does not follow the regular rule that costs shall follow the event, it must state its reasons in writing. A mere reference to the circumstances of the case with no further detail mentioned is not a sufficient compliance with the provisions of S. 35 (2). A plea of limitation is in no sense an unjust plea as it is provided for by the laws of the land as any other plea is provided for and therefore where the defendant succeeds on the plea of limitation and the suit is dismissed, the defendant cannot be deprived of his costs though the Court in view of the fact that the other issues in the suit had not been tried out may make such order for costs in favour of the defendant as it thinks fit.

[P 714*c*,*d*]

C. P. C. —

('40) Chitaley, S. 35, N. 5, Pts. 1, 6, 7 ; N. 7, Pts. 1, 6, 18.

('41) Mulla, Page 149, Pts. (h), (r); Page 150, Pt. (g).

P. Satyanarayana Rao — for Appellant.

K. Raghuramiah and N. V. B. Sankara Rao— for Respondents.

KING J. — This appeal arises from a suit brought on a promissory note executed in 1929 by defendant 1 against whom in February 1932 the plaintiff filed an insolvency petition. That insolvency petition for reasons into which we need not enter remained pending for nearly eight years and was finally dismissed in December 1939. It was in August 1940 that the plaintiff brought the present suit on the promissory note. On a cursory inspection of the dates of course it will be seen that such a debt would be barred by limitation, but the plaintiff contended that his suit fell within the provisions of S. 14, Limitation Act. The learned Subordinate Judge refused to accept this contention and dismissed the suit on this one question of limitation leaving the other issues untried. In so doing he awarded no costs to the defendants, stating merely that he passed this order "under the circumstances of the case." Against this the plaintiff has appealed and the two defendants have filed a memorandum of cross-objections. Section 14, Limitation Act, runs as follows :

"In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it."

It must now be mentioned that the reason why the insolvency petition was dismissed was that the plaintiff charged defendant 1 with having alienated the greater part of his property in order fraudulently to prefer certain creditors and to defeat the interests of others and it was finally held that these alienations did not amount to any such fraudulent preference. It seems to us perfectly clear from an examination of the language of S. 14 that it cannot be of any assistance to the appellant. In the first place, it is obvious that the words "unable to entertain it" cannot apply to the action of the insolvency Court. This is not a case in which an insolvency Court was debarred from entertaining a petition filed by the appellant. That petition specifically mentioned the facts which it was necessary to prove in order to show that defendant 1 was an insolvent and all that the insolvency Court has done is to hold that those facts have not been proved. The whole petition has been disposed of on its merits and to say that a Court which has considered all the merits of a case and held that the facts alleged by a petitioner have not been proved and therefore dismissed his application is unable to entertain it seems to us to be stretching a liberal interpretation of language to an impossible length.

The learned advocate for the appellant relies upon two rulings and in particular one reported in A.I.R. 1935 Lah. 736.[1] That is a case which is almost on all fours with the present case in so far as the other

1. ('35) 22 A. I. R. 1935 Lah. 736 : 156 I. C. 378, Lorind Chand Parmanand & Sons v. Bahadur Khan.

civil proceeding there considered was an attempt to adjudicate a defendant an insolvent. Section 14 was applied by the learned Judges without any consideration, however, of the words "unable to entertain it." In our view, it was unnecessary for them to consider those words because they make it clear on page 737 that the real reason why that insolvency petition should have been dismissed and was eventually dismissed was that the acts of insolvency alleged in the petition itself were vague and indefinite and did not fall within the definition of that expression in the Provincial Insolvency Act. That means when paraphrased, that the insolvency Court could have discovered for itself by referring to the section of the Insolvency Act, and the recitals of the petition before it that it had no jurisdiction to consider those recitals on their merits. That is a case which is fundamentally different from the case here where the Court could not have dismissed the insolvency petition in limine but was bound to consider it on its merits. The other case is of a Bench of this Court reported in 1937 M. W. N. 465.[2] That case does not deal with insolvency. It is a case where a suit was eventually filed under S. 73, Civil P. C., after the plaintiff had made an unsuccessful attempt to get an order under that section revised by the High Court. The High Court refused to interfere in revision on the ground that the remedy by suit had all along been open to the plaintiff. Of course in one sense of the word it is not true to say that the High Court had no jurisdiction to entertain the revision petition or that it dismissed it from any defect of jurisdiction, but when the High Court dismissed it because another remedy was open to the plaintiff, that in effect amounted to a declaration of the High Court that it would not consider the petition on its merits for a reason which was very similar to or "of a like nature" to lack of jurisdiction.

As we have already indicated, the real question in this case is the interpretation of S. 14. Section 14 has no doubt been rightly applied, if we may say so with respect, both by the learned Judges of the Lahore High Court and the learned Judges in this Court to the facts which they had before them. We are quite unable to hold that it can be applied to the facts of the present case. We think the decision therefore of the learned Subordinate Judge was right and this appeal must be dismissed with costs. On the question of the memorandum of cross-objections, a full discretion is vested in the trial Court with reference to the matter of costs. But S. 35 lays down that if the Court does not follow the regular rule that costs shall follow the event, it must state its reasons in writing. We are unable to hold that a mere reference to the circumstances of the case with no further detail mentioned is a sufficient compliance with the provisions of S. 35 (2), Civil P. C. When we examine the circumstances of the case all that appears is this, that upon the issue of limitation the plaintiff has failed and the defendants have succeeded. There has been no trial upon the other issues. The plea of limitation is in no sense an unjust plea. Limitation is provided for by the laws of the land just as any other plea is provided for, and we cannot subscribe to the doctrine that because a defendant has succeeded on a plea of limitation he should not be granted his costs. We therefore think that this is a fit case for interference with the order of the learned Subordinate Judge. At the same time, the fact remains that the other issues have not been tried and if they had been it might have been discovered by the Court that on issues of fact the defendants had no good case. We think that in the circumstances of the case we should order that in the lower Court the plaintiff do pay the defendants' costs but that those costs be fixed at Rs. 100 only in view of the fact that the other issues in the case were left untried.

C.R.K./G.N. *Order accordingly.*

2. ('37) 1937 M. W. N. 465, Alagappa Chettiar v. Somasundaram Chettiar.

A. I. R. (29) 1942 Madras 714

ABDUR RAHMAN J.

Kosuru Ademma — *Petitioner*

v.

Chevuru Subbamma — *Respondent.*

Civil Revn. Petn. No. 1497 of 1941, Decided on 9th April 1942, to revise decree of Dist. Munsif, Kavali, D/- 10th March 1941.

(a) Decree—Assignment by decree-holder to defraud creditors — Creditor of decree-holder can attach decree and claim that assignment is not binding on him.

If an assignment of a decree is made by a decree-holder to defraud his own creditors it may not be open to him to object to the assignment during his life-time but it cannot be said that his creditors have no right to attach the decree and to allege that the assignment was fictitious and was not binding on them. [P 715*d*]

C. P. C. —
('40) Chitaley, O. 21 R. 16, N. 15.

(b) Civil P. C. (1908), S. 47—'Representative' is not confined to legal representative.

The term "representative" in S. 47, Civil P. C., is not confined to legal representative but would also include the representatives-in-interest who may have obtained and who may allege to have obtained the decree-holder's interest by transfer or assignment. [P 715*e*]

C. P. C. —
('40) Chitaley, S. 47, N. 17 Pts. 1 and 3.
('41) Mulla, Pages 184 and 185 Pt. (c).

(c) Transfer of Property Act (1882), S. 53 — Defendant can take plea under S. 53.

Section 53, T. P. Act, cannot stand in the way of defendant contending that the plaintiff in a suit to recover a sum of money due under a decree assigned to him cannot do so because the transaction was fraudulent and he was not entitled to execute the decree: ('20) 7 A.I.R. 1920 Mad. 748 (F.B), *Rel. on.* [P 715*f*]

T. P. Act —
('42) Chitaley, S. 53, N. 14 Pt. 2.
('36) Mulla, Page 254 Pts. (s) and (t).
('34) Mitra, Page 218, N. 259 "Defence by creditor in a suit by transferee."

S. Ramachandran and B. V. Ramanarasu — for Petitioner.

K. Kuppuswami — for Respondent.

ORDER.—A decree was obtained by one P. Rama Naidu against Ramanappa Setti and his minor sons in the Court of the District Munsif of Kavali in O. S. No. 91 of 1932. Rama Naidu assigned this decree in 1935 to one Kotappa Naidu who assigned it in his turn to the plaintiff on 11th July 1935. The assignment was recognized by the Court on 26th August 1935. But before this a decree was obtained by defendant 4 against Kotappa Naidu in

O. S. No. 815 of 1932, Ramanappa Setti was adjudged insolvent on his own petition in I. P. No. 1 of 1934. A private composition was arrived at during the course of these proceedings between the insolvent and his creditors under which defendants 1, 2 and 3 were appointed trustees. They were to take possession of a portion of the insolvent's property and to sell the same with the object of distributing the sale proceeds amongst the creditors. They appear to have done so and had some money in their hands when the plaintiff proceeded to execute her decree assigned in her favour on 26th August 1935 and to attach the money in the hands of defendants 1 to 3. But before she could realize any money from them defendant 4 attached the amount (Rs. 140-6-11) on 8th February 1939 alleged to be due to her judgment-debtor Kotappa Naidu by Ramanappa Setti which was in the hands of the trustees and realized it from them in execution of her decree. The plaintiff thereupon brought the suit out of which the present revision arises for the recovery of the sum realized by defendant 4 from the trustees of Ramanappa Setti insolvent (defendants 1 to 3) on the ground that the decree had been assigned to her by Kotappa Naidu and that defendant 4 could not, therefore, recover any money from the trustees—she (the plaintiff) alone being entitled to recover the same from them in execution of the decree assigned to her.

It was contended on behalf of defendant 4 that the assignment by Kotappa Naidu made fictitiously and with the object of defrauding her and that she was entitled to recover the money due to Kotappa Naidu by the trustees in spite of the assignment in favour of the plaintiff. The District Munsif held that the assignment by Kotappa in favour of the present plaintiff was without consideration and fictitious and made with the object of defrauding defendant 4. But, in view of the assignment of the decree made in favour of the plaintiff, she alone was found entitled to realize the amount of the decree from the trustees and a decree was passed in her favour. Defendant 4 felt aggrieved by the decree and has come up to this Court in revision.

In support of his decision the learned District Munsif relied on the decision in A. I. R. 1927 Lah. 110[1] and on 48 M. L. J. 419.[2] These cases cannot help the plaintiff. The District Munsif failed to appreciate that the decision in these cases was arrived at between the assignors and the assignees of the decrees and had nothing whatever to do with a third party who was attacking the action of the assignor on the ground that the assignment was fictitious and fraudulent. If an assignment of a decree is made by a decree-holder to defraud his own creditors it may not be open to him to object to the assignment during his life-time (for which, *see* 53 M. L. J. 568[3]) but it is entirely incorrect to say that his creditors have no right to attach the decree and to allege that the assignment was fictitious and was not binding on them. There is no principle or rule of law which would debar the assignor's creditors from attacking the assignment. Fraud vitiates the most solemn documents and even proceedings of Court and I cannot see how defendant 4 could be held to be debarred from attacking the validity of the assignment of the decree and from showing that her debtor was still in fact the owner of the decree obtained by him against Ramanappa Setti.

Section 47, Civil P. C., lays down that "where a question arises as to whether any person is or is not the representative of a party, such question shall for the purposes of this section be determined by the Court." The term "representative" in this section is not confined to legal representatives but would also include the representatives-in-interest who may have obtained or who may allege to have obtained the decree-holder's interest by transfer or assignment. If that assignment is challenged and it is contended by a creditor that the assignee is not the representative of the decree-holder and that so far as he (the decree-holder) is concerned the decree cannot be taken to have been assigned and the interest in the decree still continues to vest in the assignor, the question would apparently have to be gone into by the executing Court. And if the Court finds that the assignment was fraudulent it would refuse to recognize the assignment of the decree at least so far as the objecting creditor is concerned.

The only contention advanced on behalf of the respondent in reply was that an objection of this nature could not be relied on behalf of defendant 4 as this was not a suit under S. 53, T. P. Act, but the learned counsel for the respondent forgets that it was his own client who had brought the suit for the recovery of money and it is always open to a defendant to show that the transaction was fraudulent and that the plaintiff was not entitled to execute the decree assigned in his favour. Section 53, T. P. Act, cannot in such a case stand in the defendant's way. This was held by a Full Bench of this Court in 43 Mad. 760.[4] I must, for the above reasons, vacate the decree passed by the District Munsif and dismiss the suit. Defendant 4 will have her costs both in this Court and in the Court below.

C.R.K./K.S. *Decree set aside.*

1. ('27) 14 A.I.R. 1927 Lah. 110 : 100 I. C. 545 : 8 Lah. 35 : 28 P. L. R. 239, Gurdial Singh v. Gurbakhsh Singh.
2. ('25) 12 A.I.R. 1925 Mad. 701: 88 I. C. 409 : 48 Mad. 553 : 48 M. L. J. 419, Palaniappa Chetty v. Subramania Chettiar.
3. ('27) 14 A.I.R. 1927 Mad. 903: 105 I.C. 405 : 51 Mad. 219: 53 M. L. J. 568, Kristam Naidu v. Durvada Patrudu.
4. ('20) 7 A. I. R. 1920 Mad. 748 : 59 I.C. 947 : 43 Mad. 760 : 39 M. L. J. 350 (F. B.), Ramaswami Chettiar v. Mallappa Reddiar.

A. I. R. (29) 1942 Madras 715

HORWILL J.

In re Chellappa Chettiar and others Accused.

Criminal Revn. Case No. 314 of 1942 (Case Referred No. 28 of 1942), Decided on 29th July 1942, case referred by Dist. Magistrate, Ramnad, in his letter, D/- 12th May 1942.

Criminal P. C. (1898), Ss. 201, 528 (2), 526 — Case before Magistrate having no jurisdiction— Proper procedure is for Magistrate to return complaint to be presented to proper Court and not for District Magistrate or High Court to transfer it to Magistrate having jurisdiction.

The District Magistrate has as much power to transfer under S. 528 (2) as the High Court has under S. 526; but neither the District Magistrate nor the High Court ought to transfer a case where the Magistrate has no jurisdiction, the proper procedure being for the Magistrate to return the complaint, telling the complainant that he may present the complaint to the Court having jurisdiction. If the Magistrate thinks he has jurisdiction, he must go on with the trial and dispose of the case, for a Magistrate always has jurisdiction to try an accused

for an offence less than that revealed in the complaint, although it would ordinarily be improper for him to do so. If at any stage of the trial he is of opinion that an offence has been committed which cannot be tried by him, he should return the complaint. [P 716*b*,*c*]

Cr. P. C. —
('41) Chitaley, S. 201 N. 4 Pt. 1; S. 526 N. 2; N. 12.
('41) Mitra, Page 711 N. 661A.

G. N. Chari — for Accused.

Public Prosecutor — for the Crown.

ORDER. — The District Magistrate of Ramnad has come to the conclusion that a case tried by the Sub-Magistrate of Tiruvadanai is beyond his jurisdiction, because there were allegations in the complaint indicating that an offence under S. 148, Penal Code, was committed, which offence is not triable by a Second Class Magistrate. The District Magistrate has therefore referred the matter to this Court in order that the case may be transferred from the file of that Sub-Magistrate to that of some Magistrate having jurisdiction. The District Magistrate has as much power to transfer under S. 528(2), Criminal P. C., as this Court has under S. 526, Criminal P. C.; but neither the District Magistrate nor this Court ought to transfer a case where the Magistrate has no jurisdiction, the proper procedure being for the Magistrate to return the complaint, telling the complainant that he may present the complaint to the Court having jurisdiction. The tribunal which is to decide at this stage whether or no the Sub-Magistrate should continue with the trial is neither the District Magistrate nor this Court, but the Sub-Magistrate himself. If he thinks he has jurisdiction, he must go on with the trial and dispose of the case. A Magistrate always has jurisdiction to try an accused for an offence less than that revealed in the complaint, although it would ordinarily be improper for him to do so. If a Magistrate at any stage of the trial is of opinion that an offence has been committed which cannot be tried by him, he should return the complaint as indicated above. No interference is called for at this stage. This reference is returned.

C.R.K./K.S. *Reference rejected.*

A. I. R. (29) 1942 Madras 716

ABDUR RAHMAN J.

Vakacherla Venkatasubbamma and another — *Appellants*

v.

Gobbooru Subbiah — *Respondent.*

Second Appeal No. 768 of 1941, Decided on 2nd April 1942, against decree of Dist. Court, Cuddappah, D/- 18th November 1940.

(a) Civil P. C. (1908), S. 100—Question whether agreement to sell had merged in conveyance is one of intention of parties and being one of fact or of mixed law and fact cannot be advanced in second appeal when not specifically raised in written statement.

The question whether an agreement to sell contained in a sale deed had ceased to exist by having merged in the conveyance is one of intention of the parties to the contract and being one of fact or in any case one of mixed law and fact cannot be permitted to be advanced in second appeal when not specifically raised in the written statement. [P 717*f*,*g*]

C. P. C. —
('40) Chitaley, Ss. 100 & 101, N. 28, Pt. 3; N. 52, Pt. 1.
('41) Mulla, Page 367, N. " No second appeal lies on the ground of an erroneous finding of fact."

(b) Registration Act (1908), Ss. 49 and 17 (i) (b) — Express agreement to sell contained in sale deed — Deed not accepted by vendee or incomplete in terms or legally inoperative— Agreement to sell cannot necessarily be regarded to have merged in sale deed — Clause *A* relating to agreement to sell held distinct from Clause *B* relating to sale—Nothing to show that vendee had agreed to accept deed as sale deed— No definite words of conveyance by vendor of his title in Clause *B*—Clause *A* held admissible under S. 49, Proviso and could be made basis of suit for specific performance—Clause *B* held did not come within S. 17 (i) (b).

In the absence of a specific agreement to sell a property, it is not possible to regard an unregistered sale deed as sufficient to support a suit for specific performance of a contract to sell. But it does not follow that an express contract to sell must necessarily be regarded to have merged in a sale deed, when that deed is not accepted by the vendee or happens to be incomplete in regard to its terms or is otherwise legally inoperative. [P 718*c*]

The plaintiff instituted a suit for specific performance of an agreement to sell contained in a deed executed by the defendant in his favour which ran as follows : " For payment of circar cists and for family necessity, I have borrowed of you Rs. 300. A-1. (For this money by 25th May I agree to sell the schedule mentioned properties to you and execute the sale deed on a proper stamp, and get it registered.) A-2. (If I fail to do so, you should treat this letter itself as a sale deed, get into possession of the properties and enjoy them with rights of gift and sale, etc.) :

Held that (1) no doubt an agreement to sell could not be spelt out of a sale deed and could not form the basis of a suit for specific performance : ('20) 7 A. I. R. 1920 Mad. 660 and ('26) 13 A. I. R. 1926 Mad. 530, *Rel. on* ; [P 717*h*]

But the Court was not spelling out an agreement to sell from the deed in suit as clause A-1 contained an express agreement to sell ; [P 718*a*]

(2) the fact that the deed was not registered could not prevent its portion A-1 from being admitted in evidence in the suit for specific performance in view of the clear provision of S. 49, Proviso ; [P 717*d*]

(3) there was nothing to show that the plaintiff had accepted the document as a sale deed. In the absence of any definite words of conveyance by the vendor of his title to the properties clause A-2 could not come within the purview of S. 17 (i) (b) ; [P 718*d*,*e*]

(4) even assuming that clause A-2 fell within S. 17 (i) (b) clause A-1 containing an agreement to sell could not in view of S. 49 Proviso be ignored on that account. The deed must for that purpose be regarded as a composite document and clause A-1 was easily detachable from the rest ; [P 717*e*]

(5) the plaintiff therefore was entitled to a decree for specific performance. [P 717*a* ; P 718*e*]

Ch. Raghava Rao and G. C. Venkatasubba Rao — for Appellants.

Kasturi Seshagiri Rao — for Respondent.

JUDGMENT. — A suit for specific performance of a contract to sell certain immovable properties

exceeding Rs. 100 in value was instituted by the plaintiff. It was dismissed by the District Munsif of Nandalur on the ground that the document (Ex. A) on the basis of which it was brought was not an agreement to sell on which a suit for specific performance could be founded but a sale deed that was inadmissible in evidence for want of registration. On appeal, the learned District Judge of Cuddapah did not accept this view. Having regard to the specific recitals in the document, he found it to be an agreement to sell and in the absence of any express words of conveyance he declined to hold it to be a sale deed. The plaintiff's suit was accordingly decreed. The defendant has preferred this second appeal. Since a great deal would depend upon the terms of the letter Ex. A, it may be reproduced in extenso:

"To Dated 25th April 1938

Raja Sree Gubboru Subbayya Garu, son of Seshayya Garu. Afterwards : For payment of circar cists and for family necessity, I have borrowed of you Rs. 300 (three hundred only).

A-1. (For this money by the 25th May, I agree to sell the schedule mentioned properties to you and execute the sale deed on a proper stamp and get it registered.)

A-2. (If I fail to do so, you should treat this letter itself as a sale deed, get into possession of the properties and enjoy them with rights of gift and sale etc.) This is the letter executed with my consent."

There can be no manner of doubt that the second sentence in Ex.A (and marked A-1 by me) contains an express agreement to sell the property in consideration of a sum of Rs. 300 which was acknowledged to have been borrowed by Chenchiah from the plaintiff. It is conceded by Mr. Raghava Rao, learned counsel for the appellant, that no exception could have been taken to the decision of the learned District Judge if the document had ended here. He contends, however, that in view of the following sentence (and marked A-2 by me) where the parties had agreed to treat this letter itself as a sale deed in the event of Chenchiah's failure to execute one within the time mentioned by him in this letter, Ex.A must be regarded to be a sale deed under which title to the property must have been intended to be conveyed in favour of the respondent from the date on which it was executed, or at all events, as one purporting to create a future or contingent right or interest in immovable property of more than Rs. 100 in value and that in either case, it would not be admissible in evidence.

I shall deal with this contention later. But it seems to me that the objection taken to the admissibility of the document which is being pressed before me and which was perhaps discussed before the trial Court during the final arguments of the case is different from what was raised in the pleadings filed on behalf of the defendant. In reply to a suit for specific performance, it was urged on behalf of the defendant in the trial Court that the plaintiff could not maintain the suit upon an unregistered document. Whatever might have been the law before 1929 the proviso added to S. 49, Registration Act by the Amending Act 21 of 1929, expressly provides that an unregistered document affecting immovable property may be, even if not registered, received in a suit for specific performance as evidence of a contract. The fact therefore that Ex. A is not registered cannot prevent its portion (A-1) from being admitted in evidence in the present suit which is one for specific performance. The portion A-1 is absolutely clear and provides ample evidence of an agreement by Chenchiah to sell the properties mentioned in the letter. The objection therefore that the plaintiff cannot maintain the suit upon an unregistered instrument must fail unless the portion A-1 can be found to have become inadmissible in evidence because it happens to be embodied in a document which would not be admissible unless it was registered. This is on the assumption that the portion marked A-2 falls within S. 17 (i) (b), Registration Act. It is not possible, however, to hold that cl. (A-1) containing an agreement to sell can, in view of the proviso to S. 49, be ignored on that account. Exhibit A must be for that purpose regarded to be a composite document and cl. (A-1) is easily detachable from the rest. I must therefore hold that the portion A-1 would be admissible in evidence if the main contention advanced by learned counsel for the appellant before me is not permitted to be raised or does not prevail if so permitted.

Mr. Raghava Rao's contention, if carefully analysed, is that in so far as the words in the clause marked A-2 amount to a conveyance, this portion must be held to be inadmissible in evidence under S. 17 (i) (b), Registration Act. The second step in the argument is that as the terms of the contract were reduced to writing no other evidence could under S. 91, Evidence Act, be permitted. And the third and final step is that as the clause relating to the agreement to sell must be taken to have merged in the conveyance, the only remedy available to the plaintiff was to get the conveyance registered but if he did not pursue that remedy, he must be found to have lost his right to enforce the agreement to sell. I must say at once that the third and final step in the argument cannot, in my opinion, be permitted to be advanced as the plea of merger, which forms the foundation for this contention, was never raised by the defendant in her written statement. Inasmuch as the question whether the agreement to sell contained in A-1 had ceased to exist was one of intention of the parties to the contract, and being one of fact or in any case one of mixed law and fact, it should have been specifically raised in the written statement. But even if it were not so, I am not impressed by the contention.

It must be remembered that the plaintiff is not trying to enforce the contract of sale contained in A-2 as distinguished from what is found in A-1. He is suing for specific performance of a contract to sell and does not therefore need to give evidence as to the terms of sale as alleged to be stated in A-2. For his purpose, so far as this case is concerned, it is needless to refer to A-2 altogether. From that point of view, it is unnecessary to find whether A-2 is admissible in evidence or otherwise. Moreover, if the title to the property has not passed in favour of the plaintiff, as contended by learned counsel for the appellant, by what is contained in A-2—it being inadmissible in evidence according to learned counsel—why should it be impossible for the plaintiff to enforce specific performance of Chenchiah's contract to sell the property to him. Sale deeds do not usually come into existence unless the parties have agreed to sell and purchase properties described in them. But this Court has been consistently taking the view that an agreement to sell cannot be spelt out of a sale deed and cannot form the basis of a suit for specific performance : *see* 16 Mad. 341;[1] 43 Mad. 822[2] and 49 Mad. 302.[3] I cannot there-

1. ('93) 16 Mad. 341: 3 M. L. J. 169, Venkatasami v. Kristayya.
2. ('20) 7 A. I. R. 1920 Mad. 660: 59 I. C. 417: 43 Mad. 822, Thayarammal v. Lakshmi Ammal.
3. ('26) 13 A.I.R 1926 Mad. 530: 100 I. C. 385: 49 Mad. 302, Satyanarayana v. C. Venkatrao.

fore go beyond those decisions. But an agreement to sell is not being spelt by me in this case out of what has been described (and wrongly described in my opinion) to be an unregistered sale deed (A-2) in order to found the suit for specific performance. I can safely ignore A-2 and depend for that purpose on A-1 alone. This contains an express agreement to sell.

It has been contended, however, that I cannot look at A-1 either and the only remedy left for the plaintiff was to present Ex. A (as it contained A-2) for registration. If he failed to avail himself of that remedy, so argued learned counsel for the appellant, the present suit must fail. Reliance was placed in this connexion on 49 Mad. 302.[3] But that decision does not support the appellant. I am not adopting what was characterized by the learned Chief Justice in that case "as a very vicious method of construction," in referring to a lease or a sale deed with the object of inferring an agreement of sale or lease from them after they have been found to be legally inoperative. Nor do I propose to question the soundness of the decision that the only remedy left for a person who has presented a lease or sale deed for registration is to bring a suit under S. 77, Registration Act, if a Registrar has, on a denial of its execution, refused to register the same and not to sue for specific performance of a contract. But this case is no authority for the proposition that a person is debarred from bringing a suit for specific performance even when he has not accepted the sale deed executed by his vendor and has not consequently resorted to the machinery prescribed by the Registration Act for its registration.

My attention was next drawn to a Division Bench decision of this Court in (1938) 2 M. L. J. 362,[4] where it was held that an unregistered document of transfer was not of itself sufficient to support a suit for specific performance of an agreement to transfer but in that case the agreement was not, as pointed out by me in A. I. R. 1939 Mad. 391,[5] distinct from the deed of transfer itself. It may be that in the absence of a specific agreement to sell a property it is not possible in this presidency to regard an unregistered sale deed as sufficient to support a suit for specific performance of a contract to sell. But it does not follow that an express contract to sell must necessarily be regarded to have merged in a sale deed, when that deed is not accepted by the vendee or happens to be incomplete in regard to its terms or is otherwise legally inoperative. The learned Judges were apparently contemplating a case where there was no express agreement of transfer and the deed of transfer was a complete document and executed and accepted as such by the vendee.

This takes me to Ex. A. There is nothing in this letter which would show that the plaintiff had agreed to accept it as a sale deed. This could be at the most regarded to be Chenchia's request but nobody knows whether it was accepted by the plaintiff. And that is where the difficulty of want of definite plea arises. The fact that the plaintiff has chosen to bring it as a suit for specific performance would go to show that he had not agreed to accept it as a sale deed. There are no express words of conveyance in that document and it is not easy to accept the contention that the plaintiff must have become satisfied for his title to the properties with what is contained in A-2. In the absence of any definite words of conveyance by Chenchiah of his title to the properties, the first two steps in the argument must also fall to the ground. For the above reasons, the appeal fails and is dismissed with costs. Leave refused.

C.R.K./G.N. *Appeal dismissed.*

4. ('38) 25 A. I. R. 1938 Mad. 801: 179 I. C. 240: (1938) 2 M. L. J. 362, Venkatadri Somappa v. Official Receiver, Bellary.
5. ('39) 26 A. I. R. 1939 Mad. 391: 184 I. C. 465: (1939) 1 M. L. J. 82, Venkata Seshayya v. District Board, East Godavari.

A. I. R. (29) 1942 Madras 718

KUPPUSWAMI AYYAR J.

Vydialinga Swamigal — Appellant

v.

Karuppanna Goundan and others — Respondents.

Appeal No. 47 of 1941, Decided on 3rd July 1942, against appellate order of District Court, Coimbatore, D/- 13th March 1940.

Limitation Act (1908), Art. 180 — Previous petition dismissed for no fault of party — Subsequent petition must be treated as continuation of previous one.

As the purchaser apprehended obstruction from the defendant he wanted time to take possession of the property with necessary police help. And the Court instead of posting the petition to some other date to enable the petitioner to get the necessary police help dismissed it:

Held that since this was not a case in which the party was at fault, the dismissal of the petition must be considered to be an order adjourning the petition sine die till the petitioner took steps, and a subsequent petition must be considered to be a continuation or reminder of a previous application for the purposes of limitation : C. M. A. No. 520 of 1940, *Rel. on.* [P 719*a*]

Limitation Act —
('42) Chitaley, Art. 180, N. 6 Pt. 4.
('38) Rustomji, Page 1626 Pt. 4.

C. P. C. —
('40) Chitaley, O. 21, R. 95, N. 5 Pt. 5.
('41) Mulla, Page 909 Pt. (*y*).

M. Krishna Bharathi — for Appellant.

JUDGMENT. — The appellant had purchased some properties in execution of a decree and he filed a petition under O. 21, R. 95, Civil P. C., for delivery of possession of the same. There were a number of items and all of them except one item S. No. 187A of Punjai Lakkapuram village were delivered. With regard to this item delivery was not given as the purchaser apprehended that the defendant was likely to obstruct and he endorsed on the warrant that he would take possession later on with police help. This was recorded by the Court on 21st September 1936 and the petition was dismissed. This petition out of which this second appeal arises was filed on 26th August 1939 three years after the date of the confirmation of the sale. The petitioner (i. e. the present appellant) stated that this petition must be considered to be a continuation of the prior petition referred to above and that therefore it was in time. Both the Courts found against him and dismissed the petition.

This was not a case in which there was any default on the part of the auction purchaser. From the order passed on E. A. No. 1081 of 1936 it is clear that as the purchaser apprehended obstruction from the defendant, he wanted time to take posses-

sion with necessary police help. It was the duty of the Court to have posted the petition to some other date to enable the petitioner to get the necessary police help. Instead, the petition was dismissed recording the delivery of the other items. Since this was not a case in which the party was at fault the dismissal of the petition must be considered to be an order adjourning the petition sine die till the petitioner takes steps. In C.M.A. No. 520 of 1940 His Lordship Burn J., held in a very nearly similar case that the subsequent petition must be considered to be a continuation or reminder of a previous application for the purposes of limitation. In the result, the decrees of the Courts below are set aside and the petition is remanded to the original Court for being proceeded with on the basis that the petition is only a continuation of the previous application. The respondents will pay the appellant's costs in this and in the lower Courts. Leave refused.

C.R.K./K.S. *Case remanded.*

A. I. R. (29) 1942 Madras 719

LEACH C. J. AND BYERS J.

Province of Madras—Appellant

v.

Lady of Dolours Convent, Trichinopoly represented by Mother Superior and others—Respondents.

Second Appeals Nos. 1046 and 1047 of 1939, Decided on 3rd March 1942, against decree of Sub-Judge, Trichinopoly, in A. S. Nos. 65 and 68 of 1938 and A. S. Nos. 66 and 69 of 1938.

Madras Irrigation Cess Act (7 of 1865), S. 1 —Cess in respect of water used for irrigation is land tax.

A cess which is levied in respect of water used for irrigating land is a land tax. Therefore a certificate given by the Government to a person permanently exempting him from land tax applies to water cess also : ('17) 4 A. I. R. 1917 P.C. 42, *Rel. on.* [P 720*b*,*c*]

Government Pleader — for Appellant.

K. G. Srinivasan — for Respondents.

LEACH C. J. — These two appeals arise out of different suits but they raise the same question. The suits were filed by the Mother Superior of the Lady of Dolours Convent, Cantonment, Trichinopoly, to recover from the Government of Madras monies which the convent had been compelled to pay by way of water cess and road cess as the owner of certain lands in the Trichinopoly District. The suit out of which S. A. No. 1046 of 1939 arises was filed by the Mother Superior for the recovery of amounts collected in respect of the faslis which correspond to the years 1931-32, 1932-33 and 1933-34. The suit out of which S. A. No. 1047 of 1939 arises was filed by her for the recovery of similar exactions in respect of the fasli corresponding to the year 1934-35. The appeals are concerned merely with the question of the liability for water cess.

The plaintiff's case is that under an arrangement with the Government the lands in suit are held free from land tax and that a cess which is levied in respect of water used for irrigating land is a land tax. The lands originally formed part of the private properties of the Nabob of the Carnatic. In 1801, under the terms of a treaty entered into by the Nabob with the East India Company, his sovereign rights terminated but he was allowed to retain his private properties free from taxation. The Nabob of those days died soon after the treaty had been signed and was succeeded by another Nabob, who, according to the judgment of the Subordinate Judge now under appeal, died on 7th October 1855. He and his predecessor had incurred large debts and in 1858 the Legislative Council of India passed an Act (Act 30 of 1858) for the administration of these private lands in order that the debts might be discharged and suitable provision made for the children and the relations of the Nabob as the result of proper management. The Act vested the private properties of the Nabob in a receiver, who was given power to sell. The receiver having decided to sell the properties in suit, he applied to the Government of Madras for a certificate that they were permanently exempt from all demand on account of quit rent, assessment or other land tax. A certificate was granted on 1st March 1866 and is one of the exhibits in the present suits It reads as follows :

"Whereas the receiver of the Carnatic property under Act 30 of 1858 has produced good prima facie evidence of the title of His Highness the late Nabob of the Carnatic to the premises hereunder specified, now held free of quit rent or other land tax and not justly liable to any such payment according to the custom of the district or the regulations of the Government, and has applied for a certificate, I hereby declare accordingly under the authority of the Governor in Council of Madras, that the said land is permanently exempt from all demand on account of quit rent, assessment or other land tax."

It is common ground that the Government of Madras has never imposed water cess in respect of water supplied for the cultivation of the first crop raised on the lands in suit. The water used for irrigation is supplied from the Uyyakondan channel, which is connected with the river Cauveri. The Court has been told that this channel has been in existence from time immemorial. The exactions of which the plaintiff complains were made because the tenants cultivating the lands had taken water for the purpose of raising a second crop. From the inam register of 1866 it is to be gathered that the area held by the plaintiff's predecessor-in-title measured altogether 59.50 acres, of which 50.59 acres were single crop wet lands and 8.91 acres double crop wet lands. The receiver appointed under Act 30 of 1858 sold these lands to the Rev. A. De Rochely, who was then the Superior of the Catholic Mission at Trichinopoly. On 26th June 1867 the Rev. A. De Rochely wrote to the Collector claiming that 45 cawnies (about 60 acres) were held free of "all kinds of taxation by virtue of the Government certificate," but that 6¾ cawnies (roughly 9 acres) had been by mistake classed among the Government lands "that pay tax for irrigation, roads, etc." Accordingly he asked the Collector to issue an order that these 6¾ cawnies were also held free of all taxes. On 6th July 1867 the Collector passed an order in which he has declared that the lands were liable only to village cess and road cess. On 7th September 1930 the Collector directed that the lands should be registered as being held free of assessment or quit rent.

The present suits were tried by the District Munsif of Trichinopoly, who held that the plaintiff was entitled to the refund in respect of the 8.91 acres, but not in respect of the remaining lands. The basis of his decision that the 8.91 acres were entitled to water for a second crop was apparently the fact that this area had been classified in the Inam Register as double crop lands and therefore the plaintiff was entitled to complete exemption

from the water cess to this extent. Both sides appealed to the Subordinate Judge of Trichinopoly, who held that the Government was not entitled to levy water cess at all. The Madras Irrigation Cess Act, 1865, came into force some six months before the Governor of Madras in Council gave to the receiver appointed under Act 30 of 1858 the certificate which has been quoted. Section 1, Madras Irrigation Cess Act, confers power on the Government to levy water cess in addition to land assessment, but proviso 1 to this section says that where a zamindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Crown entitled to irrigation free of separate charge, no cess under the Act shall be imposed for water supplied "to the extent of this right and no more." The plaintiff says that this provision read in conjunction with the exemption certificate makes it clear that water cess is not chargeable even when water is taken for a second crop. A charge for water supplied for the purpose of cultivation is a charge on the land. The Madras Irrigation Cess Act levies the cess on the land. In delivering the judgment of the Privy Council in 40 Mad. 886[1] in which the appellants sought to recover from the Secretary of State for India sums paid under protest in respect of water cess levied under the Act of 1865, Lord Parker of Waddington said that the cess under the Act is leviable on land which is irrigated and therefore is in the nature of a land tax. In view of this judgment there can be no doubt that the exemption certificate applies to water cess, it being a form of land tax.

By virtue of the treaty with the Nabob of the Carnatic in 1801 the East India Company had no right to levy a land tax and therefore no right to levy a water cess. The Uyyakondann channel was then in existence and if the Nabob took water from it he could not, by reason of the treaty, be taxed in this respect. The plaintiff stands in his shoes. Moreover, the exemption certificate granted to the receiver says that these lands are permanently exempt from all demand on account of land tax. These words are free from ambiguity and even if the plaintiff's case were merely based on the certificate obtained by her predecessor in title there would be much to be said for her contention, but reading that certificate in the light thrown by preceding events it is clear that the plaintiff's case is well founded.

The learned Government Pleader has argued that the plaintiff cannot claim exemption in respect of the 8.91 acres which were shown as double crop lands in the inam register, because the area held by the plaintiff is admittedly only 40.25 acres and in the settlement of 1898 the register shows an area of 30.80 acres, all of which are single crop lands. On this footing he argues that the 8.91 acres must have been disposed of. This may very well be so, but it does not affect the plaintiff's case. She contends that the Government has no power to levy a water cess at all, and for the reasons given this contention must prevail. Whether the Government can be compelled to supply the plaintiff or her tenants with water for the raising of a second crop is another matter, but as it is not necessary to decide it in this case it must be left open. All that the Court is here concerned with is whether the Government can levy water cess in respect of the lands in suit and the answer must be that it cannot, whether it be in respect of the first or the second crop. The appeals fail and will be dismissed with costs, which will be paid within three months.

C.R.K./K.S. *Appeals dismissed.*

1. ('17) 4 A. I. R. 1917 P. C. 42 : 41 I. C. 98 : 40 Mad. 886 : 44 I. A. 166 (P. C.), Balasuryaprasad Rao v. Secretary of State.

A. I. R. (29) 1942 Madras 720

KING J.

Shenbagavadivammal — Appellant

v.

Mupidathi Ammal and others — Respondents.

Second Appeal No. 133 of 1941, Decided on 7th April 1942, against decree of Dist. Court, Tinnevelly, in A. S. No. 208 of 1939.

(a) Transfer of Property Act (1882), S. 6 (a) — Scope.

A transfer of rights as prospective reversioners in some properties is invalid. [P 720*h* ; P 721*c*]

T. P. Act —
('42) Chitaley, S. 6, N. 4 Pts. 4, 5 and 6.
('36) Mulla, Page 51 Pt. (n).
('34) Mitra, Page 41, N. 42.

(b) Transfer of Property Act (1882), S. 6 (h) — Portion of consideration forbidden by law — Whole transfer is invalid.

If any portion of the consideration for a transfer is forbidden by law, the necessary result must be that the whole transfer should be set aside. [P 721*c*]

T. P. Act —
('42) Chitaley, S. 6, N. 29 Pt. 1.
('36) Mulla, Page 68 Pts. (p) and (q).
('34) Mitra, Page 57, N. 61.

(c) Practice — Duty of Court.

It is the clear duty of the Court to apply the law to the facts which it finds. [P 721*d*]

C. P. C. —
('40) Chitaley, O. 20 R. 4, N. 5 Pt. 1.

T. K. Subramania Pillai — for Appellant.

K. R. Rangaswami Ayyangar—for Respondents.

JUDGMENT. — This appeal is concerned with part of the estate of one Thangappa Pillai, who died in 1934 leaving no issue but two widows, a sister and a sister's son. The two widows are plaintiff and defendant 3. Defendant 1 is Thangappa Pillai's sister and defendant 2 is defendant 1's son. There was a dispute amongst these persons as to the disposal of Thangappa Pillai's estate and the dispute was submitted to arbitration. The award of the arbitrators was to the effect that the portion of the estate which forms the subject-matter of the present suit was to be conveyed by plaintiff and defendant 3 to defendants 1 and 2 and that in return for this, defendants 1 and 2 should release all their rights as prospective reversioners to the other portions of Thangappa Pillai's estate and defendant 2 should perform the funeral ceremonies of Thangappa Pillai. It has been found, therefore, that the consideration for the transfer by the plaintiff and defendant 3 to defendants 1 and 2 of the property which forms the subject-matter of the suit was two-fold : (1) the services rendered by defendant 2 in performing the funeral obsequies of Thangappa Pillai and (2) the promise of defendants 1 and 2 to release their rights in other property. A few months after Thangappa Pillai died, there was a partition between plaintiff and defendant 3, and it is now the plaintiff alone

who sues to recover possession of the property which plaintiff and defendant 3 in accordance with the award of the arbitrators had made over to defendants 1 and 2. There is no dispute on the part of defendant 3 to plaintiff's claim. I have said that plaintiff and defendant 3 made over this property in pursuance of the award. It must be mentioned here that this was not the plaintiff's case. According to her, the possession by defendants 1 and 2 was the result of trespass and she sought to recover possession upon her title as against trespassers. It has, however, been found as a fact that the possession was taken by defendants 1 and 2 in pursuance of the award. Whether, therefore, there was any ceremony by which possession was actually handed over by plaintiff and defendant 3 or not, it seems to me quite clear that in effect there was a transfer by plaintiff and defendant 3 to defendants 1 and 2, and this suit, therefore, must now be considered as one to set aside a transaction which, on the face of it, was a transfer. The main question which has been argued is whether such a transfer is or is not invalid. It seems to me from a consideration of S. 6, T. P. Act, that it certainly is invalid. Section 6 (h) says :

"No transfer can be made . . . . . for an unlawful object or consideration within the meaning of S. 23, Contract Act."

Section 23 says that "the consideration or object of an agreement is lawful, unless it is forbidden by law." One of the items of consideration for the transfer by plaintiff and defendant 3 was the promise of defendants 1 and 2 to transfer their rights in the other portions of Thangappa Pillai's estate. That transfer is forbidden by law: *see* S. 6 (a). Therefore S. 6 (h) applies to the transfer by the plaintiffs and defendant 3 and, therefore, that transfer would certainly be invalid if this were the sole consideration. It has been argued for the respondent, that because this was not the only consideration for the transfer but there was also the question of the services rendered by defendant 2 in performing the funeral ceremonies, the transfer cannot be set aside as invalid. But it seems to me, that if any portion of the consideration is forbidden by law, the necessary result must be that the whole transfer should be set aside. I accordingly hold that the transfer by the plaintiff and defendant 3 to defendants 1 and 2 of the subject-matter of this suit is not valid and therefore that defendants 1 and 2 can have no title under it to retain possession of the property.

There will, however, now be an obvious situation for the application of S. 65, Contract Act. The agreement between the parties that defendants 1 and 2 should release their rights in certain property to plaintiff and defendant 3 has now been discovered to be void, and it is the case of defendants 1 and 2, a case which has been found to be true by the Courts below, that the plaintiff and defendant 3 have received an advantage under this agreement. Under S. 65, therefore, it is obligatory upon the plaintiff to make compensation to defendants 1 and 2 before she can recover possession of the property which is the subject-matter of this suit. The learned District Judge refused to consider these points of law, whether the transfer was invalid, and if so, whether the defendants have any right to compensation; because the questions were not raised in the pleadings. It seems to me that this attitude cannot be justified. It is the clear duty of the Court to apply the law to the facts which it finds. And if the law is, as I have stated it, on the facts found, viz., that the transfer was invalid, it seems to me quite clearly the duty of the Court to declare it to be invalid, and to assess the compensation payable to defendants 1 and 2.

This appeal will accordingly be allowed and the suit remanded to the Court of first instance. It is not necessary, in accordance with the request made to me on behalf of the respondent, that the plaintiff should be asked to amend her plaint. The basis of what must now be her claim has been made quite clear by the judgments of the various Courts. The only question which now requires consideration is what compensation she must pay to defendants 1 and 2. The next step, therefore, in the conduct of the suit will be for these defendants to set out in an amended written statement what is the compensation which they claim. The Court of first instance will then proceed to try that particular issue and pass a decree in accordance with its findings. i. e., that possession of the suit properties shall be restored by defendants 1 and 2 to plaintiff upon payment by her to them of a certain sum of money. The question of costs will be left to the discretion of the learned District Munsif. Leave refused.

C.R.K./K.S. *Appeal allowed.*

A. I. R. (29) 1942 Madras 721

WADSWORTH J.

Mangipudi Vyagreswarudu and others — Petitioners

v.

Boddapati Bhadramma and another — Respondents.

Civil Revn. Petn. No. 718 of 1940, Decided on 2nd April 1942, to revise decree of Sub-Judge, Amalapuram, D/- 12th August 1939.

Limitation Act (1908), Ss. 21 (3) (b), 19— Manager of Hindu joint family can acknowledge debt binding on family even after his insolvency.

An acknowledgment made by a manager of a joint Hindu family in respect of a family debt after he was adjudged an insolvent can save limitation as against the other coparceners. If an insolvent after his adjudication can acknowledge his own debt, surely he can equally acknowledge a debt binding on the family of which he still remains the manager, notwithstanding his insolvency: ('41) 28 A. I. R. 1941 Mad. 772 (F.B.), *Rel. on.* [P 722*b*,*c*]

Limitation Act —
('42) Chitaley, S. 21 N. 20 Pt. 2.
('38) Rustomji, Page 429 Pt. 8.

Hindu law —
('40) Mulla, Page 284 Pt. (e).
('38) Mayne, Page 403 Pts. (p), (q).

K. Bhimasankaran — for Petitioners.

P. Somasundaram and P. Suryanarayana — for Respondents.

ORDER.—The petitioners here were defendants 2, 3 and 4 in a small cause suit on two promissory notes. The promisor was their father, defendant 1. Defendants 1 and 2 were adjudged insolvents on 7th August 1935. The adjudications were disputed in appeal and eventually the adjudication of defendant 2 was cancelled and that of defendant 1 was confirmed. During the period between the adjudication and the decision in the appeal, there were endorsements on the two promissory notes which are relied upon as acknowledgments saving limitation under S. 19 and S. 21 (3) (b), Limitation Act. The Official Receiver was not a party to the suit

and the suit as against defendant 1 has therefore been dismissed.

It is argued in revision that the suit should also have been dismissed against defendants 2 to 4 on the ground that it is barred by limitation. Defendant 1 is admittedly the manager of the family and the debt is a family debt. The argument is that the acknowledgment made by defendant 1 after he was adjudged an insolvent cannot save limitation as against the other coparceners on the ground that the manager's right of sale of the family properties to discharge a family debt incurred by him as manager vests in the Official Receiver. This argument rests on the assumption that the right to acknowledge the debt depends on the subsistence in the person acknowledging that debt of a power of sale of the properties against which the debt is to be enforced. It seems to me that this assumption is not correct. There would no doubt have been a certain logic in holding that when once a man is declared an insolvent, since his debts can only be claimed by proceedings in the insolvency against the properties vested in the Official Receiver, the Official Receiver alone would be the proper person to keep that debt alive. That is not however, the view which the Courts have taken. It has been repeatedly held that an acknowledgment by an insolvent in his schedule of liabilities filed after his adjudication is a good acknowledgment to keep alive a debt as against himself, notwithstanding the fact that all his properties at the time when this schedule is filed are vested in the Official Receiver who alone can sell those properties in order to discharge his debts. This power to acknowledge has been recognized as one which extends to the power of an insolvent father to bind his sons under the pious obligation theory: *vide* 1941-2 M. L. J. 311.[1] I have not been referred to any case which has held that after the insolvency of the manager, the manager cannot acknowledge a debt binding the other coparceners as a family debt. And I can see no principle upon which such a result could be reached without throwing overboard the principles adopted by the Full Bench in 1941-2 M. L. J. 311.[1] If an insolvent after his adjudication can acknowledge his own debt, surely he can equally acknowledge a debt binding on the family of which he still remains the manager, notwithstanding his insolvency. In this view, I dismiss the civil revision petition with costs.

C.R.K./K.S. *Petition dismissed.*

1. ('41) 28 A. I. R. 1941 Mad. 772: 197 I, C. 199: 1941-2 M. L. J. 311 (F. B.), Mohana Reddi v. Gangaraju.

A. I. R. (29) 1942 Madras 722

KUPPUSWAMI AYYAR J.

Hindu Religious Endowments Board, Madras — Appellants

v.

Dosapati Ramiah, trustee of Sri Venugopalaswami Varu and another — Respondents.

Second Appeal No. 484 of 1941, Decided on 1st July 1942, against decree of Sub-Judge, Tenali, in A. S. No. 28 of 1940.

Madras Religious Endowments Act (2 of 1927), S. 68 — Endowment for nitya naivedya deeparadhana is general endowment and property is liable to contribute.

An endowment for nitya naivedya deeparadhana is a general endowment and not a special endowment and properties endowed are liable to be proceeded against for contribution under S. 68.

[P 723*a*]

P. V. Rajamannar and M. Seshachalapathi — for Appellants.

K. Kameswara Rao and U. G. Krishnamurthi — for Respondents.

JUDGMENT.—The appellant before this Court is defendant 1 the Hindu Religious Endowments Board, Madras. The plaintiff was the trustee of the Sri Venugopalaswami Varu Temple of Alapadu village. As he failed to pay the contributions payable by the temple under S. 68, Endowments Act, a requisition was sent to the Collector under S. 70 of that Act and the plaint mentioned A and B schedule properties were attached by him. The plaintiff thereupon filed the suit for a declaration that the A schedule properties alone were the properties of the temple and the B schedule properties were specially endowed properties and that he was liable to pay only a proportionate share of the contribution payable on A schedule properties and for an injunction restraining the Board from enforcing the order against the A schedule properties in respect of the entire contribution. Defendant 2 is the archaka of the temple. He claimed the B schedule properties as his own and contended that they were not liable to be proceeded against for the contribution. The learned District Munsif dismissed the suit finding that all the properties were temple properties and they were liable to be proceeded against for the entire contributions due to the Board. On an appeal preferred by the plaintiff and the cross objections of defendant 2 the appellate Court holding that the B schedule properties belonged to defendant 2 and could not be proceeded against for the contribution gave a decree declaring that the plaintiff was not liable to pay any contribution so far as the B schedule properties were concerned and restraining the Board from collecting the said contribution from the plaintiff.

The points for determination now are (1) whether the B schedule properties are the properties of the temple or not and could not be proceeded against for the contribution levied by the Board, and (2) whether the plaintiff is entitled to the injunction prayed for. That the B schedule properties are to be enjoyed by the archaka so long as he performs the archaka service and offers nitya naivedya deeparadhanam to the idol is the case of the plaintiff and defendant 2 as well. P. W. 1 the trustee stated that the properties belonged to the temple. Defendant 2 the archaka stated as D.W. 1 that the patta for the lands comprised in Sch. B stood in the name of the idol. In addition to this in the written statement filed by him in O. S. No. 114 of 1923 on the file of the Sub-Court, Bapatla, he referred to the fact that there were some proceedings before the Inam Commissioner and he complained that the recitals in it in favour of the temple could not be availed of as against him. Unfortunately, neither the sanad nor the extract from the Inam Register has been filed in this case. Admittedly the properties are to be enjoyed by the archaka only so long as he does service. If he does not perform, in whom does the reversion vest? In the face of the admission of defendant 2 that the patta stands in the name of the idol and in the absence of any other evidence the lower Court ought to have found that the reversion at least vested in the temple and therefore the B schedule properties must be considered to be temple properties. It is unnecessary at

this stage to speculate as to what interest the auction purchaser who purchases the properties in a sale held in respect of the B schedule properties for the contribution payable by the temple to the Board would get. It is enough to find for the purpose of this appeal that they must be considered to be temple property.

The contention of the trustee that it must be considered to be a special endowment on the ground that it was endowed for nitya naivedya deeparadhana cannot be upheld because all that has to be done in a temple is the offering of naivedya and deeparadhana. An endowment for such a purpose is a general endowment to the temple. In these circumstances I find that the B schedule properties were also temple properties and that therefore they are liable to be proceeded against for the contribution. In view of my finding that the endowment even for nitya naivedya deeparadhana is a general endowment and not a special endowment it has to be found that the plaintiff is not entitled to the injunction claimed. In the result the appeal is allowed and the plaintiff's suit dismissed with costs of defendant 1 Board only in all the three Courts. The Board's costs in all the three Courts will be paid by the temple as the trustee had to file the suit in view of the fact that he was not in possession of the B schedule properties as per the terms of the compromise entered into by his predecessor and which is also referred to in the register maintained by the Board. Defendant 2 will not be entitled to any costs in any of the Courts.

C.R.K./K.S. *Appeal allowed.*

A. I. R. (29) 1942 Madras 723

HORWILL J.

In re Thammana Ramalingayya Petitioner.

Criminal Revn. Case No. 214 of 1942, (Criminal Revn. Petn. No. 201 of 1942), Decided on 10th July 1942, to revise judgment of Court of Session, East Godavari Division, Rajahmundry, D-/ 27th November 1941.

(a) Defence of India Act (1939), S. 2, Rules under, R. 19 (1) — Article (letter) when may be regarded as sent within R. 19 (1).

An article (letter) is sent within the meaning of R. 19 (1) if it is started on its way to its destination even though it is intercepted on its way and does not arrive at its destination. [P 723*f*,*g*]

(b) Defence of India Act (1939), S. 2, Rules under, R. 19 (1) (a)—Secret Code—Meaning of.

A Code does not cease to be a secret Code because a number of other persons are using it, if it is not generally known or used by persons engaged in the business for which that Code in question is employed. [P 723*h*]

(c) Criminal trial—Sentence — Imprisonment till rising of Court—Validity—No alternative of fine — Imprisonment till rising of Court is objectionable — Law permitting alternative of fine—Sentence of imprisonment—Necessity of.

Even in cases where the alternative of fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court; because it is not a form of imprisonment recognised by law, and it is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term. Where the law permits of a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it. [P 723*h*; P 724*a*]

Cr. P. C.—
('41) Chitaley, S. 32, N. 4 Pt. 6.
('41) Mitra, Page 86, N. 73.

(d) Defence of India Act (1939), S. 2, Rules under, R. 19—Offence under—Absence of intention to injure state is no reason for not imposing punishment.

In the case of an offence under R. 19, the fact that the accused is entirely innocent of any intention to injure the state during the present emergency is no reason for imposing no punishment at all. It must be almost impossible in the majority of cases under R. 19 to be sure of the accused's innocent motive. [P 724*a*,*b*]

K. Umamaheswaram — for Petitioner.

K. Venkataraghavachariar for Public Prosecutor — for the Crown.

ORDER. — The petitioner was convicted by the joint Magistrate of Rajahmundry of an offence punishable under Rr. 19 (1) (a) and (5) of the Defence of India Rules of sending by post to a destination outside British India (to wit the United States of America) instructions for utilising any means of secretly conveying information (namely a Code). Two points are raised in this petition. The first is that as the letter was intercepted by the Censor at Bombay (or Madras) the letter was not sent. The second contention is that this Code is not a secret one. I think it correct to say that an article is sent if it is started on its way to its destination. For instance, if *A* gives a book to a messenger with instructions to give it to *B*, I think it will be correct to say that *A* sent the book to *B* even though that messenger were waylaid and the book taken from him. One can say that the book was sent, but that it did not arrive at its destination. Any other interpretation would make R. 19 almost nugatory; for there would ordinarily be no detection when the missive reached its destination. The Code used by the petitioner is called Monte Amiata's Telegraphic Code. It is issued by a company registered in Rome known as Monte Amiata S.A.M. Just inside on the fly leaf of the code-book, is printed :

"This Code is for private use, and not for public sale, but only for distribution amongst the correspondents of the 'Monte Amiata S. A. M.' for use in Commercial intercourse with the quicksilver and cinnabar trades, to which it exclusively refers."

The petitioner was not a client of Monte Amiata S. A. M., nor was his correspondence in any way connected with the quicksilver and cinnabar trades. If it had been, he might have contended with some reason that this Code was a well-known and recognised Code; but it is certainly not a Code in ordinary use for the business for which the petitioner says he used it. A Code does not cease to be a secret Code because a number of other persons are using it, if it is not generally known or used by persons engaged in the business for which that Code in question is employed. I therefore agree with the Courts below that the petitioner was guilty of the offence with which he is charged. The sentences in this case are ridiculous. For such an offence, an accused person can be punished with imprisonment for a term extending to three years or with fine or with both. If the joint Magistrate or the Sessions Judge thought that it was unnecessary or undesirable to punish the petitioner with imprisonment, there was no necessity to sentence him to imprisonment till the rising of the Court. Even in cases where the alter-

native of fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court; because it is not a form of imprisonment recognised by law, and it is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term. Where the law permits of a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it.

As to the quantum of fine, it may be true, as the learned Sessions Judge seems to think, that the petitioner is entirely innocent of any intention to injure the state during the present emergency; but I do not think it right on that account to impose no punishment at all — which is what the learned Sessions Judge has done. It must be almost impossible in the majority of cases under this rule to be sure of the accused's innocent motive. Communications with persons outside India even when they were intended to prejudice the state, would probably not contain in any one letter anything that was obviously injurious. In the first instance, some simple instructions such as the petitioner sent in the present case would be sent. Further instructions issued from time to time by similar letters, each apparently harmless in itself, might only reveal their true nature when read with the other letters of the series. I therefore change the sentence of the petitioner from imprisonment till the rising of the Court to a fine of Rs. 25.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. (29) 1942 Madras 724 (1)

HORWILL J.

Palaniandi Muthirian and others — Petitioners

v.

Ramaswami Reddi — Respondent.

Criminal Revn. No. 331 of 1942 (Criminal Revn. Petn. No. 321 of 1942), Decided on 2nd September 1942, to revise judgment of Sub-Divisional First Class Magistrate, Namakkal, D/- 5th February 1942.

*** Penal Code (1860), S. 426—Cattle grazing on complainant's bund — Offence under S. 426 is committed.**

A person can be convicted under S. 426 for sending his cattle to graze on the bund of a tank belonging to the complainant : 1 Weir 492, *Foll.*; ('29) 16 A. I. R. 1929 Mad. 5, *Dissent.* [P 724*f*]

Penal Code —

('40) Ratanlal, Page 1084 Pt. 9.

('36) Gour, Page 1481 Pt. 6.

V. T. Rangaswami Ayyangar — for Petitioners.

A. S. Sivakaminathan — for Respondent.

Public Prosecutor — for the Crown.

ORDER.—The petitioners were convicted under S. 426, Penal Code, for sending their cattle to graze on the bund of a tank belonging to the complainant and the convictions were confirmed in appeal. In a somewhat similar case that came before Curgenven J. in 52 Mad. 151,[1] the learned Judge expressed the opinion that "destruction of any property within the meaning of S. 425, Penal Code, carried with it the implication that something should be done to the property contrary to its natural use and serviceableness." He added by way of illustration :

"It may be the mischief to throw the contents of a pot of food upon the fire; but it is not mischief, though it may be theft, to eat the food." He applied the illustration to the case before them and said :

"And so, here, since the graziers, by allowing their goats to graze did no more than put the grass to its normal use, by the same reasoning their act would not amount to mischief, though it may have amounted to theft."

With due respect I quite appreciate the arguments of the learned Judge in that case; but in another similar case considered by a Bench of this Court in 1 Weir 492,[2] Kernan J. said :

"There appears to be no doubt that defendants grazed the cattle in order to derive the benefit of the grazing on the Government property, viz., the grass, and it appears to be equally clear that the consumption of the grass caused the destruction of it, so far as the Government right was concerned."

The other Judge, Brandt J. adopted the same reasoning. If one construes S. 425 strictly, there can be no doubt that property was destroyed by the grazing of the cattle, although it may be thought, as Curgenven J. did, that the Legislature could not have intended to speak of destruction if a thing were destroyed in the way that nature intended it to be destroyed, such as food or grass by eating. Curgenven J. sought to distinguish 1 Weir 492;[2] but I find myself unable to do so. The question is however, rather academic; for this Court could change the conviction from S. 426, Penal Code, to S. 379, Penal Code. The ingredients of the charge were properly set out; and the evidence would be the same whether the charge were under S. 379, Penal Code, or S. 426, Penal Code, for the gravamen of the offence was that cattle grazed the crop belonging to the mittadar, the complainant. The petitioners have been punished with a petty fine of Rs. 10 each. No interference is called for in revision.

C.R.K./R.K. *Revision dismissed.*

1. ('29) 16 A. I. R. 1929 Mad. 5 : 114 I. C. 559 : 52 Mad. 151 : 30 Cr. L. J. 316 : 55 M. L. J. 767, Raghupathi Iyer v. Narayana Goundan.

2. 1 Weir 492, In re Gurram Siddugadu.

A. I. R. (29) 1942 Madras 724 (2)

HORWILL J.

In re G. N. Chakrapany Chettiar & Sons by managing member G. N. Chakrapany Chettiar — Petitioner.

Criminal Revn. Case No. 508 of 1942, (Criminal Revn. Petn. No. 487 of 1942), Decided on 19th August 1942, to revise order of Stationary Sub-Magistrate, Pattukottai, D/- 27th June 1942.

Opium Act (1878), S. 11—Unless owner knew that his conveyance was likely to be used for transporting contraband articles, conveyance should not be confiscated.

A conveyance ought not to be confiscated unless the owner knew or had reason to believe that his vehicle was likely to be used for the purpose of transporting contraband articles. [P 725*a,b*]

G. Gopalaswami — for Petitioner.

Public Prosecutor — for the Crown.

ORDER. — The petitioner entered into a hire-purchase agreement with the accused, who used a car for transporting large quantities of contraband opium and ganja. The Magistrate confiscated not only the drugs found in the car but the car itself.

The petitioner objected; but his objections were overruled with the remark that it was open to Messrs. Chakrapani Chetty & Sons (petitioner) to seek his remedy under the hire purchase agreement in a civil Court. I doubt very much whether Messrs. Chakrapany Chetty & Sons would have any remedy against the Government in a civil Court under their hire purchase agreement. The Magistrate has a discretion under S. 11, Opium Act, to confiscate any conveyance used in carrying contraband opium; and I do not think that the exercise of that discretion could be called in question in a civil Court. That could be done only by the Courts which have appellate or revisionary jurisdiction over the Magistrate. If the petitioner's case is true that he had received only one instalment towards the purchase of the car and had no reason at all to suspect that his car was being used for transporting opium it would be, I think, very hard on the petitioner to have his car confiscated. In similar cases, it has been held that a conveyance ought not to be confiscated unless the owner knew or had reason to believe that his vehicle was likely to be used for such a purpose. That seems to be a very fair test for the Magistrate to apply when he has to consider whether or not he should order the confiscation of the vehicle. As the Magistrate has not considered this, I think his order should be set aside. The petition is, therefore, allowed, the order of confiscation of the petitioner's car set aside, and the Magistrate ordered to consider afresh the question whether the car should be confiscated. He should permit evidence to be let in by the prosecution and by the petitioner.

C.R.K./R.K. *Petition allowed.*

A. I. R. (29) 1942 Madras 725

KING J.

Timiti Venkata Charlu and another — *Appellants*

v.

Rajah of Vizianagaram and another — *Respondents.*

Second Appeal No. 1023 of 1939, Decided on 20th February 1942, against decree of District Court, Vizagapatam, in A. S. No. 203 of 1937.

(a) Adverse possession—Finding that defendant had not openly asserted title is of fact — Whether admitted facts constitute assertion of title is question of law.

A finding that the defendant at no time more than 12 years before the filing of the suit had openly asserted his title to the suit land adversely to the plaintiff's right is no doubt in one respect a finding of fact but the question whether certain admitted facts constitute an open assertion of title is a question of law. [P 725*h*]

Limitation Act —

('42) Chitaley, Art. 142 & 144 N. 98 Pts. 2, 7.

('38) Rustomji, Page 1374 Note "Adverse Possession: Question of Law and Fact."

(b) Adverse possession—Title to property in issue in suit—Assertion of title in suit is open.

There can be no clearer instance of an open assertion of title made publicly in regularly constituted suits in which the title to the property in question was definitely in issue. [P 726*a*]

Limitation Act —

('42) Chitaley, Arts. 142 & 144 N. 76 Pt. 1.

('38) Rustomji, Page 1370 Pt. 10.

(c) Adverse possession — Inamdar claiming title not against Government but zamindar — Twelve years rule for perfecting title applies — Question of Government's rights to resume inam has no bearing.

No doubt wherever an inamdar claims title to land that title necessarily involves certain rights in Government to resume the inam. But that fact can be applied only to suits between the Government and the inamdar. If it is a question of whether an inamdar has established a title adversely to the Government, then of course the question will be whether his adverse possession has extended to 60 years or more. But where the only question is whether an inamdar has established his title adversely to a zamindar the question of Government's rights cannot possibly come up for any kind of consideration. The ordinary rule will therefore apply which prescribes a period of only 12 years for the perfecting of title by adverse possession. [P 726*b*, *c*]

Limitation Act —

('42) Chitaley, Art. 149 N. 7.

('38) Rustomji, Page 1557 Note "Article Restricted to Suits Brought for Benefit of Government."

B. Jagannadha Das and S. Ramamurthy — for Appellants.

S. Venkatesa Iyengar — for Respondents.

JUDGMENT. — The subject-matter of this appeal is a portion of Survey No 197/3 in the village of Kagam. The appellants claim that the whole of the survey number and therefore the portion now in dispute belongs to them as part of their inam. The contesting respondents on the other hand contend that the property in dispute is jeroyiti property of the Vizianagaram estate. The suit was one for rent based upon the assertion that the rent was leviable from this jeroyiti property. The suit has been dismissed by the Sub-Collector and has been decreed in part by the learned District Judge of Vizagapatam. The learned District Judge holds that in respect of a part of the land no decree can be given to the plaintiffs because there is a survey decision against them establishing the title of the defendants to the property. On the other hand he has held that the survey decision does not extend to the remainder of the field and that although the defendants have been in possession of this part of the field for 30 years or more they have been unable to prove any title by adverse possession. He states that the contesting respondents, that is to say the present appellants, at no time more than 12 years before the filing of the suit had openly asserted their inam title to this portion of Survey No. 197/3 adversely to the Raja's melvaram right. This is no doubt in one respect a finding of fact but it seems to me that the question whether certain admitted facts constitute an open assertion of title is a question of law and in this case the learned District Judge is clearly wrong in holding that there has been no open assertion of title. I have been referred to the pleadings in two previous suits, one in 1911 and the other in 1917. In the first, the present appellant 1 was defendant 3 and the Vizianagaram estate was defendant 1. The assertion which is contained in the written statement filed in common by defendant 3 and the other defendants was to the effect that the suit lands were not the jeroyiti lands of defendant 1 but the inam lands of the other defendants. In the suit in 1917 the Vizianagaram estate was the plaintiff and the present appellant 1 was defendant 1. It was a suit for rent and defendant 1 in common with the other defendants con-

tended that the suit lands were their inam lands. It is conceded by the learned advocate for the respondents here that the subject-matter of both these suits in 1911 and 1917 is identical with the subject-matter of the present suit. It is conceded also that whatever other differences there may be in the array of parties in those suits, the present appellant 1 was himself a party in both of them and that the written statement to which reference has been made was his written statement. It is quite clear from these facts that the subject-matter of the present suit has been asserted by the present appellant 1 in both 1911 and 1917 to belong to him. There can be no clearer instance of an open assertion of title made publicly in regularly constituted suits in which the title to the property in question was definitely in issue.

The learned District Judge proceeds further to argue that even if adverse title had been made out for a period of 30 or 40 years it would be insufficient to protect the present appellants against the suit of the estate as where there is an inam right to any land no adverse title can be perfected by a period of less than 60 years. The argument is that wherever an inamdar claims title to land that title necessarily involves certain rights in Government to resume the inam. No doubt this fact is true, but it is quite clear that it can be applied only to suits between the Government and the inamdar. If it is a question of whether an inamdar has established a title adversely to the Government, then of course the question will be whether his adverse possession has extended to 60 years or more. But where the only question is whether an inamdar has established his title adversely to a zamindar the question of Government's rights cannot possibly come up for any kind of consideration. The ordinary rule will therefore apply which prescribes a period of only 12 years for the perfecting of title by adverse possession. The result is that the present appellants are entitled to a declaration that they are now entitled as inamdars to the land in question and therefore that no rent can be levied from them. This appeal must therefore be allowed and the suit filed by the estate be dismissed with costs throughout. Leave refused.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 726 (1)

HORWILL J.

In re K. Chinnavadu and others — Accused.

Criminal Revn. Case No. 19 of 1942 (Case Referred No. 3 of 1942), Decided on 24th June 1942, referred by District Magistrate, Nellore, in his letter, D/- 12th January 1942.

Criminal P. C. (1898), S. 523—Accused asserting property as not being his—Order returning property to accused is bad — Magistrate must inquire as to person entitled to possession.

Under S. 523 of the Code the Magistrate is bound to order that the property be given to the person entitled to possession ; where the accused asserts that the property does not belong to him he is not entitled to possession, and the Magistrate should not pass an order returning the property to the accused. The duty of the Magistrate under S. 523 is to make an inquiry as to the person entitled to possession and to order possession to be given to him. [P 726*f*]

Cr. P. C. —

('41) Chitaley, S. 523, N. 6.

('41) Mitra, Page 1693, N. 1364.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER.—Four persons were charged with committing theft of property from the house of the complainant. The defence of the accused was that they had committed no theft ; that the property had been foisted on them, and that panchayatdars were brought to see the property recovered from them. The Magistrate accepted this defence and doubted whether theft had been committed. He therefore acquitted the accused and ordered the property to be returned to them, although the accused by their own defence asserted that the property did not belong to them. The District Magistrate considered that this order was wrong and referred the matter to this Court under S. 438, Criminal P. C.

I agree with the learned District Magistrate that the property should not have been ordered to be returned to the accused ; because clearly the property did not belong to the accused. The prosecution alleged that the property belonged to the complainant whereas the accused had no suggestions to make as to the ownership of the property, they merely contending that the property was foisted on them for the purpose of falsely implicating them. Under S. 523, Criminal P. C., the Magistrate is bound to order that the property be given to the person entitled to possession ; and as the accused are not entitled to possession, the Magistrate should not have made the order he did. The duty of the Magistrate under this section is to make an inquiry as to the person entitled to possession and to order possession to be given to him. If the Magistrate is unable after inquiry to satisfy himself as to the person entitled to possession, he should under S. 523 (2), Criminal P. C., issue a proclamation before passing final orders. The order of the Taluk Magistrate with regard to the disposal of the property is set aside and he is directed to dispose of the property according to the rule laid down in S. 523, Criminal P. C.

C.R.K./R.K. *Order set aside.*

A. I. R. (29) 1942 Madras 726 (2)

WADSWORTH AND PATANJALI SASTRI JJ.

Pappammal — Appellant

v.

Ramaswami Chettiar — Respondent.

Second Appeal No. 600 of 1941, Decided on 27th July 1942, against decree of Dist. Court, Trichinopoly, in A. S. No. 243 of 1940.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 19 — Relief sought during trial of suit itself — S. 19 does not apply.

Section 19 has no reference to cases in which relief under the Act is sought in the trial of the suit itself. [P 727*d*]

(b) Madras Agriculturists Relief Act (4 of 1938), Ss. 7, 23, 19, 13 and 10—Construction of S. 7—Debtor claiming relief during trial of suit — He is entitled to relief if he was agriculturist on 1st October 1937 and 22nd March 1938—He need not be agriculturist on date when relief was claimed.

Apart from Ss. 19 and 23 which require that the debtor should be an agriculturist at the time of the application and S. 13 dealing with debts incurred after the Act where the date of the debt is made the important date, there is nothing in the Act

which requires the debtor to prove his agriculturist status as on the date on which the matter is brought to the notice of the Court. Section 7 contemplates the application of the provisions of the Act to all debts payable by an agriculturist at the commencement of the Act but this is subject to the qualification in S. 10 that the provisions of Ss. 8 and 9 shall not apply to a person who was not an agriculturist on 1st October 1937. Consequently, in the absence of any provision requiring proof that the debtor must continue to be an agriculturist also up to the time when the matter comes before the Court, the debtor in cases where his claim to relief is put forward during the trial of the suit, will be entitled to relief if he can show that he was an agriculturist on 1st October 1937 and on the commencement of the Act, 22nd March 1938 : ('41) 28 A. I. R. 1941 Mad. 829, *Expl.* ; ('41) 28 A. I. R. 1941 Mad. 158, *Ref.* [P 727*e,f*]

R. Viswanathan and T. R. Srinivasan — for Appellant.

K. S. Desikan and R. Raman — for Respondent.

WADSWORTH J. — The appellant was the plaintiff in a suit for redemption of a pledged jewel and claimed to be entitled to the benefits of the Madras Agriculturists Relief Act, 4 of 1938, by virtue of the possession of a leasehold interest in agricultural land. The trial Court came to the conclusion that she had not established the truth of the lease. The lower appellate Court, assuming but not deciding that the lease did exist for the period from 1st March 1937 to 22nd March 1938, held that at the date of the suit the appellant had no interest in agricultural lands sufficient to satisfy the definition of an agriculturist and that she was, therefore, not entitled to relief. The suit was filed in 1939.

It is contended in second appeal that the question whether the appellant was or was not an agriculturist at the time of the suit is immaterial having regard to the wording of S. 7 which prescribes that all debts payable by an agriculturist at the commencement of the Act shall be scaled down in accordance with the provisions of Chap. 2. In (1940) 2 M.L.J. 887,[1] a case under S. 19 of the Act, we had occasion to consider what were the crucial dates with reference to which the applicant had to prove his agriculturist status and we held that having regard to S. 10 of the Act he must be an agriculturist on 1st October 1937, having regard to S. 7 of the Act he must be an agriculturist on 22nd March 1938 and having regard to the terms of S. 19 in cases falling under that section he must be an agriculturist at the time of the application. Section 19, however, has no reference to cases in which relief under the Act is sought in the trial of the suit itself. The respondent has quoted our decision in (1941) 2 M. L. J. 257,[2] as suggesting that the debtor must also be an agriculturist on the date of the suit. The headnote to the report of this decision contains the words "the relevant period apart from the date of the suit when a debtor has to be an agriculturist. . . ."

This phrase in the headnote is somewhat misleading. It seems to be based on a passage at the end of the judgment which says : "Applying this criterion to the present facts, defendant 1 has been proved to have been an agriculturist at the time of the suit and also to have had the necessary qualifications ever since May 1937 ;" that is to say, we pointed out that he was an agriculturist both before the crucial date 1st October 1937 and after the crucial date 22nd March 1938 which is the date of the commencement of the Act. We had no occasion on the facts of that case to consider whether it was necessary that he should have been an agriculturist on the date of the suit and the case is not authority for the proposition in support of which it has been quoted.

It seems to us that apart from S. 19 and S. 23 where the Act expressly requires that the debtor should be an agriculturist at the time of the application and S. 13 dealing with debts incurred after the Act where the date of the debt is made the important date, there is nothing in the Act which requires the debtor to prove his agriculturist status as on the date on which the matter is brought to the notice of the Court. Section 7 contemplates the application of the provisions of the Act to all debts payable by an agriculturist at the commencement of the Act but this is subject to the qualification in S. 10 that the provisions of Ss. 8 and 9 shall not apply to a person who was not an agriculturist on 1st October 1937. Reading these two sections together, in the absence of any provision requiring proof that the debtor must continue to be an agriculturist also up to the time when the matter comes before the Court, we are of opinion that the debtor in cases where his claim to relief is put forward during the trial of the suit, will be entitled to relief if he can show that he was an agriculturist on 1st October 1937 and on the commencement of the Act, 22nd March 1938. In the result, therefore, we allow the appeal and set aside the order of the lower appellate Court and remand the case to the lower appellate Court for fresh disposal in the light of this judgment after recording findings on the status of the appellant as on 1st October 1937 and 22nd March 1938. Costs to abide the result. The appellant will be entitled to a refund of the court-fees in second appeal.

C.R.K./G.N. *Appeal allowed.*

1. ('41) 28 A.I.R. 1941 Mad. 158: (1940) 2 M. L. J. 887, Palani Goundan v. Peria Goundan.
2. ('41) 28 A. I. R. 1941 Mad. 829 : 200 I. C. 321 : (1941) 2 M.L.J. 257, Devarayan Chettiar v. Subramania Iyer.

A. I. R. (29) 1942 Madras 727

WADSWORTH AND PATANJALI SASTRI JJ.

C. Velayudha Mudali — *Appellant*

v.

T. Chengama Naidu and another — *Respondents.*

Appeal No. 10 of 1941, Decided on 13th July 1942, against order of District Court, Chingleput, D/- 20th December 1940.

Madras Agriculturists Relief Act (4 of 1938), Ss. 20 and 19—Application under S. 19—Notice under S. 20—Proceedings under O. 21, R. 90, Civil P. C., must be stayed.

Proceedings under O. 21, R. 90, Civil P. C., are proceedings in execution which must necessarily be stayed when an order under S. 20, Madras Act 4 of 1938 has been passed until the disposal of a pending application under S. 19 of that Act. The fact that a sale held before 1st October 1937 cannot be set aside under Madras Act 4 of 1938 does not justify the Court in going on with proceedings relating to such a sale, when all execution proceedings have been stayed. [P 728*a*]

R. Gopalaswami Ayyangar — for Appellant.

P. V. Raghavan, K. M. Venkatavaradachariar, K. V. Ramachandra Iyer and S. Krishnaswami — for Respondents.

JUDGMENT.—It seems to us clear that proceedings under O. 21, R. 90, Civil P. C., are proceedings in execution which must necessarily be stayed when an order under S. 20, Madras Act 4 of 1938 has been passed, until the disposal of a pending application under S. 19. The fact that a sale held before 1st October 1937 cannot be set aside under Madras Act 4 of 1938 does not justify the Court in going on with proceedings relating to such a sale, when all execution proceedings have been stayed. In such circumstances the order passed under O. 21, R. 90 is an illegal order and it must be set aside. The lower Court will be directed to dispose of the application under S. 19 at once and thereafter to hold a fresh enquiry into the petition under O. 21, R. 90. The appellant is entitled to costs in this appeal, payable by the decree holder.

C.R.K./G.N. *Order set aside.*

A. I. R. (29) 1942 Madras 728

LEACH C. J. AND BYERS J.

Dandamudi Narasayya and another — *Appellants*

v.

Movva Subbayya and others — *Respondents.*

Letters Patent Appeal No. 33 of 1941, Decided on 1st April 1942, against judgment and decree of Abdur Rahman J., in S. A. No. 128 of 1938, D/- 17th February 1941.

Limitation Act (1908), Art. 144—*A* in possession of suit property as trespasser since 16th July 1918—*B* going into possession on strength of his own title to property on 9th February 1930 — *A* suing under S. 9, Specific Relief Act, obtaining decree and restored to possession on 4th September 1931 — Title suit by *B* on 24th November 1931 — Period between 9th February 1930 and 4th September 1931 during which *B* had both title and possession held could not be ignored—Suit held within time — Decree under S. 9, Specific Relief Act, held different from erroneous decree for possession based on title.

On 4th May 1915 *A* gifted the property in suit to *B* under a registered deed. Thereupon *B* went into possession and remained in possession until 16th July 1918, when *A* entered upon the property. On 9th February 1930 *B* asserted his title and dispossessed *A* who within six months brought a suit under S. 9, Specific Relief Act, and obtained a decree in consequence of which possession was restored to *A* on 4th September 1931. In the title suit instituted by *B* on 24th November 1931 it was contended that the suit was barred as *B* had not been in possession of the property within 12 years of the suit since the period between 9th February 1930 to 4th September 1931 could not be taken into account:

Held that a decree under S. 9 was different from an erroneous decree for possession based on title. Since *B* went into possession of the property on 9th February 1930 on the strength of his own title to the property, the period between 9th February 1930 and 4th September 1931 during which he had both title and possession could not be ignored and since *B* was the rightful owner and was in possession of what belonged to him within 12 years of the suit, his suit was filed in time. *A* was in possession as trespasser and the fact that he obtained a decree under S. 9, Specific Relief Act, did not make his trespass any the less. He still remained a trespasser: (1876) 1 A. C. 414, *Rel. on*; 28 Mad. 338 and 30 Mad. 316, *Disting.* [P 729*b*,*d*,*e*]

Limitation Act —

('42) Chitaley, Arts. 142 and 144 N. 90 Pt. 13.

('38) Rustomji, Page 1356 Pts. 1, 2, 4.

P. Satyanarayana Rao — for Appellants.

V. Govindarajachari — for Respondents.

LEACH C. J.—The only question in this appeal is one of limitation and we consider that it has been rightly decided by Abdur Rahman J. from whose judgment this appeal has been preferred under Cl. 15 of the Letters Patent. The suit was filed by the respondents for a declaration of title to certain immovable property in the Kistna District and a decree for possession and mesne profits. On 4th May 1915 appellant 1 gave the property in suit to respondent 1 who is his brother-in-law under a registered deed. Thereupon respondent 1 and his brother, respondent 2, went into possession and remained in possession until 16th July 1918, when the appellants entered upon the property. On 9th February 1930 the respondents asserted their title and dispossessed the appellants who within six months brought a suit under S. 9, Specific Relief Act. As they established their possession within six months of the suit, a decree was passed in their favour. This resulted in the Court restoring possession to the appellants on 4th September 1931. The decree passed in favour of the appellants did not, of course, affect the question of title and the respondents were at liberty to file the suit out of which this appeal arises. This they did on 24th November 1931. The appellants raised three pleas in bar. In the first place they said that the deed of gift executed by appellant 1 in favour of respondent 1 was a nominal transaction and consequently the title remained in appellant 1. In the second place they averred that the respondents had not been in possession of the property within 12 years of the suit. In this connection they contended that the period from 9th February 1930 to 4th September 1931 should be ignored. In the third place they averred that they had acquired title by adverse possession.

The District Munsif of Gudivada who tried the suit held that there had been no valid gift by appellant 1 to respondent 1, that the respondents had not been in possession of the property within twelve years of the institution of the suit and that the plea of title by adverse possession raised by the defendants was well founded. Consequently, he dismissed the suit. The respondents appealed to the Subordinate Judge of Masulipatam, who disagreed with the findings of the District Munsif. The Subordinate Judge held that the gift was a real one and the deed valid, that the respondents had been in possession until 16th July 1918 and also from 9th February 1930 until 4th September 1931, and that the appellants had not established a title by adverse possession. The result was that the respondents' suit was decreed with costs. The appellants appealed to this Court, but without success, Abdur Rahman J. agreeing with the findings of the Subordinate Judge. Admittedly, if the Court can have regard to the entry of the respondents upon the property on 9th February 1930, the suit was filed in time. It is said however, for the appellants that as they were successful in their suit under S. 9, Specific Relief Act, the Court cannot have regard to what happened between 9th February 1930 and 4th September 1931. In rejecting this contention Abdur Rahman J. observed that the act of a person who takes possession, either forcibly or otherwise than in due course of law, may be highhanded and not legal in the

sense that it is not authorized by law, but if he happens to be the rightful owner there is no justification for holding that the period during which he had both title and possession should not be taken into account.

In this Court, Mr. Satyanarayana Rao relied on two cases, 28 Mad. 338[1] and 30 Mad. 316,[2] both of which were considered by Abdur Rahman J. We agree with the learned Judge that they are not in point. In 28 Mad. 338[1] the plaintiff was placed in possession of immovable property under a decree of the Court in the month of July 1896. On appeal it was held that he had been wrongly placed in possession by the trial Court and in pursuance of the appellate decree he was dispossessed in 1898. He claimed that for the purpose of limitation his dispossession should be deemed to start from the date in 1898 when the appellate decree was enforced. This contention was, however, rejected. The Court considered that as he had been given possession under an erroneous decree of the Court the period of his possession should be ignored. In 30 Mad. 316[2] the decision in 28 Mad. 338[1] was approved. This is not a case where the plaintiffs were placed in possession under an erroneous decree of Court. They went into possession of the property on 9th February 1930 on the strength of their own title to the property. The appellants were in possession as trespassers and the fact that they succeeded in the suit under S. 9, Specific Relief Act, did not make their trespass any the less. They remain trespassers in spite of their decree. In the course of his judgment Abdur Rahman J. quoted the following passage from the judgment of Lord Selborne in (1876) 1 A. C. 414[3]:

"In the case also cited at the Bar in (1847 49) 2 Ex. 803[4] at p. 821 it is accurately stated by Maule J. that 'as soon as a person is entitled to possession and enters in the assertion of that possession or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession and the other person is a trespasser. They differ in no other respects. You cannot say that it is joint possession; you cannot say that it is a possession as tenants in common. It cannot be denied that one is in possession and the other is a trespasser.' And in (1845) 14 M. & W. 437[5] at page 442 it is pointed out that so far as relates to the fact of possession and its logical consequences it makes no difference whether it has been taken by the legal owner forcibly or not."

These observations have full force here. The respondents who are the rightful owners of the property were in possession of what belonged to them within 12 years of the suit and this being so, their suit was filed in time. A decree passed under S. 9, Specific Relief Act, is very different from an erroneous decree for possession based on title, as was the case in 28 Mad. 338.[1] For these reasons the appeal will be dismissed with costs. We note with regret that the trial of the suit took nearly five years in the District Munsif's Court. There can be no excuse why a suit of this nature should have taken this length of time before it was brought on for hearing. The attention of the District Munsif concerned will be drawn to this fact.

C.R.K./G.N. *Appeal dismissed.*

1. ('05) 28 Mad. 338, Narayanan Chettiar v. Kannammal Achi.
2. ('07) 30 Mad. 316 : 17 M.L.J. 149, Rajagopalan v. Somasundara Thambiran.
3. (1876) 1 A. C. 414 : 45 L. J. Ex. 613 : 35 L. T. 69 : 13 Cox. C. C. 226 Lows v. Telford.
4. (1847-49) 2 Ex. 803 : 18 L. J. Ex. 456 : 76 R.R. 794, Jones v. Chapman.
5. (1845) 14 M. & W. 437 : 3 D. & L. 55 : 14 L. J. Ex. 272 : 9 Jur. 759 : 69 R. R. 718, Harvey v. Brydges.

A. I. R. (29) 1942 Madras 729

WADSWORTH J.

Natesa Mudaliar — Appellant

v.

M. T. Rajamanicka Chettiar — Respondent.

Second Appeal No. 162 of 1941, Decided on 1st April 1942, against decree of Dist. Court, Chingleput, in A. S. No. 231 of 1936.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 19 — Payment by mortgagor pending suit by mortgagee appropriated by Court in mortgage decree dated 3rd October 1936 to interest due on mortgage — Parties not objecting — Appropriation is binding on parties and cannot be re-opened.

There is no provision in the Act which permits the re-appropriation of payments made before 1st October 1937 except only the proviso to S. 19, which deals with payments made under the decree. [P 730*a*]

Where a certain payment made by the mortgagor pending the suit by the mortgagee was appropriated by the Court in the mortgage decree dated 3rd October 1936 to the amount of interest due on the mortgage in order to work out the amount due under the decree, the appropriation is as binding on the parties who did not object to it as if it had been made by one of the parties before the decree was drafted. There is no provision in the Act which permits the reopening of that appropriation which cannot be said to be in respect of a payment made under the decree. [P 730*a*]

(b) Madras Agriculturists Relief Act (4 of 1938), S. 9—Decree for costs—Scaling down of.

A decree for costs must be treated as a debt to be scaled down under S. 9. [P 730*a*]

S. Ramachandra Iyer and S. Natarajan — for Appellant.

N. Srinivasa Iyengar — for Respondent.

JUDGMENT. — The main contention in this appeal relates to a payment of Rs. 450 made by defendant 7 pending the suit. In the decree which is dated 3rd October 1936 this sum of Rs. 450 is appropriated to the amount of interest due on the mortgage. No objection appears to have been taken to this appropriation and when the appeal was filed before the lower Court, it was not contended that this appropriation was wrong. The lower appellate Court's decree is dated 29th August 1940. It is now contended that it is open to the defendants to urge that this sum of Rs. 450 should be appropriated towards principal. I cannot accept this contention. The re-opening of a decree under S. 19 of Act 4 of 1938 is for the purpose of applying the provisions of the Act to that decree. There is no provision in

the Act which permits the re-appropriation of payments made before 1st October 1937 except only the proviso to S. 19 which deals with payments made under the decree. Although in the present case the appropriation seems to have been made by the Court which necessarily had to make an appropriation in order to work out the amount due under the decree, the appropriation is just as binding on the parties who did not object to it as if it had been made by one of the parties before the decree was drafted. At any rate, there is no provision in the Act which permits the re-opening of this appropriation which is not in respect of a payment made under the decree.

On a minor point, the appeal must, however, succeed. The lower appellate Court has allowed interest on costs at 6 per cent. The decree for costs has to be treated as a debt to be scaled down under S. 9 of the Act and the interest thereon will run at 5 per cent. from the date of the decree to 22nd March 1938 and thereafter at the decree rate of 6 per cent. Subject to this slight modification the second appeal is dismissed with costs. Leave to appeal is refused.

C.R.K./G.N. *Order accordingly.*

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* A. I. R. (29) 1942 Madras 730

KUPPUSWAMI AYYAR J.

Dasi Parvathi Ammal — Appellant

v.

Dasi Angamuthu and others

— Respondents.

Second Appeal No. 315 of 1941, Decided on 16th July 1942, against decree of District Court, Coimbatore, in Civil Appeal No. 542 of 1939.

(a) Civil P. C. (1908), S. 100 — Consideration is question of fact.

The decision as to whether the document was supported by consideration or not is a question of fact. [P 730*e*]

C. P. C. —

('40) Chitaley, Ss. 100 & 101, N. 28 Pt. 3; N. 54 Pt. 1.

('41) Mulla, Page 367, Note "No second appeal lies on the ground of an erroneous finding of fact."

(b) Civil P. C. (1908), S. 100—Finding of fact — Appreciation of evidence basis for finding — No interference in second appeal.

The question how far the lower Court was justified in appreciating the evidence in the way in which it did and came to the conclusion is not a matter to be considered by the High Court. If there were materials on which the lower Court could have come to the conclusion it arrived at it would not be open to the High Court to interfere with it. [P 730*g*]

C. P. C. —

('40) Chitaley, Ss. 100 & 101, N. 52 Pt. 10.

('41) Mulla, Page 367 Pt. (g).

(c) Transfer of Property Act (1882), S. 41 — S. 41 does not apply to mortgages — Assignee of mortgage though bona fide holder, mortgagor can plead want of consideration.

Section 41 does not apply to the case of mortgages but only to sales : Mitter J. in ('30) 17 A.I.R. 1930 Cal. 92, *Foll.* and Jack J. *Dissent.*; ('16) 3 A. I. R. 1916 Cal. 745, *Disting.* [P 730*h*]

The fact that the assignee of a mortgage is a bona fide holder for consideration, cannot stand in the way of the mortgagor or his successors successfully pleading that the suit mortgage bond was not supported by consideration. [P 731*b*]

T. P. Act —

('42) Chitaley, S. 41, N. 17 Pt. 1.

('36) Mulla, Page 181 Pt. (l).

('34) Mitra, Page 145, N. 186.

A. V. Narayanaswami Ayyar — for Appellant.

K. V. Ramachandra Ayyar — for Respondents.

JUDGMENT. — The plaintiff is the appellant before this Court and he filed a suit as assignee of a mortgage deed executed to Konavaikalpalayam Gopala Gokula Virdhi Nidhi Ltd. for recovery of money due under it. Defendants 2, 4 and 5 alone contested the suit. The others were ex parte. Their case was that the suit mortgage was not supported by consideration. Both the Courts held that the document was not supported by consideration and dismissed the suit. Hence this second appeal. The decision as to whether the document was supported by consideration or not is a question of fact, and I do not feel justified in interfering with a concurrent finding of fact by two Courts on a point like this. It is urged however that the learned District Judge committed an error when he sought to draw an inference with regard to the passing of consideration from an endorsement of payment on the mortgage deed, Ex. 1, made in 1934. But I do not think I will be justified in brushing aside the finding of the lower appellate Court on that ground. There is nothing to indicate that the learned District Judge was not aware of the date of the endorsement. As a matter of fact, he refers to the evidence of P. W. 2 with regard to this endorsement and his evidence was that the endorsement included Rs. 1000 paid on behalf of the bank. In these circumstances, I do not think there is any error or misstatement of fact on which the finding is based. The question how far he was justified in appreciating the evidence in the way in which he did and came to the conclusion is not a matter to be considered by this Court. There were materials on which the lower Court could have come to the conclusion it arrived at and therefore it would not be open to me to interfere with it. It is significant that the first Court has given a finding without reference to Ex. 1 (a) and I do not think that that finding was arrived at on irrelevant evidence or was perverse. It is next urged that even though the suit hypothecation bond is not supported by consideration, such a plea is not available against the plaintiff who is a bona fide transferee of the mortgage bond for valuable consideration. No authority of this Court has been cited for this position that a plea of want of consideration in a suit filed by an assignee of a hypothecation deed cannot be allowed if the plaintiff is a bona fide assignee for valuable consideration. In A. I. R. 1930 Cal. 92[1] a similar plea was sought to be raised on the strength of S. 41, T. P. Act. But his Lordship Mitter J., pointed out that S. 41, T. P. Act, on which the plea was based did not apply to the case of mortgages but only to sales and he has dealt with the point at great length and I entirely agree with his finding. It is true that the Honourable Jack J., was of opinion that an interest of the mortgagee itself was immovable property and where the owner of that property transferred it, the rights of the bona fide purchaser for value from the ostensible owner of that property would be protected under S. 41. I prefer to follow the ruling of his Lordship Mitter J. My attention was also drawn to another ruling in 22 C.L.J. 574[2]

1. ('30) 17 A. I. R. 1930 Cal. 92 : 125 I.C. 863 : 33 C. W. N. 994, Jogendra Kishore v. Salamat Khan.
2. ('16) 3 A. I. R. 1916 Cal. 745 : 29 I. C. 841 : 22 C. L. J. 574, Ramsumran Pershad v. Rampertab Singh.

The facts of that case are different. There the mortgage was impeached and their Lordships had to consider whether they could permit a party to impeach the genuineness of a transaction of a bona fide purchaser for value. This is what was stated there :

"The situation here is, in fact, stronger than even a case where the true owner has placed an ostensible transferee in a position to mislead a bona fide purchaser for value without notice of the secret title; the mortgage, the suit thereon, the execution sale and the delivery of possession through Court, constitute an elaborate network of devices sufficient to induce the belief that the title of Jhas had vested in Manojinarayan Singh. Consequently, the rule applies by which a bona fide transferee for value from an ostensible owner is allowed to protect himself against a claim by the real owner."

There are no such circumstances in this case. The fact that the plaintiff is a bona fide holder for consideration, I do not think, can stand in the way of the defendant successfully pleading that the suit mortgage bond was not supported by consideration and hence no decree could be passed in favour of the plaintiff. In the result, the second appeal fails and is dismissed with costs of respondent 5 alone. Leave refused.

C.R.K./R.K. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 731

WADSWORTH J.

Thotapalli Dharmayya — Petitioner

v.

Nelabarla Yanadi Reddi—Respondent.

Civil Revn. Petn. No. 958 of 1941, Decided on 3rd July 1942, to revise decree of District Court, Nellore, in A. S. No. 86 of 1940.

Madras Agriculturists Relief Act (4 of 1938), Ss. 19 and 20—Debtor's conduct obstructive — Still Court must grant stay—No conditions for stay can be imposed — Application under S. 19 can be made at last minute — Holding sale in disobedience of S. 20 is material irregularity.

Section 20 does not allow the Court a discretion to refuse a stay in a case in which the conduct of the debtor has been obstructive, nor does it contain any provision for imposing conditions for the grant of stay. Section 23 contains no time limit within which the setting aside of the sale has to be followed by an application under S. 19. The Act does not prevent a debtor from waiting to the last possible minute and then filing a stay application just at the time when the second sale is being held. The selling Court is obliged to stay the sale on being satisfied that the debtor was an agriculturist. The holding of the sale in disobedience to the provisions of S. 20 constitutes a material irregularity.

[P 731*g*,*h*]

K. Umamaheswaram — for Petitioner.

K. Kuppuswami — for Respondent.

ORDER. — The petitioner was the judgment-debtor under a decree in a suit of 1935. On 17th March 1938, his property was sold in execution of the decree. He took no action in the matter of the sale until after Madras Act 4 of 1938 came into force when on 28th April 1938 (not 1939 as the trial Court wrongly states) he filed an application under S. 23 of that Act, and got the sale set aside. Both the Courts below, misled by the error of date in the trial Court's judgment, have assumed that this application under S. 23 was preceded by an application for stay under S. 20. That is not the case. In the memorandum of appeal to the appellate Court this error was clearly pointed out, but it does not appear to have been impressed upon the learned Judge at the time of the arguments.

After the appellant had got the sale set aside in April 1938 he took no action at all until the decree-holder, a year later, once more brought the property to sale. Then on 25th April 1939 the judgment-debtor filed an application for stay under S. 20. While this application was pending he had ample time to move the Court under S. 19, but he did not do so. Eventually the executing Court required the applicant to pay costs as a condition precedent to the grant of the stay and the stay was refused for non-payment of the costs. On the same day the sale was held and the property knocked down to the decree-holder. The trial Court under the impression that there had been an earlier stay application under S. 20 and that it was not followed by any application under S. 19 to scale down the decree, refused to set aside the second sale on the ground of material irregularity. The same view was taken by the learned District Judge.

It seems to me perfectly plain that the conduct of the petitioner had been reprehensible in the extreme and that his tactics have been purely obstructive and have not indicated any desire to use the procedure laid down in the Act in the way in which it is intended. Having got the sale set aside under S. 23 he should have taken steps to get the debt scaled down. Even if he had been unable to do so before the second sale proceeding was started he had ample time to file a petition under S. 19 while his application under S. 20 was pending. Moreover when the application under O. 21, R. 90, Civil P. C., was dismissed by the trial Court under a misapprehension of the facts, the error does not seem to have been clearly put before the District Judge at the time of the arguments in the appeal although it was clearly stated in the appeal memorandum. Unfortunately S. 20 of Act 4, does not allow the Court a discretion to refuse a stay in a case in which the conduct of the debtor has been obstructive, nor does it contain any provision for imposing conditions for the grant of stay. Section 23 contains no time limit within which the setting aside of the sale has to be followed by an application under S. 19. There is nothing in the Act to prevent a debtor from behaving as this debtor has behaved, namely, waiting to the last possible minute and then filing a stay application just at the time when the second sale is being held. I am reluctantly constrained to hold that the selling Court was obliged to stay the second sale on being satisfied that the debtor was an agriculturist and that the holding of the sale in disobedience to the provisions of S. 20 constituted a material irregularity which had the effect of depriving the debtor of the benefits of the Act which would have accrued had the stay been granted so as to give him time to file an application under S. 19.

It follows, therefore, that the sale has to be set aside. As the conduct of the debtor has been deplorable and the protraction of the litigation has been almost entirely due to his dilatory tactics, I make no order as to costs in any of the Courts.

C.R.K./R.K. *Order accordingly.*

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a **A. I. R. (29) 1942 Madras 732**

KING J.

Rangaswami Gounden and others — *Appellants*

v.

Kandaswami Goundan and another — *Respondents.*

Appeal No. 9 of 1940, Decided on 6th April 1942, against appellate order of District Court, Coimbatore, D/- 13th October 1939.

(a) Civil P. C. (1908), O. 21, R. 58—Appeal — Claim by sons in execution of decree against father—Decision of lower Courts rejecting claim based on view that sons were represented in suit by father—Second appeal by sons is com- b petent.

Where a decree passed against a father is sought to be executed against the properties in the hands of his sons and the sons object that it cannot be done and both the lower Courts reject the claim of the sons on the view that the sons were represented in the suit by the father, a second appeal from the order rejecting the claim is competent. [P 732*g*]

C. P. C.—

('40) Chitaley, O. 21 R. 58 N. 24.

('41) Mulla, Page 839 Note "Appeal"

(b) Hindu law—Manager — Suit against — Whether other members of family are represented is question of fact depending upon nature of claim, plaint allegations, etc.—Remedy of decree-holder who has obtained decree against manager only but wanting to proceed against other c members who have separated from manager subsequent to decree is by separate suit.

It cannot be said as a universal proposition that whenever the manager of a joint Hindu family is sued, the members of the family must be deemed to be represented by him. Whether they are or are not so represented is a question of fact depending upon many things, the nature of the claim, the language of the plaint, the subject-matter of the suit, and the issues which require decision before a decree can be given. [P 732*h*]

In a suit on a promissory note executed by a father who had recited therein that he had borrowed for family expenses, the sons were not impleaded. This assertion was merely repeated in the plaint, but the truth of it was not put in issue, d and the plaintiff asked for no adjudication which would necessarily have the effect of binding them, and a decree was passed against the father. Subsequent to the decree, father and sons partitioned.

Held that it could not be said that the father was even sued as the representative of his family ; still less that he in fact represented it : ('37) 24 A. I. R. 1937 Mad. 610 (F.B.), *Expl.* [P 733*a*]

Held further that the remedy of the decree-holder if he wished to proceed in such circumstances against the sons' shares lay not in execution but in the filing of a separate suit : ('37) 24 A. I. R. 1937 Mad. 424 and ('41) 28 A.I.R. 1941 Mad. 262, *Rel. on.* [P 733*b*]

Hindu law—

('40) Mulla, Page 287 S. 251 (5).

('38) Mayne, Page 385 Para. 301.

(c) Civil P. C. (1908), S. 47 — Decree against father alone—Sons not parties to suit actually or even constructively — Subsequent adjudication of father as insolvent—Question of discharge of father's debts by sons under pious obligation e doctrine is for insolvency Court.

Where after the passing of a decree against a father in a suit to which the sons were neither actually or constructively parties, the father becomes insolvent and the sons are sought to be proceeded against in execution on the basis of the doctrine of pious obligation, any liability of the sons based upon the doctrine of pious obligation can extend only to the discharge of their father's debts and the question of the discharge of those debts is one for the Insolvency Court and not for the executing Court.

[P 733*b*,*c*]

C. P. C.—

('40) Chitaley, S. 47 N. 7 Pts. 21a, 22.

('41) Mulla, Page 183 Note "Parties to the suit."

P. N. Appuswami Iyer — for Appellants.

A. C. Sampath Ayyangar—for Respondents. f

JUDGMENT.—This appeal arises out of execution proceedings in O. S. No. 723 of 1935. That was a suit brought by the assignee of a promissory note executed by one Nanjappa Goundan in 1930, and was brought against Nanjappa Goundan alone. A decree was granted against Nanjappa Goundan in 1935. Subsequently Nanjappa Goundan became insolvent. In 1937 Nanjappa Goundan and his four sons partitioned their property. In 1938 the decree-holder sought to execute his decree against the family property which had thus passed into the ownership of the sons. Three of the four sons claimed that this could not be done. Both the learned District Munsif of Udumalpet and the learned District Judge of Coimbatore decided against them and ordered execution to proceed. This is a second appeal by the three sons. It is first objected g by the decree-holder (respondent 1) that no appeal lies, the argument being that as the appellants filed a claim petition their only remedy is by suit. But the very point upon which both Courts rejected the claim was that in essence the appellants were parties to O. S. No. 723 of 1935 being represented therein by their father. From decisions based upon this reasoning there must obviously be a right of appeal. The preliminary objection therefore must be overruled.

In holding that Nanjappa Goundan's sons were represented by Nanjappa Goundan in O. S. No. 723 of 1935 both Courts have relied upon the Full Bench ruling reported in I. L. R. (1937) Mad. 880[1] but they have done so in very brief judgments and without any adequate discussion of the significance of that decision or of its applicability to the facts of this case. It is impossible, I think, to read I. L. R. h (1937) Mad. 880[1] as establishing the universal proposition that whenever the manager of a joint Hindu family is sued the members of the family must be deemed to be represented by him. Whether they are or are not so represented is a question of fact depending upon many things, the nature of the claim, the language of the plaint, the subject-matter of the suit, and the issues which require decision before a decree can be given. In I.L.R. (1937) Mad. 880[1] the suit was for mesne profits realised from property enjoyed as a joint family property, and there was no possibility of conflict between father and son upon the issues involved. Here the suit was upon a promissory note. If the sons had been specifically impleaded they could have resisted it upon grounds which were not open to the father. No

1. ('37) 24 A. I. R. 1937 Mad. 610 : 171 I. C. 101 : I.L.R. (1937) Mad. 880: 1937-2 M.L.J. 251 (F.B.), Venkatanarayana v. Venkata Somaraju.

doubt the father recites in the promissory note that he has borrowed money "for family expenses" and this assertion is repeated in the plaint, but it was an unnecessary assertion the truth of which was not put in issue. All that the decree-holder had to prove if proof should be necessary at all was that the money was in fact borrowed. He did not implead the sons, he asked for no adjudication which would necessarily have the effect of binding them, and relies now solely upon the doctrine of pious obligation. It seems to me impossible in these circumstances to say that Nanjappa Gounden was even sued as the representative of his family; still less that he in fact represented it.

What then is the position if the appellants be held not to have been parties to the suit? They are now separated from their father, and this case falls exactly within the scope of I.L.R. (1937) Mad. 1004[2] which has been followed with approval by 1940 2 M. L. J. 860.[3] Those cases lay it down that the remedy of a decree-holder against the father who wishes to proceed in such circumstances against the sons' shares lies not in execution but in the filing of a separate suit. I am asked by the learned advocate for the respondent, however, not to follow these decisions, but to refer this matter to a Full Bench. In support of this request he refers to the opinions expressed by the learned Judges in I. L. R. (1937) Mad. 880[1] doubting the correctness of the law as laid down in I. L. R. (1937) Mad. 1004.[2] I am not prepared to accede to this request in the peculiar circumstances of this case. If the sons were not constructively parties to the decree, then any liability of theirs based upon the doctrine of pious obligation can extend only to the discharge of their father's debts and the question of the discharge of those debts is now one for the Insolvency Court. The question therefore whether respondent 1's proper remedy against the appellants would in other circumstances be by execution or by suit is purely academic when the appellants' father has been adjudicated an insolvent. This appeal must therefore be allowed, and the execution petition dismissed with costs throughout as against the appellants. Leave refused.

C.R.K./K.S. *Appeal allowed.*

2. ('37) 24 A.I.R. 1937 Mad. 424 : 169 I. C. 400 : I. L. R. (1937) Mad. 1004 : 1937-1 M. L. J. 249, Kuppan Chettiar v. Masa Goundan.
3. ('41) 28 A.I.R. 1941 Mad. 262 : 1940-2 M. L. J. 860, Official Receiver, Guntur v. Seshayya.

A. I. R. (29) 1942 Madras 733

WADSWORTH J.

Nanduri Sarangapani — Petitioner

v.

Yanduri Venkata Ratnam and another — Respondents.

Civil Revn. Petn. No. 2303 of 1940, Decided on 3rd July 1942, to revise decree of District Munsif, Bezwada, D/- 5th August 1940.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 3 (ii), Proviso D—Proposal to enfranchise inam falling through at time of Inam Commission — By subsequent agreement with zamindar mokhasadar paying certain amount annually to zamindar as cist — Payment is in nature of quit rent or kattubadi — Mokhasadar is landholder.

A proposal to enfranchise the inam fell through at the time of the Inam Commission, and the lands continued to be held by the mokhasadar on a payment varying with the yield of Rs. 4 per putti upto 1889, on which date there was an agreement between the zamindar and the mokhasadar, that instead of the varying payment an annual sum of Rs. 600 should be paid "towards the cist:"

Held that the annual payment of Rs. 600 under the agreement with the zamindar subsequent to the Inam Commission was in the nature of quit rent or kattubadi and that the mokhasadar was a landholder. [P 733*h*]

(b) Practice—New plea—Limitation — Point of, not pleaded in written statement and if pleaded might have been met by slight amendment of plaint—Point cannot be argued in revision.

Where a point of limitation was not pleaded in the written statement, and if it had been pleaded might have been met by a slight amendment of the plaint, it is not proper to allow it to be argued in revision for the first time. [P 733*h*]

C. P. C. —

('40) Chitaley, S. 115, N. 2, Pt. 7.

('41) Mulla, Page 408, Note "Limits of revisional jurisdiction."

N. G. Krishnamachari — for Petitioner.

V. Subramaniam — for Respondents.

ORDER. — The only question in this revision petition is whether the petitioner is entitled to the benefits of Act 4 of 1938. Admittedly he is a mokhasadar paying Rs. 150 per annum to the zamindar of Talaprole under an ancient tenure, the origin of which is rather obscure. We know that a proposal to enfranchise the inam fell through at the time of the Inam Commission, and that the lands continued to be held on a payment varying with the yield of Rs. 4 per putti upto 1889, on which date there was an agreement between the zamindar and the mokhasadar, that instead of this varying payment an annual sum of Rs. 600 should be paid "towards the cist," the mokhasadars pledging themselves to pay the maras and cesses. It is contended that this annual payment, of which the defendant's share is Rs. 150, cannot be described as quit rent, jodi, poruppu or the like so as to disqualify the defendant under proviso (D) to S. 3 (ii) of the Act from being an agriculturist. It seems to me apparent that the only difference between the annual payment made by these mokhasadars and the quit rent paid on other old inams is that the rate in the present case was fixed not at the time of the Inam Commission, but by the subsequent agreement with the zamindar. I have no doubt that the defendant and his fellow mokhasadars are landholders and that they hold their estate on a fixed and favourable rate of rent and that such fixed favourable rent payable in respect of their enjoyment of a portion of the proprietor's rights to the principal proprietor is in the nature of a quit rent or kattubadi. A point of limitation has been raised, but as it was not pleaded in the written statement, and if it had been pleaded, might have been met by a slight amendment of the plaint, I do not think it proper to allow it to be argued in revision. The revision petition is therefore dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 734

KRISHNASWAMI AYYANGAR AND KUNHI RAMAN JJ.

P. Sankara Rao—Appellant

v.

Modepalli Bala Venkatappa —Respondent.

Appeal No. 48 of 1941, Decided on 3rd July 1942, against order of District Court, Cuddapah, D/- 15th November 1940.

Civil P. C. (1908), S. 47 — Pre-decree agreement that decree when obtained should not be executed can be pleaded in bar of execution.

A pre-decree arrangement that a decree when obtained should not be executed can be pleaded in bar of execution. In other words, even where execution was absolutely prohibited by the agreement such an agreement can be pleaded. There is no difference in principle between a case where the agreement renders the decree inexecutable against some only of the defendants or against some only of the properties and the case where it renders the decree inexecutable against all the defendants or all the properties: ('26) 13 A.I.R. 1926 Mad. 582; ('35) 22 A.I.R. 1935 Mad. 860 (F.B.) and ('31) 18 A.I R. 1931 Mad. 399, *Rel. on.* [P 734*g*; P 735*b*,*c*]

Nor can the fact that the agreement was entered into not after but before the institution of the suit make any difference : ('31) 18 A. I. R. 1931 Mad. 399, *Rel. on.* [P 735*c*]

C. P. C. —

('40) Chitaley, S. 47, N. 31 Pt. 7.

('41) Mulla, Page 180 Pt. (y); Page 181 Pt. (d).

P. Somasundaram—for Appellant.

V. S. Narasimhachar—for Respondent.

KRISHNASWAMI AYYANGAR J.—Defendant 2 is the appellant. His father who was defendant 1 in the suit had executed a mortgage in favour of the respondent for Rs. 4000 on 28th February 1930. He died pending the suit and before the preliminary decree was passed. The preliminary decree was passed on 9th February 1934. It was followed by a final decree dated 22nd September 1936. The respondent then sought to execute the decree by filing E. P. No. 4 of 1940 on the file of the Court below. The appellant pleaded an agreement dated 24th August 1931 in bar of execution. The question is whether the agreement can be allowed to be pleaded so as to prevent the decree from being executed. The agreement recites that the adoptive father of the appellant (defendant 1) had become a gambler and had been utilising his properties for illegal purposes and consequently there was disagreement between the father and the son. It then states that for the purposes of safeguarding the property and bringing about harmony between them, the father executed in favour of the respondent the suit mortgage for Rs. 4000 besides two promissory notes. The agreement then states that the suit mortgage had been executed benami and the respondent had paid no money therefor. Then follow the following sentences :

"Within a period of 12 years from the date of this deed of simple mortgage, if your adoptive father would turn favourable to you and allow the entire property to pass on to you without any disputes whatever, I shall return to you the benami deed of mortgage duly cancelled so that there might not arise any disputes regarding the said deed. On the other hand, if he would remain inimical and if I have to file a suit and obtain a decree, I shall have the decree cancelled without executing the same in case the property would pass on to you."

The first sentence contemplates a case where the father changes his mind towards his son and becomes favourable to him so as to allow the entire property to pass on to him. If this happened the respondent undertook to return the deed of mortgage duly cancelled. The next sentence contemplates a different contingency, namely, if the father continues to be inimical towards the appellant, the respondent was to institute a suit on the mortgage and obtain a decree. But after obtaining a decree he should not execute it but have it cancelled if the property should by that time pass on to his son, i.e., if the adoptive father should die. On the facts of the case the second of the contingencies has happened by the death of the appellant's adoptive father after the trial but before the passing of the decree and the appellant therefore contends that he is entitled to rely on the agreement and call upon the respondent to desist from executing the decree which he had undertaken to cancel in case the father died and the properties passed on to the appellant. It may be mentioned before proceeding further that till the passing of the decree, the appellant was allowed under the terms of the agreement to remain quiet; and he had no right to object to the passing of the decree itself. It is only when the decree-holder seeks to execute the decree after the property had passed on to him that the appellant would have a grievance and would be entitled to complain that the terms of the agreement were being violated. In other words, we have before us an agreement which could not be pleaded until after the decree was passed and steps were taken by the respondent to execute it.

The learned District Judge was of opinion that the agreement cannot be pleaded as its effect in substance was to render the decree inexecutable; in other words to make it a nullity as he calls it. As we understand the learned Judge, he seems to be of the opinion that every agreement which bars execution of a decree operates to nullify a decree and therefore to abrogate it altogether. In 49 Mad. 513,[1] the identical question appears to have been considered by Wallace and Madhavan Nair JJ. and they laid down the proposition that a pre-decree arrangement that a decree when obtained should not be executed can be pleaded in bar of execution. In other words, even where execution was absolutely prohibited by the agreement, such an agreement can be pleaded. There have been a great many cases decided upon this point by this and other Courts. The latest is the case in 58 Mad. 994[2] where the following statement of principle made by Pakenham Walsh J. in 54 Mad. 184[3] was approved :

"On a review of the authorities it appears to us that the Full Bench case, 40 Mad. 233,[4] only covers agreements which relate to execution and not to agreements which attack the decree itself."

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1. ('26) 13 A.I.R. 1926 Mad. 582 : 98 I.C. 428 : 49 Mad. 513 : 50 M.L. J. 364, Venkatasubba Mudali v. Manickammal.
2. ('35) 22 A. I. R. 1935 Mad. 860 : 158 I. C. 187 : 58 Mad. 994 : 69 M.L.J. 451 (F. B.), Papamma v. Venkayya.
3. ('31) 18 A. I. R. 1931 Mad. 399 : 129 I.C. 818 : 54 Mad. 184 : 60 M. L. J. 721, Butchiah Chetti v. v. Tayar Rao Naidu.
4. ('18) 5 A.I.R. 1918 Mad. 1174 : 37 I.C. 836 : 40 Mad. 233 : 32 M. L. J. 13 (F. B.), Chidambaram Chettiar v. Krishna Vathiar.

What was meant is that agreements which relate to execution only not those which strike at the decree itself are pleadable in bar of execution. There were several judgment-debtors in the case before the Full Bench. The first of them, namely, judgment-debtor 1 pleaded an agreement by which the decree-holder had undertaken not to execute the decree as against him. The effect of the agreement obviously was that the decree was rendered inexecutable so far as one of the judgment-debtors was concerned. Pandrang Row J. who delivered the judgment of the Full Bench observed as follows :

"Judgment-debtor 1 does not seek to vary the terms of the decree; it is not his case that the terms of the decree were varied by the oral agreement, but that it was agreed that the decree against him should not be executed. An agreement not to execute a decree does not vary its terms, and in the present case the agreement pleaded is not one to which all the parties to the decree are parties but only some of them, as the other defendants are not parties to it."

Taking hold of the latter half of the second sentence in this passage, the learned advocate for the respondent urges that if the agreement had the effect of rendering the decree wholly inexecutable against all the defendants and not merely as against one or some of them, the agreement would hit at the decree itself and not merely bar its execution. We are not satisfied that any such distinction in the principle to be applied was in the mind of the learned Judges at all. We see little difference between a case where the decree is rendered inexecutable against some only of the defendants or against some only of the properties and the case where a decree is rendered inexecutable against all the defendants or all the properties. Our attention was also called to another circumstance, namely, that the decision of the Full Bench in 58 Mad. 994[2] had reference to an agreement between the parties after the institution of the suit and not one as in the present case entered into before suit. Here again we are unable to see any sound principle of distinction and we have the satisfaction of seeing that the same view was adopted in the decision of this Court in 54 Mad. 184[3] by a Bench of two learned Judges Beasley C. J. and Pakenham Walsh J. We are of opinion that the learned Judge erred in declining to permit the agreement to be pleaded. The order of the learned Judge is therefore set aside and the learned District Judge is directed to restore the petition to his file and dispose of it according to law. The appellant is entitled to his costs of the appeal in this Court from the respondent.

C.R.K./G.N. *Order set aside.*

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* A. I. R. (29) 1942 Madras 735

HORWILL J.

In re Alati Appalaswamy and another — *Petitioners.*

Criminal Revn. No. 206 of 1942 (Criminal Revn. Petn. No. 203 of 1942), Decided on 29th July 1942, to revise judgment of Court of Session, Vizagapatam, in C. A. No. 172 of 1941.

* Defence of India Act (1939), S. 2, Rules under, R. 38 (1)—Mill producing war material—President of labour union calling strike not with object of impeding war effort but to remedy grievance regarding dismissal of worker—President must be deemed to have acted with lawful excuse and is guilty of no offence.

Strikes and lockouts, though clumsy and injurious are the only existing means of deciding trade disputes. The calling of a strike is not illegal.

[P 735*h*]

Where the president of a labour union calls a strike and dissuades the workers from going to work in the mill engaged in producing war material, not with the object of impeding the war effort but with the object of remedying the real or supposed grievance of the union with regard to the arbitrary dismissal of a worker by the employer without any inquiry, the president and the union must be deemed to have had a lawful excuse for the strike, when they had no other method of redressing their grievance except by going on strike, though the president knew that as a result of the strike essential war work would be impeded. The president therefore is not guilty of any offence punishable under the rules.

[P 735*h*; P 736*a*]

C. V. Dikshitalu for B. Jagannadha Das — for Petitioners.

K. Venkataraghavachari for Public Prosecutor — for the Crown.

ORDER.—The petitioners are the president and vice-president of the Chittivalasa Labour Union, connected with the Chittivilasa Mills. They have been convicted under R. 35 (4) read with R. 38 (5), Defence of India Rules, and sentenced by the Joint Magistrate of Vizianagaram to nine months' rigorous imprisonment each. In appeal to the Sessions Judge, these convictions were confirmed as well as the sentences. The prejudicial act alleged to have been committed by the petitioners was the bringing about of a strike by the mill workers and thereby impeding the war effort; for the mill in question was turning out sand bags and other articles urgently required by the Government for the prosecution of the war. The petitioners also indulged in picketting, thus dissuading workers from going to work. The reason for the strike was that a woman named Ellamma was dismissed because she struck a botkin or needle of some sort into another worker. The labour union seems to have thought that she ought to have been given two or three warnings before she was dismissed and that she was dismissed without a proper inquiry. These omissions, the union considered, were very objectionable, and if repeated would affect the interests of the whole body of workers. A strike was, therefore, ordered and the workers persuaded not to go to work. The learned Magistrate rightly found that the strike necessarily involved a reduction in the output of the mill; and he thought that as the petitioners were aware of the fact that the mill was doing war work, they were guilty of doing a prejudicial act.

Rule 38(1) says that no person shall without lawful authority or excuse (a) do any prejudicial act. The learned Magistrate and the learned Sessions Judge unfortunately did not further consider whether the petitioners acted without lawful authority or excuse. The simple question that falls for decision here is therefore whether the petitioners had a lawful excuse for calling on this strike. Strikes and lockouts, though clumsy and injurious are the only existing means of deciding trade disputes; and the calling of a strike has not yet been declared to be illegal. If the petitioners had called the strike with the object of impeding the war effort and not merely with the knowledge that it would impede the war effort, they would undoubtedly have been guilty of the offence with which they were charged. There however seems very little doubt that the motive for the calling of a strike was to remedy what the petitioners and others considered to be an

arbitrary exercise of the employers' power of dismissal without a fair inquiry and without giving a reasonable warning to the worker. The evidence indicates that the petitioners even interviewed the Collector of Vizagapatam even before the strike was declared, and asked him to intervene. There can therefore be no doubt from the record that the petitioners were primarily concerned with remedying their real or supposed grievance with regard to the treatment of Ellamma. As the petitioners and their union had no other method of redressing their grievance except by going on strike, it must be held that they had a lawful excuse for the strike, even though the petitioners knew that as a result of the strike essential war work would be impeded. As the petitioners acted with a lawful excuse, they were not guilty of any offence punishable under the Defence of India Rules. The petition is, therefore, allowed, the convictions and sentences are set aside, and the bail bonds of the petitioners cancelled.

C.R.K./G.N. *Petition allowed.*

A. I. R. (29) 1942 Madras 736 (1)

LEACH C. J. AND HAPPELL J.

In re S. S. Pattabirama Ayyar — Petitioner.

Criminal Revn. No. 391 of 1941 (Cri. Revn. Petn. No. 370 of 1941), Decided on 8th October 1941, to revise Judgment of Sub Divisional First Class Magistrate, Gobichettipalayam, in C. C. No. 176 of 1940.

Madras General Sales Tax Act (9 of 1939), Rules under, R. 11—Amendment of rules cannot create offence retrospectively.

By an amendment of the rules in one year an act or omission in the previous year cannot be made an offence. The amendment of the rules cannot create an offence retrospectively. Consequently, when at the time the charge was laid the accused was not required by the Act to make any return, he cannot be punished for omission to file a return because such omission was made an offence by an amendment of R. 11, during the course of the hearing. [P 736*d*]

S. S. Ramachandra Ayyar — for Petitioner.

Advocate General and A. S. Sivakaminathan for Public Prosecutor — for the Crown.

LEACH C. J. — The petitioner was charged in the Court of the Sub-Divisional First Class Magistrate of Gobichettipalayam with failure to submit a return under the Madras General Sales Tax Act and with fraudulently evading payment of tax, offences which were said to fall within S. 15 (a) and (d) of the Act respectively. The Magistrate held that the charge under S. 15 (a) had been proved and fined the petitioner one anna, ordering him in default of payment to undergo simple imprisonment for one day. At the time the charge was laid the petitioner admittedly was not required by the Act to make any return. During the course of the hearing the Provincial Government made an amendment to R. 11, which, if made on 1st April 1940 would have meant that the petitioner would have been liable to make a return. It is manifest that by an amendment of the rules in one year an act or omission in the previous year cannot be made an offence and the learned Advocate General has very properly stated that the conviction of the petitioner cannot be supported. The amendment of the rules could not create an offence retrospectively and the petitioner has been unlawfully convicted. The petition will be allowed and the conviction and sentence set aside. This does not mean that for other purposes the amended rule may not have retrospective effect and the allowing of this petition is entirely without prejudice to the validity of the amendment in other respects.

C.R.K./G.N. *Petition allowed.*

A. I. R. (29) 1942 Madras 736 (2)

LEACH C. J. AND LAKSHMANA RAO J.

S. V. M. Mahomed Jamaluddeen & Bros. Pettah, Colombo — Applicant

v.

Commissioner of Income-tax, Madras — Respondent.

Case Referred No. 16 of 1942, Decided on 28th September 1942.

Income-tax Act (1922 as amended by Act of 1939), S. 4A (b)—Firm carrying on business in Colombo—Branch in British India managed by partner residing there — Firm is liable to be taxed under Act.

Where a firm carrying on business in Colombo opens a branch in British India and the said branch is managed by a partner of the firm residing there, the control and management of the firm cannot be said to be wholly without British India and therefore the firm is liable to be taxed under the Act. The fact that the partnership deed provides for the management of the firm in Colombo is irrelevant as under S. 4A (b) what the Court has to consider is the question whether the firm is controlled and managed wholly outside British India. [P 736*g,h*]

M. Subbaraya Ayyar — for Applicant.

K. V. Sesha Ayyangar — for Respondent.

LEACH C. J.—The Income-tax Appellate Tribunal has referred the following question to this Court :

"Whether on the facts and in the circumstances of this case, the applicant firm was 'resident' in British India under S. 4A (b), Income-tax Act?"

The Tribunal has expressed the opinion that the applicant firm was resident in British India and we have no hesitation in concurring in that opinion. The firm commenced carrying on business in Colombo in 1932. In the year 1937 it opened a branch at Kilakarai in British India. Business was carried on there and it was managed by a partner of the firm, who was resident at Kilakarai. There were four partners, all of whom belonged to Kilakarai. Section 4A (b) says that a firm is resident in British India unless the control and management of its affairs is situated wholly without British India. It has been found as a fact—and the finding is conclusive—that the business in Kilakarai was managed by a partner there. Therefore the control and management of the firm was not wholly without British India. That being the case, the firm is liable to be taxed under the Income-tax Act. Section 4A is a new section and the question here is governed by its terms. Before the Tribunal there was apparently much discussion of cl. (7) of the partnership deed which provides for the management of the firm in Colombo. We do not consider that this clause has any bearing on the question. What the Court has to consider is the question whether the firm was controlled and managed wholly outside British India, and it is obvious that it was not. The question referred will be answered in the affirmative and as the assessee has failed he must pay the costs, Rs. 250.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 737 (1)

BYERS J.

F. P. S. Albuquerque — Appellant

v.

Catholic Bank Ltd. Mangalore by its Secretary, C. V. N. Pais, and others — Respondents.

Second Appeal No. 1173 of 1940, Decided on 29th June 1942, against decree of District Court, South Kanara, in A. S. No. 192 of 1938.

(a) Company—Bank — Article of Association declaring director's office to be ipso facto vacated if he resigned or became incapable of acting as director—Construction—Director's indebtedness to bank held not incapacity within article.

Article 78 (g) of the Articles of Association of the company declared that the office of a director shall ipso facto be vacated "if he resigns, or for any other reason becomes incapable of acting as a director."

Held that Art. 78 (g) contemplated resignation or some incapacity such as illness, long absence, imprisonment, insanity or any other incapacity. Director's indebtedness to the bank could not be said to be incapacity within Art. 78 (g), and therefore was no ground for his removal. Moreover loans to directors of bank were part of its business. [P 737*e*]

(b) Company—Articles of Association — Removal of directors — Directors cannot under procedural article frame rule for removal of directors—Such rule is ultra vires.

A rule for the removal of a director framed by the directors of a company under one of its Articles of Association which is procedural only is ultra vires. When the removal of a director was already provided for in one of the articles which required an extraordinary resolution of the company, the directors must act in accordance with that article and cannot rely upon the rule which is ultra vires in support of the removal of a director. [P 737*d*,*e*]

(c) Companies Act (1913), S. 86D — Loans to directors of bank are part of its business.

The exclusion of the new S. 86D (1) from banking companies under cl. (3) of the same section makes it clear that loans to directors of a bank are contemplated as part of its business. [P 737*e*]

John & Row and R. Rajeswara Rao — for Appellant.

B. Sitarama Rao and S. J. S. Fernandez — for Respondents.

JUDGMENT.—The only questions which arise in this second appeal are whether the resolution of the directors of the defendant bank removing the appellant from the board of directors was ultra vires and, if so, the damages to which he is entitled. The respondents rely on Art. 78 (g) of the Articles of Association, which declares that the office of a director shall ipso facto be vacated "if he resigns, or for any other reason becomes incapable of acting as a director." The ground on which the defendants relied to declare that the appellant had vacated his office was that he had defaulted in repaying a loan taken by him some years previously. The directors had earlier passed a rule that any director defaulting in repayment of a loan taken by him as principal borrower would cease to be a director. This rule, the respondent's learned advocate informs me, was passed under the powers conveyed by Art. 67 of the articles. This is clearly procedural only and gives no power to the directors to frame fresh Articles of Association. The removal of a director was already provided for in Art. 62 of the articles and this required an extraordinary resolution of the bank. This rule was, therefore, ultra vires and cannot be relied on in support of the removal.

Article 78 (g) of the articles contemplates resignation or some incapacity such as illness, long absence, imprisonment, insanity or any other incapacity. It cannot be said that indebtedness would incapacitate him and the learned advocate for the respondents has been unable to cite any authority to show that indebtedness to the bank is incapacity. The exclusion of the new S. 86D (1) from banking companies under cl. (3) of the same section makes it clear that loans to directors of a bank are contemplated as part of its business. I agree with the lower Courts that the removal of the appellant was ultra vires. It follows that he is entitled to damages accordingly and on this point appellant's learned counsel says he will be satisfied with the nominal damages assessed by the lower Court, provided he be given costs. In the result, the suit is decreed for the damages already awarded by the trial Court with costs throughout. The memorandum of cross objections is ordered to be dismissed with costs. Leave is refused.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 737 (2)

KING J.

V. Varadaramanujalu Naidu — Appellant

v.

Kaunanoor Naidu — Respondent.

Appeal No. 241 of 1941, Decided on 21st September 1942, against order of Registrar, Court of Small Causes, Madras, D/- 30th July 1940.

Criminal P. C. (1898), S. 195 — Registrar of Small Cause Court Madras when Court within S. 195 — While taking security under O. 12, cl. (10) Madras High Court Rules of Practice, Registrar does not act as Court within S. 195, Criminal P. C.

For the purposes of the Rules of Practice of the Madras High Court and therefore for the purposes of S. 195, Criminal P. C., also, the Registrar of the Small Cause Court, Madras, can never be deemed to be a Court unless he has been in some way or other specially empowered to be a Judge. The Registrar is a Court only when he is trying suits of the value of Rs. 20 or less under the powers invested under S. 14, Presidency Small Cause Courts Act. When engaged in every other kind of duty the Registrar is not a Court. There is nothing in O. 12 of the Madras High Court Rules of Practice which empowers the Registrar to be a Judge. Consequently, when taking security under O. 12, cl. (10) of the aforesaid rules the Registrar does not act as a Court within S. 195. [P 738*a*,*b*,*c*]

Cr. P. C. —

('41) Chitaley, S. 195, N. 17.

('41) Mitra, Pages 653, 654, N. 622.

V. Rajagopala Mudaliar — for Appellant.

Srinivasaraghavan — for Respondent.

JUDGMENT. — The subject-matter of this appeal is a complaint filed by the Registrar of the Court of Small Causes, Madras, under Ss. 193 and 199, Penal Code, in connexion with a false state-

ment said to have been given by the appellant in an affidavit to the Registrar that a certain house in Madras was his own property. The main point taken in appeal is that the complaint which was filed by the Registrar under the provisions of S. 195, Criminal P. C., is incompetent because the Registrar is not a Court. It seems to me that this objection to the validity of the complaint must be upheld.

Under S. 14, Presidency Small Cause Courts Act, the Provincial Government may invest the Registrar with the powers of a Judge under this Act for the trial of suits in which the amount or value of the subject-matter does not exceed Rs. 20. It is clear from this section that if the Provincial Government has so invested the Registrar with powers, the Registrar when he is trying suits for an amount of Rs. 20 or less is a Court, but it seems necessarily to follow that when engaged on every other kind of duty the Registrar is not a Court. The affidavit in question was filed before the Registrar while he was engaged in taking security from the appellant. The Registrar is empowered to take security in any suit or matter according to O. 12 of the Rules of Practice, cl. (10). It is argued that in carrying out this particular duty the Registrar is acting in a judicial capacity. In one sense of the word that is no doubt true, and it is significant that five particular powers are specified in O. 12 as being non-judicial or quasi-judicial. By contrast therefore the eleven powers which precede these five may well be called judicial powers, but it is not every person who deals in the widest sense of the word "judicially" with any matter, that is to say, applies the same principles of hearing and deciding the matter as a Judge would who can be called a "Court" and O. 1 (a) of the Rules of Practice lays down specifically what throughout the various orders the term "Court" shall mean. "Court" means the Court of the Small Causes, Madras, and includes a Judge, and where he is empowered to exercise the powers of a Judge, the Registrar of the Court. It seems to me very clear that for the purposes of the Rules of Practice and therefore for the purposes of S. 195, Criminal P. C., also, the Registrar can never be deemed to be a Court unless he has been in some way or other specially empowered to be a Judge. There is nothing in O. 12 which specially empowers the Registrar to be a Judge, and the only provision which deals with this matter is S. 14 of the Act, itself to which reference has already been made. It seems to me therefore that it is impossible to hold that when he takes security, and in order to do so incidentally takes from a party an affidavit, the Registrar is acting as a Court. The complaint filed by him under S. 195 has therefore no validity and must be quashed. This appeal is accordingly allowed and the respondent must pay the appellant's costs throughout.

C.R.K./G.N. *Appeal allowed.*

A. I. R. (29) 1942 Madras 738

BYERS J.

In re Siddappa Chettiar — Petitioner.

Civil Revn. Petns. Nos. 840, 841 and 842 of 1942, Decided on 27th July 1942, to revise decree of District Munsif, Dharmapuri, D/- 14th February 1942.

Madras Debt Conciliation Act (11 of 1936), Ss. 10 (2) and 4—Scope of S. 10 (2) — Any debt not included in creditor's statement is discharged under S. 10 (2).

Section 10 (2) is not limited only to debts which have been shown by the debtor in his application under S. 4. The effect of S. 10 (2) is that any debt not included in the creditor's statement is for all purposes deemed to have been discharged.

[P 738 *f*,*g*,*h*]

D. Ramaswami Ayyangar and A. Swaminatha Iyer — for Petitioner.

ORDER. — The facts leading to these revision petitions are that the defendant in Small Cause Suit No. 299 of 1941 on the file of the District Munsif of Dharmapuri filed an application under S. 4, Madras Debt Conciliation Act, in respect of a mortgage debt due to the plaintiff. In due course the plaintiff was called upon to file a statement of his claims under S. 10 (1) of the Act. This he failed to do in spite of notices served upon him and finally the debt was deemed to be discharged under S. 10 (2) of the Act. Subsequently, the plaintiff filed the present suit on a promissory note and the defendant's answer was that all debts due to the creditor had been wiped out under S. 10 (2) of the Act. The learned District Munsif accepted this plea and dismissed the suit. The point which has been raised in revision is that S. 10 (2) of the Act applies only to debts which have been shown by the debtor in his application under S. 4. This is not what the sub-section says. It is in the following words:

"Subject to the provisions of sub-section (3) every debt of which a statement is not submitted to the board in compliance with the provisions of sub-s. (1) shall be deemed for all purposes and all occasions to have been duly discharged."

The meaning of these words is not open to any possible doubt. Under S. 10 (1) if the Board, after examining the debtor, is of the opinion that it is desirable to effect a settlement between the debtor and his creditors, a notice is then issued to each of the creditors and upon each creditor served with the notice the duty then devolves of submitting a statement of all debts owing to him by the debtor. Clearly this statement is not to be limited to the debts given by the debtor himself in his application under S. 4 although there is a burden on him to include in his application particulars of all his debts. When creditors have filed their statements, the conciliation proceeds on the basis of their statements and it is clear from S. 10 (2), that debts which are not included in those statements are outside the scope of the settlement and cannot be sued upon in future. If S. 10 (2) is to be limited to debts mentioned only by the debtor in his application, then there can be no purpose in calling on creditors to file statements of all their claims and it would be open to a debtor to file successive applications for each one of his debts as each of his creditors proceeds against him in execution. I do not think there can be any doubt about the meaning of the plain words in S. 10 (2) of the Act, the effect of which is that any debt not included in the creditor's statement is for all purposes deemed to have been discharged. The order of the Munsif dismissing the suit was therefore correct and Civil Revision Petition No. 840 is dismissed. Civil Revision Petitions Nos. 841 and 842 relate to the learned Munsif's order under S. 10 (3) of the Act. The plaintiff applied subsequently for the revival of his other debts on the ground that there was sufficient cause for his failure to furnish the statement of his claims under S. 10 (1). The learned Munsif found as a fact that he had been served with notice and that there was no sufficient cause for his failure. There is no error of jurisdiction in these proceedings and both the petitions are also dismissed.

C.R.K./G.N. *Petitions dismissed.*

a

A. I. R. (29) 1942 Madras 739

KRISHNASWAMI AYYANGAR AND KUNHI RAMAN JJ.

Sub-Collector, Rajahmundry — *Appellant*

v.

Pillarisetti Parthasarathi Naidu and another — *Respondents.*

Appeal No. 388 of 1940, Decided on 26th June 1942, against award of District Court, East Godawari at Rajahmundry, D/- 25th March 1940.

(a) Land Acquisition Act (1894), Ss. 15 and 4 (1) — Sale deed more than six years prior to notification under S. 4 (1) — Price of sites in locality increasing by reason of fresh amenities — Sale deed cannot furnish basis for fixing market value of land.

A sale deed of neighbouring land more than six years prior to the date of notification under S. 4 (1) cannot furnish proper basis for fixing the market value of the land sought to be acquired especially when the value of the sites in the locality has increased by reason of the springing up of fresh amenities not in existence before. [P 739*f*]

(b) Land Acquisition Act (1894), S. 15 — Property covered by sale deed situated about half mile from site to be acquired—Sale deed is not proper criterion of value.

Where the property covered by a sale deed is situated more than half a mile from the site to be acquired, the sale deed cannot furnish a proper criterion of the value of the land to be acquired. [P 739*h*]

(c) Land Acquisition Act (1894), S. 15 — Capitalization — Net annual value of property should be considered.

For the purpose of capitalization the net annual value and not the gross rental value of the property to be acquired should be taken into account. [P 740*b*]

(d) Land Acquisition Act (1894), S. 15 — Valuation of property to be acquired—No evidence as to number of years pursbase to be adopted — Twenty years' purchase should be adopted.

It is wrong to say that twenty years' purchase is the maximum compensation payable under the Act. The number of years purchase which should be adopted in a given case must vary with individual cases and will have to be decided upon the material placed before the Court. [P 740*a*,*b*]

In the absence of evidence on the point, twenty years' purchase which is the rule of ordinary practice should be adopted as the basis for fixing the market value of the land to be acquired : ('38) 25 A. I. R. 1938 Mad. 33, *Expl. and Rel. on*; ('41) 28 A. I. R. 1941 Mad. 684, *Not approved.* [P 740*b*]

(e) Land Acquisition Act (1894), S. 15 — Market value of land — Ascertainment of — Definite material not forthcoming — Mode of fixing value indicated.

The function of the Court in awarding compensation is to ascertain the market value of the land at the date of the notification under S. 4 (1) of the Act. Where definite material is not forthcoming either in the shape of sales of neighbouring land at or about the date of the notification or otherwise the Court would not be erring on the wrong side if it fixes the market value by capitalizing the net annual income at twenty years' purchase. [P 740*d*, *e*]

Government Pleader — for Appellant.

K. Umamaheswaram — for Respondents.

KRISHNASWAMI AYYANGAR J. — This appeal arises out of certain land acquisition proceedings taken for the purpose of acquiring 648 sq. ft. in Town Survey No. 1625/1-A in Ward No. 4, Block 39 in the Town of Rajahmundry. The land acquisition officer awarded compensation at the rate of Rs. 4-8-0 per square yard. On a reference under S. 18 of the Act, the District Judge of East Godavari enhanced the compensation by awarding Rs. 26 per square yard. The Government has preferred this appeal and objects to the award of the District Judge on the ground that it is too high. It is contended by the Government pleader that the learned Judge was in error in proceeding to fix the market value with reference to the rent which was received from the property acquired. He has argued that Ex. 2 which is a sale deed of neighbouring property furnishes the true basis for the award of compensation. Exhibit 2 is dated 23rd July 1928 and is a sale of 1000 square yards at Rs. 3 a square yard. In view of the fact that the notification under S. 4 (1) in the present case was issued on 11th December 1934 and the sale deed Ex. 2 was more than six years prior in date, we are of opinion that this document does not furnish proper material for fixing the market value. Moreover, there is the evidence of the second witness for the claimant who has deposed that the value of the sites in the locality has increased by reason of the springing up of fresh amenities not in existence before. He has stated that a large number of houses has sprung up near the site acquired and two cinema halls have also come into existence in the locality and a petrol bunk opposite to it. The learned Government pleader has suggested that the evidence does not make it clear that these amenities came into existence before the notification under S. 4 (1). The learned Judge in the Court below is apparently of the opinion that they did. If it was the case of the Government that they came into existence after the notification the matter must have been cleared by cross-examination directed to the purpose. But no such thing has been done. We are prepared to hold with the District Judge that the springing up of fresh amenities in the neighbourhood has pushed up the value of the suit site and its neighbourhood. Apart from Ex. 2, there is no other sale deed of neighbouring land which has been put forward as furnishing data for arriving at the market value. One other sale deed, Ex. 3, dated 24th July 1928 was filed but admittedly the property covered by it is situated about half a mile away from the suit site and cannot furnish a proper criterion of the value.

The only material placed before the learned Judge in the Court below thus consisted of rental agreements of the acquired site. These are Ex. D series. Exhibit D-2 the earliest of them is dated 22nd August 1931 and was for a period of one year at Rupees 10 per month. On 1st August 1932, another rental agreement, Ex. D-1, came into existence covering a period of two years and the rent fixed was Rs. 13. Exhibit D was the rental agreement in force at the time of the notification and is dated 1st October 1934 and the rent fixed under it was also Rs. 13 per month. The learned Judge was right in his conclusion that Rs. 13 per month should be taken to be the gross rental received from the property. But before capitalising the rental income he

a should have deducted the municipal taxes payable in respect of the property and Ex. C series show that the half-yearly tax was Rs. 10-13-3. Out of a gross annual rent of Rs. 156, Rs. 21-10-6 must therefore be deducted in order to arrive at the net rental annual value. The learned Judge has fixed the valuation by adopting twelve years' purchase whereas the claimant wanted the calculation to be made upon thirty years' purchase. There is no evidence on the record upon which it could be decided that any particular number of years' purchase should be taken as the basis. There was no material for the learned Judge to fix it at twelve years' purchase and the claimant himself did not put forward any material for persuading the Court to accept his basis, namely thirty years' purchase. The learned Judge is apparently of the opinion that twenty years' purchase is the maximum compensation payable. b In this he is wrong. The number of years purchase which should be adopted in a given case must vary with individual cases and will have to be decided upon the material placed before the Court. As we have already pointed out, the learned Judge also fell into an error in taking the gross rental value for purposes of capitalisation instead of the net annual value. In the absence of evidence on the point, we think that twenty years' purchase should be adopted as the basis for fixing the market value. This is ordinarily adopted as the basis and we see no reason to depart from the rule of ordinary practice. Our attention has been drawn to two decisions of this Court, the first of which is reported in I. L. R. (1938) Mad. 431[1] and followed in the second of the cases cited, namely (1941) 2 M. L. J. 75.[2] The first of these cases deals with the compensation c awardable in respect of the melvaram right of a zamindar on zamindari property. The second of the cases has reference to a site with a building thereon in the town of Calicut. It extends the principle of the decision in I. L. R. (1938) Mad. 431.[1] The learned Judges make the following statement :

"It is clearly laid down in the case already cited that it has long been the practice of the Courts in this Presidency to calculate the profits from any form of landed property as equal to the profits made by investing money in guilt-edged securities."

We are unable to discover in the judgment in the case referred to any statement of law to this effect. On the other hand, Venkatasubba Rao J. has expressly stated that there is no uniform or rigid practice in regard to the number of years purchase and cites three cases in support of the statement, 11 C. W. N. 875;[3] 16 Mad. 369[4] and 10 Cal. 769.[5] d After all the function of the Court in awarding compensation is to ascertain the market value of the land at the date of the notification under S. 4 (1). Where definite material is not forthcoming either in the shape of sales of neighbouring land at or about the date of the notification or otherwise, the Court can only proceed to do the best, it can under the circumstances. In the present case we think we shall not be erring on the wrong side if we say that e the market value should be fixed by capitalising the net annual income at twenty years' purchase. We accordingly hold that the respondents should have been given compensation at the said rate. In the result the appeal fails and the cross-objections are allowed to the extent of the difference between the amount awarded by the District Judge and the amount to be calculated on the basis mentioned above. On this basis it is agreed between the parties that the respondent will be entitled to Rs. 3090 in all including the fifteen per cent. compensation. The amount awarded by the lower Court is varied by substituting for it the figure Rs. 3090. The respondent will also be entitled to the interest on the excess from the date of the taking up of possession by the Government to the date of payment. The appeal will be dismissed with costs but the appellant will pay only half the costs of the respondent f in the memorandum of cross-objections which is partially allowed as mentioned above.

C.R.K./G.N. *Appeal dismissed.*

1. ('38) 25 A.I.R. 1938 Mad. 33 : 175 I. C. 735 : I. L. R. (1938) Mad. 431 : (1937) 2 M. L. J. 744, Collector of Kistna v. Zamindar of Challapalli.
2. ('41) 28 A.I.R. 1941 Mad. 684 : 197 I. C. 402 : (1941) 2 M. L. J. 75, Land Acquisition Officer, Calicut v. Subbarao.
3. ('07) 11 C. W. N. 875, Harishchunder Neogi v. Secretary of State.
4. ('93) 16 Mad. 369 : 20 I. A. 80 (P.C.), Secretary of State v. Shunmugharaya Mudaliar.
5. ('84) 10 Cal. 769, Secretary of State v. Sham Bahadur.

A. I. R. (29) 1942 Madras 740

HORWILL J.

In re Kota Appalakonda and others Petitioners.

Criminal Revn. Case No. 398 of 1942, (Criminal Revn. Petn. No. 386 of 1942), Decided on 31st August 1942, to revise order of Joint Magistrate, Narasapatam, D/- 26th June 1942.

Criminal P. C. (1898), S. 496—Bailable offence —Condition not to enter disputed land is not authorized. g

Where a person is charged with bailable offences only, the Magistrate has no discretion in granting bail and hence the imposing of a condition, e.g., not to enter on the disputed land, in a bail order leads to the infringement of the provisions of S. 496 in case the condition be not fulfilled. Such is not one authorized by law. [P 741a]

Cr. P. C. —

('41) Chitaley, S. 499, N. 2a Pt. 1.
('41) Mitra, Page 1632, N. 1316a.

E. Venkatesan — for Petitioners.

K. Venkataraghavachariar for Public Prosecutor — for the Crown.

ORDER. — The petitioners were charge-sheeted by the police under Ss. 147, 148, 447, 324 and 323, Penal Code. They applied for bail and the Magis- h trate granted bail under S. 496 subject to a condition in these words "accused will be released on a bond of Rs. 250 with two sureties for like sums and on condition that they will not enter on the disputed land till disposal of the case."

The question that arises in this petition is whether this condition is one permissible by law. With regard to non-bailable offences, I can see no objection to imposing conditions of this kind; for the Magistrate has an option to grant bail or to refuse bail and he has also the power under S. 497 (5), Criminal P. C., of causing persons so released to be arrested and committed to custody, which subsection he would apply in case the condition was not fulfilled. But all the offences with which the petitioners were charged are bailable offences, with regard to which a Magistrate has no discretion. He must release the accused on bail provided that he is willing to execute bonds for his appearance. If he imposes an extraneous condition such as the Sub-

divisional Magistrate has in this case done, then it would mean that if the condition were not fulfilled he would have to refuse bail; and that he is not permitted to do under S. 496, Criminal P. C., if bonds are furnished for the accused's appearance. So the imposing of a condition of this kind in a bail order leads to the infringement of the provisions of S. 496, Criminal P. C., in case the condition was not fulfilled. As the order of the Magistrate is not one authorized by law, it is modified by deleting the condition that the accused should not enter the disputed land till the disposal of the case.

C.R.K./R.K. *Order accordingly.*

A. I. R. (29) 1942 Madras 741

WADSWORTH J.

Sri Kallalagar Devasthanam, Madura through its trustee, K. N. Radhakrishna Ayyar — Appellant

v.

M. Baskaram Pillai and another — Respondents.

Appeal No. 190 of 1939, Decided on 10th September 1941, against order of Dist. Court, Madura, D/- 30th January 1939.

(a) Madras Agriculturists Relief Act (4 of 1938), S. 23—Applicability.

Section 23 applies to sales under any decree of Court and therefore to sales in execution of decrees under the Madras Estates Land Act: ('41) 28 A.I.R. 1941 Mad. 500, *Foll.* [P 741*e*]

(b) Second appeal—Competency—Lower appellate Court entertaining incompetent appeal and modifying trial Court's order — Second appeal lies.

When a lower appellate Court entertains an appeal which is not competent and modifies the decision of the trial Court, a second appeal will lie: ('18) 5 A. I. R. 1918 Cal. 435; 13 All. 575 and ('30) 17 A.I.R. 1930 Pat. 280, *Rel. on.* [P 741*f*]

C. P. C. —

('40) Chitaley, Ss. 100 and 101 N. 15 Pts. 1, 2.

('41) Mulla, Page 369 Pt. (p).

(c) Second appeal—Whether dismissal of incompetent appeal gives rise to second appeal *(Quære).*

Whether a second appeal lies where the lower appellate Court entertains an incompetent appeal and dismisses it. [P 741*f*]

(d) Second appeal — Lower appellate Court wrongly entertaining appeal and dismissing it on merits — High Court in second appeal can only set aside incompetent appellate order — Interference with trial Court's order can be only in revision.

Where the District Judge wrongly entertains an appeal and dismieses that appeal on the merits, the only order which can properly be passed in second appeal would be to set aside the incompetent appellate order. There would be no apparent justification for the second appellate Court for going into the merits of the trial Court's order, which is unaffected by the incompetent appellate decision. Should the High Court, when hearing a second appeal against an incompetent appellate order come to the conclusion that the trial Court's order is wrong on the merits, in a proper case the High Court will interfere in revision with the order of the trial Court. But in second appeal the only thing which it can properly do is to set aside the incompetent appellate order. [P 741*h* ; P 742*a*]

C. P. C. —

('40) Chitaley, S. 115 N. 16 Pts. 4, 5.

('41) Mulla, Page 426 Pt. (l).

K. V. Srinivasa Iyer — for Appellant.

R. Venkataraman and S. Viswanathan — for Respondents.

JUDGMENT. — This appeal arises out of an application under S. 23 of Madras Act 4 of 1938. The sale in question was in execution of a decree under the Madras Estates Land Act, and the principal contention of the appellant in the trial Court was that S. 23 does not apply to sales under the Estates Land Act. That question has been settled in (1941) 1 M. L. J. 156,[1] and it must now be held that S. 23 applies to sales under any decree of Court. Before going into the merits of the appellant's case, it has to be decided whether this Court can, on this appeal, go into the question of the correctness of the trial Court's order. The trial Court's order was taken up in appeal to the District Judge. The District Judge, without considering the competence of the appeal, dismissed the appeal on the merits and it is argued that this decision gives rise to a right of second appeal. It is well established that when a lower appellate Court entertains an appeal which is not competent and modifies the decision of the trial Court, a second appeal will lie : *see* 45 Cal. 926,[2] 13 All. 575[3] and 9 Pat. 685.[4] But it is doubtful whether such a second appeal will lie when the lower appellate Court has dismissed the appeal preferred to it. Certainly if the lower appellate Court dismissed the appeal as incompetent, there is no apparent reason for entertaining a second appeal against that decision. It is argued that if the lower appellate Court wrongly entertains the appeal and dismisses the appeal on the merits, the decision would give rise to a right of second appeal just as if the lower appellate Court had interfered with the trial Court's order.

Some authority for this proposition is found in a decision of Walsh J. in A. I. R. 1933 Mad. 475[5] which quotes the words in 9 Pat. 685,[4] to the effect that a second appeal will lie whatever be the nature of the order passed by the lower appellate Court. But the Patna case was dealing with a contention that there would be no second appeal if the lower appellate Court has merely remanded the case. It was not dealing with a case in which the lower appellate Court has dismissed the appeal. Whatever be the correct view on the question—whether the dismissal of an incompetent appeal will give rise to a right of second appeal, it seems to me that the question is largely academic ; for if the District Judge wrongly entertained an appeal and dismissed that appeal on the merits, the only order which can properly be passed in second appeal would be to set aside the incompetent appellate order. There is no apparent justification for going into the merits of

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1. ('41) 28 A.I.R. 1941 Mad. 500 : 199 I. C. 591 : (1941) 1 M.L.J. 156, Venkataratnam v. Suryarao.
2. ('18) 5 A. I. R. 1918 Cal. 435 : 43 I. C. 758 : 45 Cal. 926 : 27 C. L. J. 115, Bandiram Mukerjee v. Purna Chandra Roy.
3. ('91) 13 All. 575 : 1891 A. W. N. 158, Jwala Prasad v. Salik Ram.
4. ('30) 17 A. I. R. 1930 Pat. 280 : 122 I. C. 589 : 9 Pat. 685 : 11 P. L. T. 156, Ram Ratan Prasad v. Benarsilal.
5. ('33) 20 A. I. R. 1933 Mad. 475 : 147 I. C. 494, Nachimuthu Chettiar v. Ramakkal.

a the trial Court's order, which is unaffected by the incompetent appellate decision. Should this Court, when hearing a second appeal against an incompetent appellate order come to the conclusion that the trial Court's order is wrong on the merits, in a proper case this Court will no doubt interfere in revision with the order of the trial Court. But in second appeal the only thing which this Court can properly do is to set aside the incompetent appellate order. On the facts of the present case, it does not appear that there are any grounds upon which the revisional jurisdiction of this Court can be invoked against an order of the trial Court. In this view I dismiss the appeal with costs.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 742 (1)

b PATANJALI SASTRI J.

Govindaswami Achari and others — *Appellants*

v.

Kandaswami Achari and others — *Respondents.*

Second Appeal No. 1080 of 1941, Decided on 30th July 1942, against decree of Subordinate Judge, Trichinopoly, in A. S. No. 240 of 1940.

Negotiable Instruments Act (1881), S. 50 — Pronote — Endorsee for collection is merely agent of endorser—If endorser could have sued other persons on debt, endorsee also can do so.

According to S. 50 an endorsement which itself purports to assign a pronote expressly for the pur-
c pose of collection of the amount due on the note, has the effect merely of constituting the endorsee an agent of the payee, and the endorser can himself sue on the note without getting it re-endorsed in his favour. Consequently, if the endorser could have sued other persons on the debt there is no reason why the endorsee for collection should be restricted only to the remedy on the note: 5 I.C. 435 (Mad.), *Rel. on*; ('39) 26 A.I.R. 1939 Mad. 846, *Expl.* [P 742e,f]

A. V. Narayanaswami Iyer — for Appellants.

K. S. Desikan and K. R. Raman — for Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by the appellants for recovery of the principal and interest due on a promissory note executed by one Govinda Achari respondent 3 herein who is now dead, in favour of the mother of appel-
d lants 2 to 4. These appellants obtained a succession certificate in respect of the suit debt and endorsed the promissory note to their husband appellant 1 herein for collection of the amount due thereunder. Appellant 1 thereupon brought the suit and appellants 2 to 4 were subsequently joined as co-plaintiffs therein.

The trial Court passed a decree against the deceased respondent 3 personally and against the family properties in the hands of his sons respondents 1 and 2; but the lower appellate Court purporting to follow the decision of this Court in 1939 M. W. N. 774[1] reversed the decree against respondents 1 and 2 and dismissed the suit as against them, holding that the suit having been brought by appellant 1 as endorsee of the note he was not entitled to ask for relief against any other persons on the basis of the debt evidenced by the note, the e endorsee having obtained no other right under the endorsement apart from the property in the note. This proposition is no doubt correct in the case of an ordinary endorsee and the decision referred to above was with reference to a suit by such an endorsee on the endorsed note. No doubt in the course of the judgment the learned Judges observed that the plaintiff admitted in his plaint that the endorsement had been made only for collection but they take care to point out that the endorsement was of the ordinary kind and their decision proceeded on that basis. The case has therefore no application here as the endorsement itself purports to assign the note expressly for the purpose of collection of the amount due on the note. Such an endorsement, according to S. 50, Negotiable Instruments Act, has the effect merely of constituting the endorsee an agent of the payee, and if the latter could have sued f other persons on the debt there is no reason why the endorsee for collection should be restricted only to the remedy on the note. The decision in 7 M.L.T. 271[2] shows that an endorsee for collection is in no higher position than an agent and that the endorser can himself sue on the note without getting it re-endorsed in his favour. I hold therefore that respondents 1 and 2 can be properly made liable in the suit as on the debt and that the decree of the lower appellate Court exonerating them was wrongly passed. The appeal is accordingly allowed and the decree of the trial Court is restored with costs here and in the Court below. Leave refused.

C.R.K./G.N. *Appeal allowed.*

1. ('39) 26 A.I.R. 1939 Mad. 846 : 186 I. C. 327 : (1939) 2 M. L. J. 531 : 1939 M. W. N. 774, Vira Raghavalu Naidu v. Chinna Rajalingam.

2. ('10) 7 M. L. T. 271 : 5 I. C. 435, Ponnayya v. Palaniappa Chetti.

g

A. I. R. (29) 1942 Madras 742 (2)

BYERS J.

Syed Muhammad Ghouse Sahib Suthari — *Petitioner*

v.

Syed Muhammad Ghouse Sahib, trustee and Manager of Sha Rahamatullah Mosque, Shamayapuram — *Respondent.*

Civil Revn. Petn. No. 579 of 1941, Decided on 7th July 1942, to revise order of Deputy Collector, Musiri, D/- 26th February 1941.

Madras Estates Land Act (1 of 1908), S. 3 (5) h —Order under S. 3 (5)—No revision lies under S. 115, Civil P. C.

The Deputy Collector acting under S. 3 (5) is not a Court subordinate to the High Court within the meaning of S. 115, Civil P. C. Hence, no revision lies to the High Court under S. 115, Civil P. C., from the Deputy Collector's order under S. 3 (5).

[P 743b]

C. P. C. —

('40) Chitaley, S. 115, N. 6 Pt. 22.

('41) Mulla, Page 416 Pts. (d), (e).

A. Ramaswami Iyer — for Petitioner.

K. S. Sankara Ayyar — for Respondent.

ORDER. — The petitioner seeks to revise under S. 115, Civil P. C., an order by the Deputy Collector of the Musiri division under Section 3 (5), Madras Estates Land Act. The respondent has a preliminary objection that revision does not lie, because the Deputy Collector exercising his functions under

S. 3 (5), Madras Estates Land Act, is not a Court subordinate to the High Court. It is pointed out that the duty of the Deputy Collector is only to recognize or nominate one or other of the disputants as the landholder, an expression defined in the first half of the sub-section. Such recognition or nomination is only provisional and could be contested in the ordinary civil Courts. In fact, S. 3 (5) expressly states that the Deputy Collector's order is subject to any decree or order of a competent civil Court. The section makes no provision for any judicial enquiry and the use of the words "recognize or nominate" indicates that the proceedings are purely of an executive or administrative character, involving nothing more than the insertion in the revenue registers of the name of a person to whom the Collector looks for the payment of revenue and whom he recognizes, subject to the civil Courts proceedings, as the person entitled to collect the rents. I find that the Deputy Collector acting under S. 3 (5), Madras Estates Land Act, is not a Court subordinate to the High Court within the meaning of S. 115, Civil P. C. The petition is accordingly dismissed with costs.

C.R.K./G.N. *Petition dismissed.*

A. I. R. (29) 1942 Madras 743

BELL J.

Rajkumar Visweswara Gajapathi Raj, minor represented by mother Rani Pushpathi Vidyavati Devi and another — Plaintiffs

v.

Mirza Raja Sri Pushavati Viziaram Gajapathi Raj Manne Sultan Bahadur Garu minor Rajah of Vizianagaram, represented by Court of Wards, Chepauk, Triplicane, Madras and others — Respondents.

C. S. No. 24 of 1940, Decided on 30th June 1942.

Hindu law — Impartible estate — Holder — Position of — Person succeeding to ancestral impartible estate and also receiving legacy of monies due by estate — No merger takes place — Legacy is not extinguished.

In Madras, since the passing of the Impartible Estates Act of 1904, the holder of an impartible estate is in the same position as the manager of a joint Hindu family; he is an owner subject to limitations; he is a qualified and not an absolute owner. Therefore where a person succeeds to an ancestral impartible estate and also receives a legacy consisting of monies and outstandings due by that estate, no merger takes place and the legacy is not extinguished as the person succeeding has a dual capacity. In one he owed money to the legatee, in the other he was the legatee to whom money was owed. There can therefore be no merger, and the debt is not extinguished : ('22) 9 A. I. R. 1922 P. C. 94, *Ref.* [P 744*a*]

Advocate-General, N. Rajagopala Iyengar and M. Seshachalapathi — for Plaintiffs.

T. R. Venkatarama Sastri, S. Venkatesa Iyengar and V. K. Thiruvenkatachari — for Respondents.

JUDGMENT. — In this case the question is whether, where a person succeeds to an ancestral impartible estate and also receives a legacy consisting of monies and outstandings due by that estate, merger takes place and the legacy is extinguished. The facts may be stated shortly as follows. One Chitti Babu Vijiaram Raju, one time Raja of Vijianagaram, executed a trust deed on 28th October 1912 whereby he vested property in trustees to hold for himself for life with remainder over to his elder son Alakh Narayana Gajapathi Raja, for him to hold it as an ancestral impartible estate descending according to the law of primogeniture. He had another son named Vijia Ananda Raja. On 11th September 1922 the father died and on 2nd October 1922 the son, Alakh Narayana Gajapathi Raja, entered upon the ancestral estate and the trust came to an end. An aunt of Chitti Babu Vijiaram Raju, the Maharani of Rewa, had made a will on 14th December 1911 whereby she gave a life estate in her property to Vijiaram Raju with the remainder over in favour of Alakh Narayana Gajapathi Raja and Vijia Ananda Raja, the former being entitled to two-thirds and the latter to one-third. She died on 14th December 1912, so that on the same day, upon the death of his father, Alakh Narayana Gajapathi Raja received two properties, (a) the ancestral estate and (b) the legacy. The legacy, the principal property left by the Maharani of Rewa was a sum of about 32 lakhs of rupees which was owed to her by the impartible estate of Vijianagaram. During the lifetime of Vijiaram Raja he received the interest due upon these monies and on his death the new Raja received it too. There are accounts showing that payments were made to him and that all along he treated the debt as subsisting and as being owed by the estate of which he was the holder to himself as legatee under the Maharani of Rewa's will. After some years had passed, no doubt after receiving some advice, in order to make the position quite plain he gave a promissory note as zamindar, that is as owner of the impartible estate, to himself as leatee under the will. That is Ex. P13. Various other documents are exhibited showing entries which are consistent with this attitude. An administration report on the estate made to the Court of Wards dated 18th January 1937 refers in terms to an "inside debt of 21 lakhs due to the present Raja under the Maharani's will." It is now contended, or it was contended and the present suit is the result, that as the zamindar and the legatee were one and the same person, the debt was extinguished the moment the estate and the legacy passed into the same hands; that is to say, that a merger takes place. Now in 48 I.A. 485[1] at p. 491 it is said that:

"Merger is not a thing which occurs ipso jure upon the acquisition of what, for the sake of a just generalisation, may be called the superior with the inferior right. There may be many reasons—conveyancing reasons, reasons arising out of the object of the acquisition of the one right being merely for a temporary purpose, family reasons and others—in the course of which the expediency of avoiding the coalescence of interest and preserving the separation of title may be apparent. In short, the question to be settled in the application of the doctrine is, was such a coalescence of right meant to be accomplished as to extinguish that separation of title which the records contain?"

Had it been possible to apply the doctrine of merger here, I would have held that the separation had been made clear by the conduct of the Raja by the entries in the books of account and by the terms

1. ('22) 9 A. I. R. 1922 P. C. 94 : 66 I. C. 551 : 48 I. A. 485 (P. C.), Dulhin Lacchanbati Kumari v. Bodh Nath Tivari.

of the report to the Court of Wards. But I think the merger could not in any event take place because I think the Raja had one status as zamindar, that is as owner of the impartible estate, and another as recipient of the legacy. He was absolute owner of the legacy. He was not, in my opinion, absolute owner of the impartible estate. Whatever may be the case in other parts of India, in Madras, since the passing of the Impartible Estates Act of 1904, the holder of an impartible estate is in the same position as the manager of a joint Hindu family, he is an owner subject to limitations; he is a qualified and not an absolute owner. Therefore the Raja had a dual capacity. In one he owed money to the legatee, in the other he was the legatee to whom money was owed. There was therefore no merger, and the debt was not extinguished. The plaintiffs succeed in the claim and there will be a decree in the terms of the prayer. Costs of the suit will be paid by defendant 1 out of the estate and there will be no order as to costs with regard to defendants 2 and 3. I certify for two counsel for plaintiff 1.

C.R.K./G.N. *Suit decreed.*

A. I. R. (29) 1942 Madras 744

KRISHNASWAMI AYYANGAR J.

In re Gunda Narasimham — Appellant.

S. R. No. 34266 of 1941, Decided on 3rd July 1942, against decree of Sub-Judge, Guntur, in A. S. No. 11 of 1938.

Court-fees Act (1870), S. 17—Suit for possession on basis of sale deed and in alternative for recovery of consideration money — Suit valued at Rs. 955 — Same value placed on alternative relief — Alternative reliefs held did not constitute two distinct subject-matters within S. 17— Single court-fee based on valuation of Rs. 955 held sufficient for both reliefs.

The plaintiff purchased the property in suit under a sale deed executed in his favour by the defendant pursuant to a previous written agreement between the parties. The defendant having sold the same property to another person subsequently, the plaintiff founding himself on the earlier agreement and the sale deed in his favour instituted a suit for possession of the property sold to him and in the alternative for the recovery of the consideration money paid by him. He valued the suit at Rs. 955 made up of Rs. 925 representing the value of the property, and Rs. 30 the mesne profits claimed and paid court-fee on that amount. The same figure of Rs. 955 was the value of the alternative relief and it was made up of Rs. 925 the amount of the consideration for the sale deed, and Rs. 30 the incidental expenses :

Held that the alternative reliefs based on the same cause of action did not constitute two distinct subject-matters within S. 17 and therefore a single court-fee based on a valuation of Rs. 955 was sufficient for both the reliefs: ('38) 25 A.I.R. 1938 Mad. 241 and 30 Mad. 61, *Rel. on.* [P 744 *f*, *h*]

V. Rangachari — for Appellant.

Government Pleader — for the Crown.

ORDER. — The matter relates to a question of court-fee. The plaintiff who is the appellant purchased the property in suit under a sale deed in his favour dated 26th June 1936. The seller was defendant 1 and he is respondent 1 here ; and the sale deed was executed pursuant to a written agreement between the parties dated 22nd June 1936. On the next day, namely 23rd June 1936, defendant 1 along with certain others entered into a similar written agreement with respondents 5 and 6 to sell the same land to them. This agreement also was followed by a regular sale deed dated 30th June 1936. The appellant founding himself on the earlier agreement and the sale deed in his favour instituted the suit out of which this second appeal has arisen for possession of the property sold to him and in the alternative for the recovery of the consideration money paid by him. He valued the suit at Rs. 955 made up of Rs. 925 representing the value of the property, and Rs. 30 the mesne profits claimed and paid court-fee on that amount. The same figure of Rs. 955 is the value of the alternative relief and it is made up of Rs. 925 the amount of the consideration for the sale deed, and Rs. 30 the incidental expenses. He failed in the first Court and in the appeal which he preferred he paid the same court-fee. Having again failed, he has preferred the present second appeal.

The question is whether his claim embraces two distinct subjects within the meaning of section 17, Court-fees Act. It is perfectly plain that he is seeking in the first instance to obtain a single relief by way of possession with which he will be completely satisfied. But if for some reason or other, the Court is unable to give him this relief, he prays in the alternative for the return of the consideration amount paid by him. It appears to me that the question of what is the proper court-fee in such a case is really governed by the principle of the decision reported in 1938-1 M. L. J. 139.[1] In that case as in the present there was only one cause of action, on which two reliefs were claimed. A settlement deed had been executed for a consideration of Rs. 22,000. The first relief was for setting aside the deed of settlement. The second and alternative relief was for the recovery of the consideration on the footing that though the deed might be good, the consideration money had not been paid. In other words, one of the reliefs was claimed on the footing of the validity of the deed and the other on the footing of its invalidity. The Court held that a single court-fee based on a valuation of Rs. 22,000 would be sufficient for both the reliefs, as they did not constitute two distinct subject-matters. An earlier decision by a Bench of this Court in 30 Mad. 61[2] was also referred to. At page 64 the following observations occur :

"The phrase 'two or more distinct subjects' in S. 17 may not admit of precise definition applicable to all cases, and it may be that where reliefs are claimed in the alternative with reference to the same cause of action, S. 17 would not govern the case."

Although the decision in the particular case was that the alternative claims were distinct matters within the meaning of S. 17 it was due to different considerations from those present in this case. I am clearly of opinion that the present case does not fall under S. 17 and one single court-fee based on the value of the second appeal at Rs. 955 is all that can be levied in the present case.

C.R.K./G.N. *Order accordingly.*

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1. ('38) 25 A. I. R. 1938 Mad. 241 : 174 I. C. 983 : 1938-1 M. L. J. 139, Rangaswami Reddiar v. Venkataperumal Reddiar.
2. ('07) 30 Mad. 61 : 16 M. L. J. 462, Neelakandam v. Ananthakrishna Iyer.

A. I. R. (29) 1942 Madras 745 (1)

KUPPUSWAMI AYYAR J.

Nalliya Goundan — Appellant

v.

Marappa Goundan — Respondent.

Second Appeal No. 1325 of 1941, Decided on 27th July 1942, against decree of Sub-Judge, Trichinopoly, in A. S. No. 309 of 1940.

Provincial Insolvency Act (1920), Ss. 34 and 44 (2) — Liability of insolvent to indemnify his surety is provable under Act — Order of discharge absolves insolvent from that liability.

Though the liability of an insolvent to indemnify his surety is a contingent liability it is a liability which is provable under the Act and consequently under S. 44 (2) an order of discharge absolves the insolvent from that liability also: ('28) 15 A.I.R. 1928 All. 306, *Rel. on* ; ('17) 4 A.I.R. 1917 Mad. 39 (F.B.), *Approved.* [P 745*b*, *d*, *f*]

B. V. Viswanatha Iyer — for Appellant.

L. A. Gopalakrishna Iyer — for Respondent.

JUDGMENT.—The only question for consideration in this appeal is whether the order of discharge obtained by the respondent in the proceedings in insolvency in which he was adjudged an insolvent discharged him from the liability in respect of which he has been sued in the suit from which this appeal arises. The appellant and the respondent and another executed a promissory note for Rs. 600 to a bank. The bank obtained a decree and a portion of the debt was recovered. The respondent was later adjudged an insolvent and he subsequently obtained an order of discharge. The bank assigned the decree to a third person to whom the appellant had to pay money. This was after the order of discharge was passed. It is not disputed that so far as the amount paid by the appellant is concerned, it is an amount payable by the respondent and therefore recoverable by the appellant as money paid by him as surety for the respondent. The respondent's contention was that this liability which was incurred prior to the insolvency was extinguished by the order of discharge granted in the insolvency proceedings. Under S. 44 (2), Provincial Insolvency Act, "Save as otherwise provided by sub-s. (1) an order of discharge shall release the insolvent from all debts provable under this Act." Debt provable under the Act is defined in S. 34 (2) which runs thus: "Save as provided by sub-s. (1) all debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under this Act."

The question for consideration is whether this liability of the respondent to indemnify the plaintiff as his surety is a liability which was provable under the Act or not. That a surety like the appellant is a creditor for the purpose of insolvency is pointed out in 40 Mad. 783.[1] But it is urged that that was a case of fraudulent preference and that he was considered to be a creditor within the meaning of that expression in that particular section relating to fraudulent preference. It cannot be said that he is a person to whom any provable debt was due in respect of which he could have obtained a dividend as no liability arose till he actually paid the amount to the original creditor. In 50 All. 606[2] their Lordships had to consider this very same question and it was held by that Court on the interpretation of the language of S. 34, Provincial Insolvency Act, that though this was a contingent liability it was a liability which is defined as being provable under the Act and consequently under S. 44 (2) an order of discharge absolved him from this liability also. It is true that under the English law such a surety had only a right to obtain a declaration that the insolvent was bound to discharge that debt. He could not prove the debt in the sense that he could prove it and claim dividend out of the realisations of the estate of the insolvent. Even in India it is so. He could not prove the claim and ask for a dividend being paid to him on the ground that he was a surety for the insolvent. But this is not what we are concerned with. His inability to claim a dividend after proof cannot stand in the way of this liability being one which comes within the purview of S. 34 (2). This is a case of contingent liability. The liability can be enforced only if the surety is made to pay the amount. But the fact that it is contingent and the contingency had not occurred does not make it any the less a liability provable under the Act. In these circumstances I do not see any reason to differ from the finding of the Allahabad High Court in the ruling in 50 All 606.[2] In the result, the second appeal fails and is dismissed with costs. Leave to appeal is refused.

C.R.K/G.N. *Appeal dismissed.*

1. ('17) 4 A.I.R. 1917 Mad. 39 : 38 I. C. 783 : 40 Mad. 783 : 32 M. L. J. 253 (F.B.), Rodrigues v. Ramaswami Chettiar.

2. ('28) 15 A.I.R. 1928 All. 306 : 109 I. C. 421 : 50 All. 606 : 26 A. L. J. 425, Gangadhar v. Kanhai.

A. I. R. (29) 1942 Madras 745 (2)

HORWILL J.

In re V. Chengiah Chetty — Petitioner.

Criminal Revn. No. 307 of 1942 (Criminal Revn. Petn. No. 299 of 1942), Decided on 11th August 1942, to revise the judgment of Court of Sub-Divisional First Class Magistrate, Ranipet, in C. A. No. 11 of 1942.

Madras Local Boards Act (14 of 1920, as amended by Act 11 of 1930), Ss. 227A and 208(3) —Panchayat Board superseded by Special Officer—Ex-president refusing to hand over to Special Officer records of Panchayat — Sanction of Local Government under S. 227A is not necessary for prosecution of ex-president.

Where the Panchayat Board is superseded by the Government and a Special Officer is appointed to conduct its affairs and the ex-president of the Panchayat refuses to hand over to the Special Officer certain records belonging to the Panchayat on being required to do so by the latter, the sanction of the Local Government under S. 227A is not necessary for the prosecution of the ex-president under Section 208 (3) inasmuch as the ex-president cannot be said to be the president or member of the local board at the time the offence was committed nor can he be said to have acted or purported to act in the discharge of his official duty because he had no official duty at that time : ('40) 27 A. I. R. 1940 Mad. 649 and ('39) 26 A. I. R. 1939 Mad. 598, *Disting.* [P 746*b*]

D. S. Veeraraghava Iyer — for Petitioner.

A. S. Sivakaminathan for Public Prosecutor — for the Crown.

ORDER. — The petitioner was the president of the Panchayat Board, Anwardikanpet, Arkonam Taluk, which board was superseded by the Government. The Special Officer appointed to conduct the affairs of the Panchayat demanded from the petitioner certain records belonging to the Panchayat. The allegation is that the petitioner refused to hand over the records asked for. The petitioner was therefore charged and convicted under S. 208 (3), Local Boards Act. In appeal, his conviction and sentence were affirmed.

The point on which this revision petition was admitted was whether the sanction of the Local Government for the prosecution was necessary. The section that requires the sanction of the Local Government before certain cases can be instituted against a member or President of a Local Board is S. 227A, Madras Local Boards Act, which says that when the President or any member of a Local Board is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Provincial Government. There are two reasons why this section does not apply. In the first place, the petitioner was neither the President nor a member of the Local Board at the time the offence was committed, because the Panchayat had been already superseded. Secondly, he could not have acted or purported to act in the discharge of his official duty because he had no official duty at that time. Since the petitioner possessed certain records as ex-President of the Panchayat the Special Officer of the Panchayat had a right to demand these documents from him, and he could have had no excuse for not giving them up. 51 M. L. W. 552[1] and (1939) 1 M. L. J. 830,[2] relied on by the petitioner, deal with a rather nice point of law that does not arise in this petition. There is no other point in this petition worth considering. The sentence of Rs. 100 fine was certainly not unfitted to the offence. The petition is dismissed.

C.R.K./G.N. *Petition dismissed.*

1. ('40) 27 A.I.R. 1940 Mad. 649 : (1940) 1 M.L.J. 760 : 51 M. L. W. 552, In re Natesa Padayachi.
2. ('39) 26 A. I. R. 1939 Mad. 598 : 183 I. C. 743 : 40 Cr. L. J. 833 : (1939) 1 M. L. J. 830, Subbayya v. Venkata Narasayya.

A. I. R. (29) 1942 Madras 746

WADSWORTH AND PATANJALI SASTRI JJ.

Sri Rajah Vyricherla Narayana Gajapati Raja Bahadur Varu — Appellant

v.

Takuru Narasimhulu — Respondent.

Appeal No. 565 of 1940, Decided on 10th February 1942, against order of Sub-Judge, Chicacole, D/- 26th August 1940.

Madras Agriculturists Relief Act (4 of 1938), Ss. 19 and 15—Decree passed for contractual rent which alone could be claimed when Court dealt with matter—Amendment of S. 3 (2) (d), Madras Estates Land Act, by Act 18 of 1936 cannot change character of rent or relations of parties at time of previous adjudication—Decree can be scaled down only as decree for debt and not rent—Mode of scaling down decree indicated.

The amendment of S. 3 (2) (d), Madras Estates Land Act, by Act 18 of 1936 which enlarged the scope of the definition of "estate" in S. 3 (2) (d) cannot govern completed judicial proceedings and divest vested rights. Where a decree had already been passed (on 18th March 1936) for a contractual rent (rent or damages for use and occupation of land) which alone could be claimed at the time when the Court dealt with the matter, the amendment of S. 3 (2) (d) by Act 18 of 1936 cannot have the effect of changing the character of the rent or the relations of the parties as they stood at the time of the previous adjudication by treating the decreeholder as a landholder of an estate under the Estates Land Act and the rent decreed in the previous suit as rent due to him as such landholder, even though he did not sue as a landholder of an estate and got his decree on the basis of an ordinary contract. The decree therefore can be scaled down only as a decree for a debt and not as a decree for rent. [Mode of scaling down-decree indicated]: ('38) 25 A. I. R. 1938 Mad. 339, *Expl.* [P 746*h*; P 747*b*,*c*]

K. Umamaheswaram — for Appellant.

P. V. Rajamannar and K. Subba Rao — for Respondent.

WADSWORTH J.—The appellant obtained a decree on 18th March 1936 for what is described in his plaint as rent or damages for use and occupation—the period covered by these arrears being from 15th December 1932 to 15th October 1935. He also got a decree for land cess in respect of the same lands for the period from 30th June 1931 to 30th June 1935. At the time when he obtained this decree in the ordinary civil Court no question was raised as to the jurisdiction of the Court. When Act 4 of 1938 came into force the judgment-debtor filed an application under Ss. 8, 15 and 19 of that Act praying the Court to scale down the amount due under the decree. He did not make any deposit of rent for faslis 1346 and 1347 as contemplated in S. 15 and the District Munsif dismissed the petition for want of such deposit. In appeal the learned Subordinate Judge held that the rent which was decreed was not rent as defined by Act 4 of 1938 and that the decree had to be scaled down, therefore, as a decree for a debt.

It is contended in appeal before us that this decision is wrong, mainly because it was held by a Bench of this Court in 1938-1 M. L. J. 206[1] that the enlargement of the definition of "estate" in S. 3 (2) (d), Madras Estates Land Act, as amended by the Act of 1936 should be taken to be declaratory and as having a retrospective effect. The argument is that the appellant should be deemed to have been a landholder of an estate under the Estates Land Act and the rent decreed in the previous suit should be deemed to have been rent due to him as such landholder, even though he did not sue as a landholder of an estate and got his decree on the basis of an ordinary contract. The whole of this argument depends upon the assumption that in the case just cited it was laid down as a general proposition of universal application that all estates newly brought under the Madras Estates Land Act by the amendment of 1936 must be deemed to have been estates under that Act for all purposes in the past and that the retrospective declaration of the nature of these estates must govern even completed judicial proceedings and divest vested rights. It does not appear to us that any such decision can be spelt out of the case cited. The learned Judges who heard that case were dealing with Letters Patent

1. ('38) 25 A. I. R. 1938 Mad. 339: 177 I. C. 652: (1938) 1 M. L. J. 206, Kondappa Naidu v. Mahalakshmamma.

Appeals, which had a long antecedent history, the main question at issue being whether the suits in question were suits over which the revenue Court or the civil Court had jurisdiction. While the Letters Patent Appeals were pending, Madras Act 8 of 1934 came into force and under S. 127 of that Act a stay was obtained. The effect of S. 13 of Act 18 of 1936 was to provide that all proceedings stayed under S. 127 of the 1934 Act were to be disposed of, as if the amended Act for 1936 had been in force at the original institution of the proceedings. This plain statutory provision clearly governed the case and it was necessary to treat this long pending litigation as if the amended Act of 1936 had been applicable to it at its inception. It was merely to repel an argument advanced against the plain meaning of the Statute that the learned Judges had occasion to observe that the Act was declaratory and retrospective, the observation clearly having reference to the effect of S. 13 of Act 18 of 1936. We see no reason to extend this observation to facts which were not in contemplation of the learned Judges or to hold, when there are vested rights under contracts which were lawful at the time when they were made and have formed the subject of adjudications before there was any question of subsequent litigation applying to them, that this subsequent litigation will have the effect of destroying those rights or of making the adjudications into something which they were not. Clearly, in the present case, the decree was passed for an ordinary contractual rent which alone could be claimed at the time when the Court dealt with the matter. We see no reason to hold that the effect of the amendment of 1936 to the Madras Estates Land Act will be to change the character of that rent or the relations of the parties as they stood at the time of the previous adjudication. It follows therefore that the lower Court was right in holding that this decree could be scaled down as a decree for a debt.

In two minor matters modification seems necessary. Since S. 15 has no application, there seems no reason to apply S. 16 either, S. 16 being merely a rider to S. 15. The decree for land cess will therefore have to be scaled down as any other decree for a debt and to the extent to which the arrears were due before 1st October 1932, the interest thereon outstanding as on 1st October 1937 will be liable to be cancelled and subsequent interest will have to be at the decree rate. To the extent to which the arrears accrued due after 1st October 1932 the interest on land cess will have to be reduced to five per cent. under S. 9 up to 22nd March 1938 and thereafter the decree rate will prevail. The decree for costs must also be treated as a debt incurred on the date of the decree and interest on costs will run under S. 9 at five per cent upto 22nd March 1938 and thereafter at the decree rate. Subject to these modifications the appeal is dismissed with costs.

C.R.K./G.N. *Order accordingly.*

A. I. R. (29) 1942 Madras 747

SOMAYYA J.

Madavarvilagam Sri Vaithinatha Swami Devasthanam Srivilluputhur, through its executive officer, Subramaniam — Appellant

v.

V. Anantharama Ayyar — Respondent.

Second Appeal No. 972 of 1939, Decided on 7th November 1941, against decree of District Court, Ramnad at Madura, in A. S. No. 129 of 1936.

Madras Estates Land Act (1 of 1908), S. 30— Single crop land — Ryot raising second crop with land-holder's water — Land-holder is entitled to additional charge and can recover it as rent in revenue Court — Second crops raised with aid of well dug by ryot — Landlord is not entitled to additional rent in absence of contract to that effect.

In the case of lands registered as single crop lands the ryot is bound to pay an additional charge if he raises a second crop with the aid of the land-holder's water. The additional charge would be rent whether it is called water cess or by any other name and the land-holder can sue to recover it as rent in revenue Courts: ('40) 27 A. I. R. 1940 Mad. 455, *Rel. on.* [P 747*h*]

If the second crops were raised with the aid of wells dug by the ryot, the landlord cannot claim an additional charge as rent in the absence of a contract between the land-holder and the ryot entered into before the date of the Madras Estates Land Act under which the ryot undertook to pay additional rent even if the crops were raised with the aid of wells dug by the ryot at his own expense: ('19) 6 A. I. R. 1919 Mad. 397 (F. B.), *Rel. on.* [P 748*a*,*b*]

R. Desikan — for Appellant.

V. Ramaswami Iyer — for Respondent.

JUDGMENT. — The landholder, who was the defendant in the trial Court, is the appellant in this second appeal. When he attempted to bring the ryot's holding to sale under the provisions of S. 111, Madras Estates Land Act, the ryot brought the suit for a declaration that the amount which is sought to be recovered for the non-payment of which the sale was attempted, is not legally due from him. What we are now concerned with is the claim made by the land-holder in regard to the second crop raised on his holding by the plaintiff—the ryot. The allegation of the land-holder was that the water with which the second crop was raised was the water of the tank belonging to himself. He also alleged that even if the second crop was raised with water from wells dug by the ryots themselves, he is nevertheless entitled to charge for the second crop. The lower Court held that during the fasli in question the ryot did not use the land-holder's water and that the second crop was raised with the aid of well constructed by the ryots. On this finding both the Courts held that the land-holder is not entitled to any additional rent or charge in respect of the second crop. The defendant appeals.

If the lands are registered as single crop lands as they are in this case, the ryot is bound to pay an additional charge if he raises a second crop with the aid of the land-holder's water. If he does so, the land-holder is entitled to an additional charge, whether you call it water-rate or additional rent. In such cases, it is usual to find stipulations that if a second crop is raised with the aid of the land-holder's water, half the rate which is fixed for the first crop should be paid, and that is the rate which is claimed in this case and such a charge would be rent whether it is called water cess or by any other name: *see* I. L. R. (1940) Mad. 745.[1] There the ryot took water for the second crop from the land-holder's tank without his permission. It was held that the landholder is entitled to recover additional

1. ('40) 27 A. I. R. 1940 Mad. 455 : 191 I. C. 34 : I. L. R. (1940) Mad. 745 : 1940-1 M. L. J. 160, Madura Kallalagar Devastanam v. N. Subbiah Ambalam.

charge as rent in the revenue Court. A case where the ryot takes the land-holder's water with his consent would be an a fortiori case. If in this case in any year the ryot takes the water of the landholder and raises a second crop with the aid of that water, then the landholder is entitled to levy an additional charge and sue for the recovery of it as rent in revenue Courts. If the second crop is raised with the aid of wells constructed by the tenants themselves, as held by this Court in 42 Mad. 475,[2] if there was a contract between the land-holder and the ryot entered into before the date of the Madras Estates Land Act under which the ryot undertook to pay additional rent even if the crops were raised with the aid of wells dug by the ryot at his own expense, such a contract would be valid and binding on the ryot. In this case a contract which would come within the principle laid down in this decision was not alleged. It is now too late to ask for a remand for an investigation whether there was such a contract or not. If in any case such a contract is proved, then the land-holder will have the benefit of the decision in the above case. The second appeal is accordingly dismissed with costs.

C.R.K./G.N. *Appeal dismissed.*

2. ('19) 6 A. I. R. 1919 Mad. 397 : 50 I. C. 616: 42 Mad. 475 : 36 M. L. J. 320 (F. B.), Periakaruppa Mukundan v. Raja Rajeswara Sethupati.

A. I. R. (29) 1942 Madras 748

ABDUR RAHMAN J.

Matte Atchutarama Rao — Appellant

v.

Solasa Bapanayya, Trustee Vijjapu Kamakshamma Charities, Rajahmundry and others — Respondents.

Second Appeal No. 654 of 1940, Decided on 2nd April 1942, against decree of Dist. Court, East Godavari at Rajahmundry, in A. S. No. 98 of 1938.

(a) Civil P. C. (1908), Ss. 92 and 73—Scheme decree under S. 92—Provision in, whether executable — Test—Direction in scheme decree in regard to realisation of trust properties including certain amount as belonging to trust held not money decree and not executable.

The provisions of a decree in a scheme suit would be inexecutable if they formed a part and parcel of the permanent scheme of administration and were not "intended to be given effect to independent of the constitution framed by and embodied in the decree" even if they happened to be directory in their nature. They would be executable even if they happened "to stray into the wording of the scheme if they were intended to be immediately executable for the purpose of introducing the scheme or otherwise". The true distinction is, not whether a provision in a scheme decree is directory or declaratory, but whether the provision sought to be executed, is or is not in what is really the scheme part of the decree: *Case law relied on.* [P 750*c*,*d*]

A decree for money directs payment of money by the defendants to the plaintiff and therefore in considering the question whether the provision in a scheme decree amounts to a money decree the distinction whether the direction in the decree was being given against a trustee or against a stranger to the trust who had to be impleaded because his presence was necessary to a final adjudication of the question relating to the existence of the trust or to the nature of the property should not be lost sight of : ('24) 11 A. I. R. 1924 Mad. 369, *Approved*; ('27) 14 A. I. R. 1927 Mad. 416, *Not approved.* [P 750*f*,*g*]

In a suit under S. 92 for the removal of the trustee and for the settlement of a scheme the trustee died pending the suit and his legal representatives were brought on the record. The Court appointed a new trustee and framed a scheme. The decree mentioned a certain amount as belonging to the trust and directed the trustee to realise the trust property. The relevant clause in the decree was "that the trustee do realise the trust properties and administer the same as per scheme hereto appended" while the material clause of the scheme ran as follows : "All the trust properties either cash or moveables shall vest in the trustee for the time being and he shall take possession of the same through Court if necessary in execution of this decree and manage the same on behalf of the public":

Held that the decree was not a decree for payment of money as there was nothing in the decree which empowered the decree-holder to realise the money from the deceased trustee's legal representatives. Nor could the decree be said to be executable as the direction in the decree in regard to the realisation of the trust properties formed part of the actual scheme of management and could not be said to have erroneously strayed into the scheme as the realisation of the trust properties on which the whole scheme depended was an essential part of the same. [P 750*f*; P 751*a*,*b*]

C. P. C. —

('40) Chitaley, S. 92, N. 92 Pt. 5.

('41) Mulla, Page 334, Note "Clause (g): "Setting a scheme".

(b) Civil P. C. (1908), S. 47—Executing Court can go into contention that recital in decree was not enough to make it executable.

The executing Court can go into the contention that the recital embodied in the decree was not enough to make it executable. There can be no question of the Court being called upon to go behind a specific recital in the decree. [P 749*h*; P 750*e*]

C. P. C.—

('40) Chitaley, S. 47, N. 33 Pt. 2.

('41) Mulla, Page 179, Note "Question relating to execution, discharge or satisfaction".

(c) Civil P. C. (1908), Ss. 47 and 11 — Objection to executability of decree — Objector not party to order passed by Court's predecessor deciding objection — Court cannot refuse to go into question on ground of predecessor's order.

The executing Court would not be justified in refusing to go into the question of the executability of a decree on the ground that that question was decided by an order of his predecessor when the objector before the executing Court was not a party to the order passed by the predecessor. [P 750*a*,*e*]

C. P. C. —

('40) Chitaley, S. 11 N. 23 Pt. 33.

('41) Mulla, Page 89 Pt. (w).

(d) Practice — Pleadings — Second appeal—Plaintiff need not state reasons in support of his contention in plaint—Point that decree was not for payment of money and was not executable raised throughout—Contention that there is no reference to defendant in decree and therefore decree is not money decree is not new and can be raised in second appeal.

The pleadings cannot be argumentative and it is not necessary for the plaintiff to state the grounds or reasons in support of his contention in his plaint.

a When the point that the decree was not a money decree and was not executable was raised throughout, the contention that there is no reference to defendant in the decree and therefore the decree is not a money decree cannot be said to be a new one and therefore can be raised in second appeal. [P 750*g*,*h*]

C. P. C. —

('40) Chitaley, Ss. 100 & 101, N. 55; O. 6 R. 2, N. 7 Pt. 1.

('41) Mulla, Page 374 Note "New case in second appeal"; Page 574 Pt. (e).

(e) Civil P. C. (1908), O. 41, R. 33 and S. 73 —Suit under S. 73 (2), for refund — Other creditors also impleaded as defendants—Suit dismissed — Appellate Court while decreeing suit cannot pass decrees in favour of defendant
b creditors when limitation for suit by them under S. 73 (2) had expired.

Where a suit for refund under S. 73 (2) to which the other creditors who had applied for rateable distribution were impleaded as defendants was dismissed by the lower Court, the appellate Court while allowing the plaintiff's appeal and decreeing his suit cannot pass a decree in favour of the defendant creditors when the period of limitation for a suit by them under S. 73 (2) has expired as it would affect a vested right which has come into existence by virtue of the law of limitation. The remedy of the defendant creditors was by way of suit under S. 73 (2) if they felt aggrieved by the order of the executing Court. [P 751*f*]

C. P. C. —

('40) Chitaley, S. 73, N. 18; O. 41, R. 33, N. 1.

c ('41) Mulla, Page 297 Note "Sub-s. (2): "Suit for refund;" Page 1200 Note "Cases to which this rule does not apply."

K. S. Champagesa Ayyangar and P. Veeraraghavulu — for Appellant.

M. S. Ramchandra Rao, P. Somasundaram, M. Krishna Rao, M. V. Nagaramayya, V. Suryanarayana, P. V. Rajamannar and K. Subba Rao, King and Partridge — for Respondents.

JUDGMENT.—This appeal arises out of a suit under S. 73 (2), Civil P. C., for refund of certain assets paid to defendant 1 on his application for rateable distribution. The facts which led to the present suit are that one Vijjappu Kamakshamma executed a will on 16th September 1918 bequeathing her stridhanam properties of the value of Rs. 20,000
d for the establishment of a public watershed and a public choultry for feeding people and appointed her brother Nalam Subramanyam as an executor and a trustee for carrying out her directions contained in the will. On the allegation that Nalam Subramaniam had failed to carry out the directions in his sister's will after her death, a suit O. S. No. 8 of 1932 under S. 92, Civil P. C., was instituted in the Court of the District Judge of East Godavari at Rajahmundry for Nalam Subramaniam's removal from the trusteeship and for a settlement of a scheme. Nalam Subramaniam died before filing a written statement and his son and widow were brought on record as his legal representatives. A decree (Ex. B) was eventually passed against these representatives on 11th February under which a scheme was framed by the Court and the present defendant 1 (who had applied for and succeeded in getting rateable distribution) was appointed as a sole trustee for the management of the trust. The following provisions of the decree are important:

e (1) that the suit trust be managed by a single trustee as per terms of the scheme hereto appended;

(3) that the trust property do consist of Rupees 29,886-6-9 as on this date and that it do carry further interest at six per cent. per annum.

(4) that the trustee do realise the trust properties and administer the same as per the scheme hereto appended;

(5) that defendants 2 and 3 do pay the plaintiffs Rs. 604 as and for their costs in the suit and do bear their costs in the suit being Rs. 201; and

(6) that defendants 2 and 3 do deliver the utensils and articles as per list below to the trustee within two months from this date and in default do pay Rs. 157-14-3 their value to the trustee.

The only clause which is of any consequence in the scheme framed by the Court and attached to the decree reads as follows:

f "4. All the trust properties either cash or moveables shall vest in the trustee for the time being and he shall take possession of the same through Court if necessary in execution of this decree and manage the same on behalf of the public."

Not being satisfied with the decree, Ex. B, that was passed on 11th February 1933, the trustee appointed under that decree brought a suit O. S. No. 57 of 1934 in the same Court for a declaration that he had a right to recover the money decreed in O. S. No. 8 of 1932 from out of the assets of the late Nalam Subramaniam in the hands of defendant 1 and that the trust had a charge over the properties of the deceased Subramaniam generally and over the properties A to E mentioned in the schedule attached to the plaint in particular. The important clauses of the decree (Ex. A) passed in that suit on 15th September 1936 are:

g "(1) That the plaintiff be and hereby is entitled to recover from the assets of the late Nalam Subramaniam in the hands of defendant 1 the money decreed in O. S. No. 8 of 1932 on the file of this Court.

(2) That a charge for the recovery of the money decreed in cl. (1) supra be, and the same hereby is, created over all the properties proved to have been acquired by the late Nalam Subramaniam after 11th June 1924.

(3) That the question which of the properties have been acquired by the late Nalam Subramaniam after 11th June 1924 be determined by the executing Court in execution proceedings."

The other clauses in the decree only provided for costs and need not be reproduced. In the meantime, three decrees were obtained against the estate of h Nalam Subramaniam. The appellant obtained a a decree for Rs. 70,000 and odd in O. S. No. 79 of 1931. A decree in O. S. No. 19 of 1933 was obtained by defendant 3 and defendants 7 to 10 had secured a decree in O. S. No. 23 of 1933. The decrees in these two suits were being executed in the Court of the District Judge of East Godavari and Subramaniam's assets were expected to be received by the executing Court in these executions. This led a number of creditors including defendant 1 and the appellant to make applications for rateable distribution. They were allowed although the executing Court was of opinion that in view of the decision in 59 Mad. 751[1] the decree passed in O. S. No. 8 of 1932 on the basis of which defendant 1 had made his application was inexecutable. But holding that

1. ('36) 23 A. I. R. 1936 Mad. 581 : 165 I. C. 820 : 59 Mad. 751 : 71 M. L. J. 87, Bava C. Vaithilinga Mudaliar v. Sri Thyagarajaswami Devastanam, Tiruvarur.

it was not possible for the Court to go behind the decree and in view of an order passed by his predecessor which had held the decree to be executable, the learned District Judge allowed defendant 1's application for the grant of rateable distribution. The plaintiff, i. e., the decree-holder in O. S. No. 79 of 1931, not being satisfied with the order, brought the suit out of which the present appeal arises, for a sum of Rs. 2886-9-10 to which he alleged he was entitled in excess of what he had already got by way of rateable distribution. To this suit, the other decree-holders who had received their shares in the rateable distribution (defendants 3 to 16) were also impleaded. It was contended on behalf of the plaintiff that defendant 1 was not entitled to rateable distribution, (a) as the decree in O. S. No. 8 of 1932 was not a decree for money and was not executable; and (b) that even if that decree could be regarded to be one for the payment of money, it ceased to bear that character after defendant 1 had succeeded in getting a charge declared in O. S. No. 57 of 1934. These allegations were controverted on behalf of defendant 1. The lower Courts came to the decision that the decree in O. S. No. 8 of 1932 was a decree for the payment of money and defendant 1 was entitled to rateable distribution. The suit having been thus dismissed by both the Courts, the plaintiff has preferred this second appeal.

From what has been stated, it would be obvious that two main questions have to be determined in this appeal. They are, (a) whether the decree passed in O. S. No. 8 of 1932 was one for payment of money and executable, and (b) if so, what was the effect of the decree passed in O. S. No. 57 of 1934. It has been held in a number of decisions, 47 Mad. 139;[2] 49 Mad. 580;[3] 1933 M. W. N. 183;[4] 59 Mad. 751;[1] 45 M. L. W. 230[5] and 1937-2 M. L. J. 887[6] to most of which Venkatasubba Rao J. was a party, that the provisions of a decree in a scheme suit would be inexecutable if they formed a part and parcel of the permanent scheme of administration and were not "intended to be given effect to independent of the constitution framed by and embodied in the decree" even if they happened to be directory in their nature. At the same time it was pointed out that they would be executable even if they happened "to stray into the wording of the scheme if they were intended to be immediately executable for the purpose of introducing the scheme or otherwise." The distinction has been very clearly brought out in 59 Mad. 751[1] where Venkatasubba Rao J. observed as follows:

"The true distinction is, not whether a provision in a scheme decree is directory or declaratory, but whether the provision sought to be executed, is or is not in what is really the scheme part of the decree."

I have therefore to see whether the provision in the decree which has been held by the lower Courts to be executable does or does not form "the scheme part of the decree." I cannot get rid of the decisions which have been cited before me in the way in which the learned District Judge seems to have got over the decision in 59 Mad. 751[1] in execution proceedings. The present plaintiff was no party to the order passed by his predecessor and there was no question of the Court being called upon to go "behind a specific recital in the decree" when the contention advanced before him, as admitted by the learned District Judge in his order of 26th January 1937, was that the recital embodied in the decree was not enough to make it executable. The very first thing that strikes the eye in reading Ex. B is that although there is a definite direction in clause 4, "that the trustee do realize the trust properties" there is nothing in that provision which entitles the trustee to realize the properties from the defendants. Clause 4 of the decree may be, in that respect, compared with clauses 5 and 6 where defendants 2 and 3 were ordered to pay the costs or to deliver the utensils to the plaintiffs or to the trustee. As observed by Venkatasubba Rao J. in 47 Mad. 139[2] at page 146:

"In a suit for money the decree directs payment of it by the defendant to the plaintiff."

But there is nothing in this decree which empowers the decree-holder to realize the money from Nalam Subramaniam's heirs. The omission appears to have been deliberate and not accidental. Nalam Subramaniam died during the pendency of that suit and even if defendants 2 and 3 (his minor son and widow) were added as legal representatives of the deceased trustee, they could not be held to be trustees themselves and were really strangers to the trust. One must not, in considering these cases, fail to notice the distinction (which Odgers J. failed to draw in 52 M.L.J. 182[7] at p. 184 between a trustee who was ordered to render an account in the Allahabad case and any other defendant who was not a trustee) whether the direction in the decree was being given against a trustee or against a stranger to the trust, who had to be impleaded because his presence was necessary for a final adjudication of the question relating to the existence of the trust or to the nature of the property. Learned counsel for the respondents complained to me that the contention as to the omission of any reference to the defendants from clause 4 of the decree was a new one and should not be allowed to be raised at this stage. I do not agree as the point that the decree was not for the payment of money and was inexecutable has been specifically raised throughout. The pleadings could not have been argumentative and it was not necessary for the plaintiff to state the grounds or reasons in support of that contention in his plaint. When I expressed my opinion on that objection, he suggested that I might look through the judgment on which the decree (Ex. B) was based and requested me not to pronounce my judgment until he had been able to get a copy of the same from his clients. As no objection was raised to this course by the other side, I agreed to do so. A copy of the judgment was produced in Court on Friday last and I have looked into it. But on going through the same, I do not find that the judgment in any way helps the respondents. The portion of the judgment on which clause 4 of the decree is based is identical in terms with what is found in the decree. No decree was passed against defendants 2 and 3 in spite of

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2. ('24) 11 A. I. R. 1924 Mad. 369 : 75 I. C. 189 : 47 Mad. 139, Ranganatha Thathachariar v. Krishnaswami Thathachariar.
3. ('26) 13 A. I. R. 1926 Mad. 559 : 95 I. C. 720 : 49 Mad. 580, Abdul Hakim v. Mohamed Burrammuddin.
4. ('33) 1933 M. W. N. 183, Vedantam Ramacharyulu v. Kasturi Narasimha Suryanarayana.
5. ('37) 24 A. I. R. 1937 Mad. 826 : 168 I. C. 715 : 45 M. L. W. 230, Krishnaswami v. Vedantam Seetharamanujacharyulu.
6. ('38) 25 A. I. R. 1938 Mad. 256 : 174 I. C. 934 : 1937-2 M. L. J. 887, Ramanathan Chettiar v. The Madura Sri Meenakshi Sundareswar Devasthanam.
7. ('27) 14 A.I.R. 1927 Mad. 416 : 100 I.C. 841 : 52 M. L. J. 182, Balakrishna Chettiar v. Krishnamurthi Iyer.

the fact that they were found to be in possession of the assets and accounts belonging to Subramaniam.

I have thus to see whether in view of the legal position that has been stated in the various cases to which reference has already been made, this direction in regard to the realisation of the trust properties was one forming part of the scheme of management or was independent of the same. That it does form part of the actual scheme (*vide* para. 4 of the same) admits of no doubt. But it may be that that direction has, in the words of Reilly J. erroneously strayed into the scheme and this is what is being contended by Mr. Ramchandra Rao. He would want me to take out the words "he shall take possession of the same through Court if necessary in execution of this decree" from para. 4 of the scheme and attach them to clause 4 of the decree. This cannot be done as in my opinion the realisation of the trust properties on which the whole scheme depended was an essential part of the same and could not be taken out of it. The words in clause 4 of the decree (Ex. B) are words vesting the property of the trust in the trustee appointed under clause 2 of the decree and cannot be construed so as to be directory. The vesting of the trust property in the trustee cannot but be regarded to form "a part and parcel of the permanent scheme of administration" and cannot be found to have strayed into the wordings of the scheme erroneously. It is only in pursuance of the scheme and in accordance with the vesting order passed by the Court and embodied in the decree that the trustee can be said to have been entitled to recover it for and with the object of carrying out the object of the trust. To say that the realisation of the trust property, on which the foundation of the scheme rests was outside its pale and could not be said to relate to the permanent arrangements or permanent scheme of administration as remarked by the learned District Judge is incorrect in my opinion. Moreover, the decree was not really for the payment of money by the defendants. I must therefore hold that the decree Ex. B was not for the payment of money and was not executable. The application therefore for rateable distribution under S. 73 (2) was not competent.

As to the second question. Defendant 1 was not content with the decree passed by the District Judge in the scheme suit. It was in all probability realised that the decree was not passed against the defendants and could not therefore be executed against them. That is how clause 1 in the decree, Ex. A, can be explained. If the decree amount was realisable from the assets of the late Nalam Subramaniam in the hands of defendant 1, the first provision in the decree, Ex. A, would have been useless. It was also realised that in view of Nalam Subramaniam having died with a large number of debts, the trust may not be able to satisfy itself, at any rate fully, from out of his property if it did not get a charge declared in its favour. That is why a separate suit was brought for that purpose. The second provision in the decree creates "a charge for the recovery of the money decreed in clause 1 supra" "over all the properties proved to have been acquired by the late Nalam Subramaniam after 11th June 1924." But, in view of my decision on the first question that the decree in O. S. No. 8 of 1932 was not for money and was inexecutable, it is unnecessary for me to decide as to the effect of the decree in O. S. No. 57 of 1934. That question would have arisen for consideration if the first contention advanced on behalf of the plaintiff would have been decided against him. For the above reasons, the appeal must be accepted, the order of dismissal of the suit by both the Courts set aside and a decree for Rs. 2886-9-10 and interest at 6 per cent. per annum from the date of the suit upto the date of its realisation passed in favour of the plaintiff against defendant 1. The plaintiff will have his costs throughout from out of the estate vesting in defendant 1.

A verbal application was made at the hearing on behalf of the other creditors who were impleaded in this case as parties and who did not choose to bring a suit under S. 73, Civil P. C., praying for a decree to be passed in their favour also if I came to the conclusion that the judgments of the lower Courts were incorrect and could not be sustained. Reference was made in this connexion to the very wide powers conferred on a Court of appeal under O. 41, R. 33, Civil P. C. But they cannot possibly help the other defendants in this case. If they were dissatisfied with the decision of the executing Court passed in January 1937, they should have instituted a suit against defendant 1 within the period of limitation prescribed for such suits. They failed so to do. It is impossible to grant a relief to them in this case as it would affect a vested right which has come into existence by virtue of the law of limitation. They should have brought suits themselves if they felt aggrieved by the order of the executing Court. I am dealing in this case with a suit for a specific sum of money brought by a person who had felt aggrieved by that order. And in dealing with an appeal from a decree passed in that suit, it is impossible for me to grant decrees in favour of all the defendants who were hit by the order of the execution Court simply because they were parties to this action and in supporting the plaintiff's claim had asked for decrees for their rateable shares passed in their favour. No court-fee was paid by them in respect of their demands and no appeal or even cross-objections were preferred or filed by them in the lower appellate Court when the plaintiff's suit was dismissed. The fact is that these defendants were merely formal parties to the present action and have continuously regarded themselves to be so. I cannot therefore accede to their prayer. Leave refused.

C.R.K./G.N. *Appeal accepted.*

A. I. R. (29) 1942 Madras 751

LEACH C. J. AND BYERS J.

K. S. Muthuswami Chettiar—Appellant

v.

Ramaswami Samiyar and others —

Respondents.

Letters Patent Appeal No. 6 of 1941, Decided on 5th March 1942, against decree of Wadsworth J., in S. A. No. 59 of 1940, D/- 11th February 1941.

(a) Transfer of Property Act (1882, as amended in 1929), S. 92, third para—Transferee of immovable property paying off mortgage on property —No registered agreement as contemplated by S. 92, third para—Transferee is not entitled to charge on property in respect of amount paid to mortgagee—Nor can he be given charge on equitable grounds for it would defeat object of amendment of 1929.

A transferee of immovable property is not entitled to a charge on it in respect of the amount disbursed by him in paying off a mortgage on the property when he is not entitled to be subrogated to the rights of the mortgagee by reason of the fact that there does not exist a registered agreement of the nature contemplated in the third paragraph of

S. 92. No doubt a person who is entitled to be subrogated to the rights of a mortgagee is in law in a somewhat different position to a person who is merely entitled to a charge under an order of the Court. But this does not mean that the transferee is entitled to ask the Court to give him a charge. The giving of an equitable relief to the transferee in the form of a charge would defeat the very object of the amendment of S. 92 in 1929 and would mean setting the section at naught : ('36) 23 A.I.R. 1936 Mad. 171 (F.B.), *Rel. on*; 33 Mad. 334, *Expl.*; ('39) 26 A.I.R. 1939 Mad. 745, *Approved*. [P 752*c*; P 753*b*,*c*]

T. P. Act —

('36) Mulla, Page 526 Note "Advance to pay off a mortgage."

('34) Mitra, Page 529 N. 518.

(b) Practice—Relief—Equitable relief — Person seeking relief must come with clean hands —Transfer offending against S. 53, T. P. Act—Transferee prime mover in bringing about transaction — Court would refuse to give any relief to transferee.

Equity will not grant relief to a person who comes into Court with unclean hands. Where a transfer of immovable property is found to offend against S. 53, T. P. Act, and the transferee was the prime mover and took prominent part in bringing about the transaction the Court will refuse to give any relief to the transferee : 33 Mad. 334, *Ref.* [P 753*c*,*d*]

T. P. Act —

('36) Mulla, Page 250 Note "Transferee in good faith and for consideration."

('34) Mitra, Page 218 N. 261.

K. Rajah Ayyar and K. S. Ramamurthy — for Appellant.

T. P. Gopalakrishna Iyer, L. K. Sarma and K. Srinivasan — for Respondents.

LEACH C. J.—The question for decision in this appeal is whether a transferee of immovable property is entitled to a charge on it in respect of the amount disbursed by him in paying off a mortgage on the property when he is not entitled to be subrogated to the rights of the mortgagee by reason of the fact that there does not exist a registered agreement of the nature of that contemplated in para. 3 of S. 92, T. P. Act. Paragraph 1 of the section states that any of the persons referred to in S. 91 (other than a mortgagor) and a co-mortgagor shall, on redeeming the property subject to the mortgage, have, as regards redemption, foreclosure or sale, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or another mortgagee. Paragraph 2 says that the right conferred by the section is called the right of subrogation and a person acquiring such right is said to be subrogated to the rights of the mortgagee whose mortgage he redeems. In para. 3 it is provided that a person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee if the mortgagor has, by a registered instrument agreed that he shall be so subrogated. In the present case there is no registered agreement but it is contended by the appellant that this does not prevent the Court from granting him in the exercise of its equitable jurisdiction, a charge over the properties in suit. The argument is that S. 92 only applies in a case of subrogation, which means that the person redeeming the mortgage stands in the shoes of the mortgagee in every respect. A person who is merely entitled to a charge is not in the same position as a mortgagee. In the case of a mortgage there is a transfer of an interest in the property and the contract entered into between the mortgagor and the mortgagee is the governing factor. In the case of a charge no interest is transferred. A person entitled to a charge granted by the Court is confined strictly to the terms imposed by the Court and does not stand in the shoes of the mortgagee.

Before proceeding to discuss the question further, it will be well to set out the facts. On 15th June 1934, the appellant bought the properties in suit from respondent 2 and the father of respondent 3, who were joint. The consideration alleged was Rs. 3500 of which Rs. 2000 was to be paid in the discharge of a mortgage on the properties, Rs. 71-4-0 in cash, and the balance in the discharge of unsecured debts. On 3rd July 1934 the appellant paid the amount due to the mortgagee, but he did not discharge the other debts and did not pay the Rs. 71-4-0. On 23rd April 1934 respondent 1 filed a suit against respondents 2 and 3 to recover the amount claimed by him to be due on a promissory note, and on 23rd December 1935 obtained a decree for Rs. 3300 inclusive of interest and costs. On 23rd November 1936 respondent 1 attached the properties in suit. The appellant objected to the attachment, but his objection was overruled by an order of the Court dated 31st August 1937. On 6th October 1937 the appellant filed the present suit under the provisions O. 21, R. 63, Civil P. C. The defence raised was that the transfer of the properties to the appellant on 15th June 1934 constituted a fraud on the creditors and therefore was void under S. 53, T. P. Act. The Subordinate Judge of Dindigul, in whose Court the suit had been filed, held that the sale did constitute a fraud on the creditors, but declared that the appellant was entitled to a charge on the properties in respect of Rs. 2000 which he had paid to the mortgagee and on this footing he dismissed the suit. On appeal the District Judge of Madura agreed with the Subordinate Judge. Respondent 1 then appealed to this Court, and his appeal was heard by Wadsworth J., who disagreed with the opinion of the Courts below that the appellant was entitled to a charge. The learned Judge held that a person could not obtain a valid charge without there being a registered agreement. In his opinion the section made no difference between a person claiming a charge and a person claiming the right of subrogation. The present appeal is from this decision.

In 59 Mad. 359[1] a Full Bench of this Court held that para. 1 of S. 92, T. P. Act, applies only to a case in which a person who has a pre-existing interest in the property pays off a prior charge for the protection of his own interest and that para. 3 refers to a case in which a person acquires an interest in property only by reason of advancing money to pay off an existing mortgage debt. Admittedly, the appellant had no pre-existing interest in the properties, and consequently para. 3 of the section applies to him. In these circumstances the appellant clearly cannot claim to be subrogated to the rights of the mortgagee whose debt he discharged. Mr. Raja Iyer, on behalf of the appellant, has, however, placed great reliance on the judgment of this Court in 33 Mad. 334[2] where a transfer was set aside on

1. ('36) 23 A. I. R. 1936 Mad. 171 : 160 I. C. 137 : 59 Mad. 359 : 70 M.L.J. 1 (F.B.), Lakshmi Amma v. Sankaranarayana Menon.
2. ('10) 33 Mad. 334 : 5 I. C. 33 : 20 M. L. J. 211, Palamalai Mudaliar v. South Indian Export Co. Ltd.

the ground that it fell within the mischief of S. 53, T. P. Act, but on the condition that the defendant had a charge for Rs. 7500 the amount which he had expended in discharging a mortgage on the property. He says that this decision recognises a difference between a right of subrogation and a right to a charge. The judgment in 33 Mad. 334[2] does not indicate that the learned Judges had in mind the technical distinction between a person who is entitled to a mortgage and a person who is entitled to a charge, a distinction which Mr. Rajah Ayyar has so much emphasized. In 1939-2 M.L.J. 362,[3] Varadachariar J., stated that it was well established law that if a transaction offends against S. 53, T. P. Act, it cannot ordinarily be upheld, even to the extent to which it may be found to be supported by consideration, but an exception has been made in the transferee's favour in cases in which a part of the consideration has been applied in the discharge of pre-existing secured debts and it has been held that the transferee might in such cases be entitled to the benefit of the doctrine of subrogation.

Other cases have been quoted to the Court, in the course of the arguments and it would appear that the expressions "charge" and "subrogation" have been used much in the same sense. We are, however, prepared to accept the proposition that a person who is entitled to be subrogated to the rights of a mortgagee is in law in a somewhat different position to a person who is merely entitled to a charge under an order of the Court. But this does not mean that the appellant is entitled to ask the Court to give him a charge. Since the amendment of the Act in 1929 the Court cannot hold a transferee who has discharged an encumbrance on the property to be subrogated to the rights of the mortgagee unless an agreement in writing has been entered into between him and the transferee and the document has been registered. That being the position, is the Court to defeat the very object of the amendment by giving equitable relief in the form of a charge? Equity follows the law and in my opinion that maxim applies in full force here. To accept the argument which has been presented to the Court would mean setting the section at naught, and this cannot be done. This is sufficient to dispose of the appeal, but there is a further factor. Equity will not grant relief to a person who comes into Court with unclean hands. We are aware that in some cases—the case in 33 Mad. 334[2] is one in point—the Court has granted equitable relief to a person whose hands have not been altogether clean, but this does not mean that the Court is going to grant relief to a person who has been a prime mover in the committal of fraud on another's creditors. The appellant in this case is the maternal uncle of respondent 3 and took a prominent part in bringing this transaction about. Each case must be decided on its own particular facts, but the facts in this case are such that we should not have been prepared to grant relief to the appellant even if his first argument had proved to be acceptable.

The appeal fails and will be dismissed, but we make no order as to costs. The hearing of the appeal commenced on 26th February 1942. As it was not concluded it was adjourned to 2nd March, but at the request of the learned advocate for respondent 1 and for his personal convenience the adjournment was extended until today. When the Court rose on 26th February the learned advocate for the respondent had just commenced his address. When the case was called on today the Court was informed that he was in another Court, but would be free to appear in this Court in ten minutes time. It was his duty to be here when called upon to resume his argument, but, as he was not and the Court has not had his assistance to a material extent his client is not entitled to an order for costs.

C.R.K./G.N. *Appeal dismissed.*

3. ('39) 26 A. I. R. 1939 Mad. 745 : 188 I. C. 283 : 1939-2 M. L. J. 362, Muthuvasu Chettiar v. Velumuruga Nadar.

A. I. R. (29) 1942 Madras 753

HORWILL J.

In re Karathammathintakath Kunhamad — Appellant.

Criminal Appeal No. 330 of 1941, Decided on 18th September 1941, against order of Court of Session, North Malabar Division, D/- 9th April 1941.

(a) Criminal P. C. (1898), Ss. 556, 476 and 476B — Complaint by District Munsif under S. 476—District Judge dismissing appeal holding that there was sufficient material to justify District Munsif in laying complaint — Same case coming before District Judge as Sessions Judge — District Judge is not precluded from dealing with case.

A Court has often to consider twice the same set of facts, and it does not necessarily follow that because it has passed an order on the matter at a prior stage, it is precluded from considering the matter at a later stage. [P 754*e*]

No doubt when the District Judge himself files a complaint under S. 476 he would by reason of S. 556 have no jurisdiction to try the case as a Sessions Judge and no question of prejudice to or effect of consent of the accused would arise at all. The same result would follow where the District Munsif has declined to lay a complaint and the District Judge under S. 476B has ordered the District Munsif to lay the complaint. The maxim *qui facit per alium facit per se* would then apply and even though the District Munsif would have laid the complaint he would have done so as the agent of the District Judge who would then be said to have been a party to the case. [P 754*d*,*e*]

But where the District Judge on appeal from an order of the District Munsif directing the filing of a complaint under S. 476 merely considers that there was sufficient material to justify the District Munsif in laying the complaint and dismisses the appeal, the District Judge cannot be said to have been a party to the proceedings under S. 476 nor can he be said to be personally interested in the case and therefore he is not precluded by S. 556 from trying the case as a Sessions Judge: 24 Mad. 238, *Rel. on*; *Case law discussed.* [P 755*c*,*d*]

Cr. P. C. —

('41) Chitaley, S. 556 N. 5 Pt. 3; N. 20.

('41) Mitra, Page 1793 N. 1429 (4); Page 1796 N. 1431.

(b) Criminal P. C. (1898), Ss. 526, 476 and 476B — Fact that District Judge who heard appeal from order directing complaint to be filed under S. 476 is to try case itself is good ground for transfer of case under S. 526 *(Obiter)*.

The fact that the District Judge who heard the appeal from an order directing the filing of a complaint under S. 476 is to try the case itself as Sessions Judge might cause a reasonable apprehension in the mind of the accused that he might not secure a fair trial and therefore is a good ground for transfer of the case under S. 526 : 1934 M. W. N. 862, *Rel. on*. [P 754*g*]

a Cr. P. C. —
('41) Chitaley, S. 526 N. 5 Pt. 19.
('41) Mitra, Page 1716 N. 1378.

(c) Criminal P. C. (1898), S. 476—Proceedings under — Judgment in civil proceedings how far admissible — Similarity of reasons in criminal Court and in civil Court does not mean that criminal Court was influenced by decision in civil Court.

In proceedings under S. 476 the judgment in civil Court is admissible to show the parties to the proceedings, the points raised, and the decisions thereon. The reasons given are of course irrelevant. When the arguments in the S. 476 proceedings and in the civil suit were necessarily much the same as in the criminal trial, one would expect a similarity in the reasons given in the criminal Court and in the civil Court, but that does not mean that the b criminal Court was influenced by the decisions in the civil Court. Still less does it mean that the criminal Court considered that it was in any way bound by them. [P 755*d*,*e*]

Cr. P. C. —
('41) Chitaley, S. 476 N. 10.
('41) Mitra, Page 1504 N. 1241 : "Is of opinion."

C. K. Viswanatha Iyer — for Appellant.

A. S. Sivakaminathan for Public Prosecutor —for the Crown.

JUDGMENT. — The appellant has been convicted by the Sessions Judge of North Malabar of offences punishable under Ss. 193, 467 read with S. 109 and 471 read with S. 467, Penal Code, and has been sentenced to one year's rigorous imprisonment on each count, the sentences to run concurc rently. P. W. 3 filed two suits for arrears of rent against the accused for the Malayalam year 1114 and for a part of the rent due for the year 1113. The accused then produced Ex. C, which purports to be a receipt for the balance of rent due for the year 1113, and during the course of the trial he paid the rent due for the year 1114. The District Munsif who tried the suits came to the conclusion that Ex. C was a forgery. He therefore issued notice to the accused and inquired into the matter ; and he came to the conclusion for reasons expressed by him that a complaint ought to be laid against the acoused for forgery and other kindred offences. He therefore laid a complaint. His order was carried in appeal under S. 476B, Criminal P. C., to the District Judge, who came to the conclusion that the learned District Munsif was justified in filing a complaint and dismissed the appeal. Now the same d matter has come before the same Judge as the Sessions Judge of North Malabar ; and a preliminary objection has been taken to the legality of the proceedings in the Sessions Court on the ground that the Sessions Judge was precluded by S. 556, Criminal P. C., from trying this case.

If the District Judge had himself filed this complaint, he would have been directly hit by S. 556, Criminal P. C., and he would have had no jurisdiction to try this case. The questions of prejudice to and the effect of the consent of the accused would not have arisen at all, because he would have had no jurisdiction to try the case. The same result would have followed if the District Munsif had declined to lay a complaint and the District Judge, by virtue of the authority given to him by S. 476B, had ordered the District Munsif to lay the complaint. The maxim *qui facit per alium facit per se* would then apply, and even though the District Munsif had laid the complaint, he would have done so as the agent of the District Judge ; and it could then have been said that the District Judge was a party in the case. A very different question arises, e however, when the District Judge merely considers, on appeal from the order of the District Munsif directing the filing of a complaint, whether a prima facie case has been made out and then dismisses the appeal. There, the Judge cannot be said to have been a party to the proceedings ; and so the only question that would arise in such a case would be whether he could be said to be personally interested. It is difficult to see how he could be interested in the result. It was not he who laid the complaint. In a purely judicial capacity he had to consider whether the District Munsif was right in finding that a prima facie case had been made out. A Court has often to consider twice the same set of facts, and it does not necessarily follow that because it has passed an order on the matter at a prior stage, f it is precluded from considering the matter at a later stage. In a revision application, for example, a Judge of the High Court may find that there is no cause for interference with the course of a trial ; but that would not preclude him from hearing an appeal if the case subsequently ended in a conviction and an appeal was preferred. In the same way a Judge often considers the facts of a criminal case in a bail application—either in particular proceedings which are before him or in the proceedings of subordinate Courts which ultimately end in a conviction and come before him in appeal. I find it difficult to believe that the Sessions Judge was in any way biased as a result of his previous deliberations; still less can it be said that he was interested.

A number of cases have been referred to by the learned counsel for the appellant and by the learned public prosecutor; but not one of those discussed g resembles the present case at all closely. Lakshmana Rao J. in 52 M. L. W. 345,[1] set aside an appellate order because the Joint Magistrate who heard the appeal had laid the complaint; but no facts are set out in that judgment and we do not know what were the considerations which led the learned Judge to pass the order. If this matter had come before me in a transfer application, then I would, undoubtedly, have ordered a transfer; because the fact that the Judge who heard the appeal from the order that a complaint should be made was to try the case itself, might cause a reasonable apprehension in the mind of the accused that he might not secure a fair trial. Such a case arose in 1934 M. W. N. 862,[2] when Pandrang Row J. ordered the case to be transferred to some other Sessions Judge. But the very fact that the accused here did h not file an application for transfer in this Court, did not ask the Sessions Judge to apply to this Court to have the matter transferred, and did not even object to the trial by this Judge, shows that the accused had in fact no apprehension that he would not receive justice at the hands of Mr. Sivaramakrishnan. Most of the cases quoted on behalf of the learned Public Prosecutor do not help us very much, because they were cases in which it was quite obvious that the Magistrates were not interested. They were responsible for the general administration of subjects connected with the matter under inquiry; but they had nothing to do with the inquiries in those particular cases. In 24 Mad. 238,[3]

1. ('40) 27 A.I.R.1940 Mad.945: 190 I.C.640: 42Cr. L.J .55: 52 M.L.W. 345, In re Ponnusami Pillai.
2. ('34) 1934 M. W. N. 862, Kottamiddi Ranga Reddi v. Emperor.
3. ('01) 24 Mad. 238, Queen-Empress v. Chenchi Reddi.

however, two learned Judges of this Court held that a Deputy Magistrate, who after considering certain allegations against a person, ordered the Tahsildar to prosecute him on such charges as could be proved in a criminal Court, was not precluded from hearing an appeal against conviction, because he was not personally interested in the matter within the meaning of S. 556, Criminal P. C. In 23 Cal. 328,[4] the Magistrate had initiated some of the police inquiries and played an important part in the investigation, intervening in it at various stages. It was held that he was an interested party and therefore had no jurisdiction to try the case.

In 32 All. 635,[5] the president of the Octroi Sub-Committee of a Municipal Board expressed an opinion on the material before him and ordered his secretary to prosecute. He afterwards tried that case and it was held that as he had already considered the facts and had ordered his secretary to make a complaint, he was personally interested. In A. I. R. 1927 Bom. 35,[6] the Sessions Judge, in disposing of a sessions case, came to the conclusion that certain offences had been committed by some of the prosecution witnesses and he therefore ordered their prosecution. The Magistrate who tried the accused for the offences which were the subject of the complaint of the Sessions Judge discharged two of the accused, and the same Sessions Judge ordered that these two accused should be committed to the sessions. It was held that he was an interested party and therefore had no jurisdiction to order the discharged persons to be committed to the sessions. None of these decisions goes as far as to say that a Magistrate or Judge who merely expressed an opinion that there was no sufficient reason to stop a prosecution, is an interested person. There is no more ground for thinking Mr. Sivaramakrishnan interested in this case, than the Deputy Magistrate in the case dealt with in 24 Mad. 238.[3] There is, however, one case which, in general outline, is something like the present case; but special circumstances existed in that case. The Sessions Judge, as District Judge, heard the appeal from the order of the District Munsif sanctioning a complaint, and used very strong language in dismissing the appeal. He said that the mortgage bond in question was "replete with some of the clearest forgeries that were ever perpetrated" and was "obviously made dishonestly and fraudulently." The learned Judges who dealt with this matter in revision did not say that the Sessions Judge had no jurisdiction: but they thought it proper, for reasons not expressed, to direct the appeal to be re-heard by another Judge. In the present case Mr. Sivaramakrishnan merely quoted a part of the District Munsif's judgment and said that there was sufficient material to justify the District Munsif in laying a complaint.

Another technical objection raised by the learned counsel for the accused is that the Sessions Judge has admitted documents wholesale from the civil case which are not admissible; in particular, he complains of the free use of the judgment of the District Munsif in the civil proceedings. Judgments are admissible to show the parties to the proceedings, the points raised, and the decisions thereon. The reasons given are of course irrelevant; but the learned Sessions Judge certainly did not consider himself bound—nor could he have been influenced—by any remarks in the judgments in the civil case. As the arguments in the S. 476 proceedings and in the civil suit were necessarily much the same as in the criminal trial, one would expect a similarity in the reasons given in the criminal Court and in the civil Court, but that does not mean that the Sessions Judge was influenced by the decisions in the civil Court. Still less does it mean that the Judge considered that he was in any way bound by them. Coming to a consideration of the facts of the case, P. W. 3 filed his account books and showed what amounts were due from the accused on two marupats in the various years from 1107 onwards and what amounts were paid. He says that in the year 1113, 1000 seers of paddy were paid and 480 seers remained due. He admits that Ex. C (the forged document) was written by him and that he and his brother signed it, but he says that Ex. C is a receipt that he gave in the year 1107 and was not one given by him on the same day and month of the year 1113. The most important evidence against the accused is the internal evidence of Ex. C itself. Exhibit C is written on a scrap of paper; and it is clear that the whole body of the document has been over-written in order to make what was originally faint appear clearer. There are also many erasures in the document, the significance of most of which is not now very clear; but two very important erasures have taken place in the last two figures of the year. The year is given in two places, and in the second of these the erasure and the re-writing of the letters is so patent that nobody at the most casual glance could fail to observe it. The paper has been so thinned by rubbing that a hole has almost been made in the paper. It is argued very vehemently by Mr. Viswanatha Iyer that where the year is written on the first occasion there has been no erasure; but I have no doubt that there was. The figure "7" is very much darker, and it is clear that under the last two figures the paper is very rough and that roughness is pretty clearly due to erasure. Then, as the learned Judge points out, the wording of Ex. C is not at all what one would expect on the facts as they existed in the year 1113. Exhibit C says: "Received the entire paddy rent due under registered marupats ..... for the year 1113 M. E., inclusive of the arrears of the previous year."

Now, as already pointed out, 1000 seers had been paid only a few days before the date that Ex. C now bears. One finds no reference to the payment of 1000 seers and to the balance remaining due, but there is a statement that the payment was of the entire rent due under the registered marupats for the year 1113 inclusive of the arrears of the previous year. Such a recital is however suitable to the state of affairs in 1107, when the dues for the year on one marupat were 410 seers, and the arrears of the previous year 170 seers, whereas for the other marupat the whole of the rent was paid. Another point that weighed with the learned Sessions Judge was that from the year 1108 onwards P. W. 3 was using only printed receipts. It is possible that for some reason or other he might have forgotten to take out his receipt book when he made the collection in question; but it has been pointed out that the arrangements by P. W. 3 when he collected his dues were very elaborate. He used to hire a big boat and travel in it for days, going from one tenant to another and filling the boat with the paddy that was due to him. Another point is that the date and the month on Ex. C agree with the date and the month of the payment in 1107 as would appear

4. ('96) 23 Cal. 328, Sudhama Upadhya v. Queen-Empress.
5. ('09) 32 All. 635 : 7 I. C. 291 : 7 A. L. J. 749, Emperor v. Bishesbar.
6. ('27) 14 A. I. R. 1927 Bom. 35 : 99 I. C. 85 : 28 Cr. L. J. 53 : 28 Bom. L. R. 1302, In re Mudkaya Andanaya Herimath.

from P. W. 3's accounts. Again, the learned Sessions Judge points out that it is unlikely that if the accused was able to pay only 1000 seers a few days earlier, he would have been able to pay 480 seers on the date now borne by Ex. C. The accused realizes this difficulty and explains it by saying that he had the whole of the rent ready to pay on the first of the two occasions, that P. W. 3 was unable to take all the rice because his boat was already full, that he therefore took 1000 seers only saying that he would come back for the rest, and that he did so a few days later. The accused examined some witnesses to support him in this statement, but they did not figure very well in the witness box. Although it was not incumbent on the accused to produce the receipts for 1107 to prove that Ex. C could not have been for that year, one cannot ignore the fact that he did not do so. He said that in that year his father was alive and took the receipt, and so the accused cannot produce it; but one of the witnesses for the accused rather supports the prosecution case that the father of the accused died some years before 1107. The internal evidence of Ex. C the printed receipt filed by P. W. 3, and the accounts kept by him in the regular course of business, are sufficient, taken with the evidence of P. W. 3, to establish the charges against the accused beyond all reasonable doubt. The sentences are not excessive. The convictions and sentences are therefore affirmed and the appeal dismissed.

C.R.K./G.N. *Appeal dismissed.*

A. I. R. (29) 1942 Madras 756

HORWILL J.

In re N. P. Essappa Chettiar
Petitioner.

Criminal Revn. Case No. 272 of 1942 (Criminal Revn. Petn. No. 258 of 1942), Decided on 27th August 1942, to revise order of Taluk Magistrate, Sivaganga, D/- 27th March 1942.

(a) Madras Local Boards Act (14 of 1920), S. 223—Government is not authorized to proceed with prosecution under Act stayed by Magistrate.

The sentence "nothing herein shall affect the provisions of the Code of Criminal Procedure in regard to the power of certain Magistrates to take cognizance of offences upon information received or upon their own knowledge or suspicion" in S. 223 does not give the Government power to proceed with the prosecution. Government may be the ultimate owner of the land over which the road passes; but that does not give them the right to prosecute under the Local Boards Act, although they may have remedies under the Land Encroachment Act or other enactment. [P 756*f*,*g*,*h*]

(b) Specific Relief Act (1877), S. 56 (e)—Court cannot stay criminal proceedings by issuing injunction on complainant—Local Body should not be restrained from doing duty.

In view of the provisions of S. 56 (e), Specific Relief Act, a civil Court cannot stay the criminal proceeding by preventing the proceedings from continuing by issuing an injunction to the complainant board. A Court should not interfere with the proceedings of a local body or restrain its officers from doing their duty. [P 756*h*]

(c) Criminal trial — Injunction by civil Court on complainant not to further prosecute case — Magistrate can proceed with case and summon complainant to give evidence.

When the injunction by the civil Court merely orders the complainant not to further prosecute the criminal case, that does not mean that the Magistrate cannot proceed with the trial. That would mean that the complainant may not himself take any active steps in the further prosecution of the case. That does not prevent him from appearing and giving evidence if he is so ordered by the Magistrate. [P 757*a*,*b*]

V. T. Rangaswami Ayyangar—for Petitioner.

K. Venkataraghavachariar for Public Prosecutor—for the Crown.

ORDER.—The special officer of the Panchayat Board of Nattarasankottai filed a complaint against the petitioner under S. 157, Local Boards Act, of erecting a wall and structure on the public road. The petitioner thereupon filed a civil suit in the local District Munsif's Court for establishing his right to the property and praying for an injunction restraining the defendant board from interfering with his rights. At the same time he filed an application for a temporary injunction restraining the special officer from proceeding with the prosecution of the criminal case. The District Munsif granted the injunction prayed for; and so both the special officer and the criminal Court felt that the criminal case could not be proceeded with. As it however seemed to the District Magistrate that he might proceed with the case under S. 223, Local Boards Act, the Public Prosecutor intervened and sought to continue the prosecution on behalf of the Government. The petitioner has filed the present petition in this Court to revise the order of the Magistrate.

I have no doubt that the petitioner is right in saying that the Government cannot proceed with this prosecution. Under the Local Boards Act, public roads within the local board area are vested in the local board and S. 223 makes it clear that except under certain circumstances a criminal case can be launched only upon the complaint of the president of the local board or by some person specially authorised in this behalf. The sentence "nothing herein shall affect the provisions of the Code of Criminal Procedure in regard to the power of certain Magistrates to take cognizance of offences upon information received or upon their own knowledge or suspicion" does not in this case give the Government power to proceed with the prosecution. The Magistrate did not take cognizance of the offence upon information received or upon his own knowledge or suspicion, but upon the written complaint of the special officer of the Panchayat Board. Government may be the ultimate owner of the land over which the road passes; but that does not give them the right to prosecute under the Local Boards Act, although they may have remedies under the Land Encroachment Act or other enactment. I think it necessary to say a few words about the very improper order of the District Munsif. In the first place, I think that the learned District Munsif had no authority to pass such an order, in view of the provisions of S. 56 (e), Specific Relief Act. He could not stay the criminal proceeding directly; so he attempted to do it by preventing the proceedings from continuing by issuing an injunction to the defendant board. But even if the District Munsif had jurisdiction to stay a prosecution in this way, he ought not to have exercised it in this case and interfered with the course of justice in another Court. Even in the case quoted by the learned District Munsif, it is pointed out that only in extreme cases should a Court interfere with the proceedings of a local body or restrain its officers from doing their duty. The District Munsif moreover had

no material on which he could conclude that the special officer had no right to prosecute. If the petitioner was aggrieved he was not without his remedy and could, as others do in similar circumstances, seek the assistance of the criminal Courts superior to that of the Magistrate trying.

The special officer unfortunately did not endeavour to get the improper order of the District Munsif set aside by appealing to a higher tribunal, and so the special officer cannot disobey the injunction of the District Munsif. That does not however mean that the Magistrate cannot proceed with the trial. If he issues a summons to the special officer to give evidence in the case the special officer cannot disobey that summons. All that the special officer has been ordered with regard to this criminal case is not to further prosecute it. That would mean that he may not himself take any active steps in the further prosecution of this case. That does not prevent him from appearing and giving evidence if he is so ordered by the Magistrate. It is said that the special officer at a subsequent hearing did not appear and that therefore the accused should have been acquitted. Under S. 247, Crimial P. C., it is open to the Magistrate to acquit the accused if the complainant does not appear on the date of hearing, unless for some reason he thinks proper to adjourn the hearing of the case to some other day, provided that where the complainant is a public servant—as in this case — and his personal attendance is not required, the Magistrate may dispense with his attendance and proceed with the case. With the above remarks, the petition is allowed and the order of the Magistrate permitting the Government to proceed with the prosecution is set aside.

C.R.K./R.K. *Petition allowed.*

A. I. R. (29) 1942 Madras 757

WADSWORTH J.

Chinnaswami Chetty — Petitioner

v.

Parvathiah Chetty — Respondent.

Civil Revn. Petn. No. 2270 of 1941, Decided on 23rd July 1942, to revise order of District Munsif, Tiruvannamalai, D/- 30th June 1941.

(a) Civil P. C. (1908), Ss. 115 and 47—Execution of decree — Objection by judgment-debtor to executability rejected on 25th March 1941 — On 30th June on judgment-debtor's application Court declining to reconsider previous order — Revision against order of 30th June held could be treated as one to revise order of 25th March.

In the execution proceedings the judgment-debtor's objections to the executability of the decree were rejected on 25th March 1941. On 30th June the judgment-debtor's application for enquiring into the executability of the execution application on the same grounds was dismissed. The judgment-debtor filed a revision petition against the order of 30th June :

Held that what the petitioner substantially sought to get revised was the lower Court's decision that his objections were invalid. If however he was wrong in treating the first order as a mere finding and asking for a definite decision as to the executability of the petition before coming up in revision, the only result would be that the revision petition would be a little belated and in the circumstances of the case, the delay could properly be excused and the revision petition could be treated as a petition to revise the decision in the order of 25th March 1941. [P 758*a*,*b*]

C. P. C. —

('40) Chitaley, S. 47, N. 87; S. 115, N. 27.

(b) Madras Agriculturists Relief Act (4 of 1938), S. 20, Proviso—Applicability—Execution of decree stayed under S. 20—Application under S. 19 filed more than sixty days after stay and contested by decree-holder — Decree amended — Executing Court must execute decree as amended.

The words "notwithstanding anything contained in this Act to the contrary" in S. 20, proviso have reference to the provisions of S. 7 and are not intended to refer to a case where the decree has in fact been amended before execution has actually been taken. The words "the decree shall be executed as it stands" in the proviso to S. 20 have reference to the frame of the decree at the time of the execution, having regard to any changes which it may have undergone in the trial Court, and not to the frame of the decree as it stood at the time of the stay order. Therefore, where the application by the judgment-debtor under S. 19 filed more than sixty days after the stay of execution of decree under S. 20 was contested by the decree-holder and his objection to the amendment of the decree was overruled it is no longer open to him to urge before the executing Court that the decree to be executed is the decree as it stood before the amendment. Even if the decree was wrongly amended he is bound by it and the executing Court must execute the decree as amended : ('39) 26 A. I. R. 1939 Mad. 613, *Ref.*

[P 758*c*,*e*,*f*,*g*]

C. R. Rajagopalachari and C. S. Padmanabhan — for Petitioner.

T. K. Sundararaman — for Respondent.

ORDER. — This case raises a question under Ss. 19 and 20 of Madras Act 4 of 1938 on rather peculiar facts. The petitioner was the judgment-debtor and when proceedings in execution were pending, he obtained an order of stay under S. 20 of Act 4 in August 1939. He did not follow up that stay order with an application under S. 19 within sixty days, as contemplated in the proviso to S. 20. Apparently, though the facts are not on record, the judgment-debtor was taking proceedings before the Debt Conciliation Board and the pendency of these proceedings was regarded as a sufficient reason for not proceeding at once under S. 19. Whatever be the reason, both parties remained inactive; the execution of the decree was abandoned and nothing was done by the judgment-debtor to get the decree scaled down until 9th September 1940, i. e., more than a year after the stay order. This application under S. 19 was opposed by the decree-holder and on 27th September 1940, the decree-holder filed a fresh execution petition praying for the execution of the decree, as it stood without any scaling down. We do not know what were the grounds on which the decree-holder opposed the application under S. 19, or whether he raised the contention that the application was barred, not having been preferred within sixty days of the grant of the stay under S. 20. The fact remains that on 27th November 1940, notwithstanding the objection of the decree-holder, the decree was amended under S. 19. Thereafter, the decree-holder attempted to execute the unamended decree and an objection was taken by the judgment-debtor that by reason of the amendment under S. 19, the only decree which could be executed was the amended decree. The executing Court passed a considered order rejecting this contention on 25th March 1941. On 17th April 1941, the judgment-debtor, apparently seeking a more formal order,

prayed for the same reasons already advanced, that the Court should inquire into the executability of the execution petition and should stay execution proceedings meanwhile. This petition was dismissed on the ground that it raised the same contentions already overruled.

A preliminary objection was taken to the revision petition on the ground that it is preferred not against the order of 25th March overruling the objections, but against the order of 30th June declining to reconsider the previous order. It seems to me that what the petitioner substantially seeks to get revised is the lower Court's decision that his objections are invalid. If, however, he was wrong in treating the first order as a mere finding and asking for a definite decision as to the executability of the petition before coming up in revision, the only result would be that the revision petition would be a little belated and in the circumstances of the case, I have no doubt that the delay could properly be excused. I am therefore treating this revision petition as a petition to revise the decision in the order of 25th March 1941. Turning to the merits of the order, the trial Court reads the proviso to S. 20 as containing a mandatory direction to the executing Court to execute the decree in its unamended form, notwithstanding anything which may have taken place under the Act in the interval between the passing of the stay order and the final process of execution. The proviso states :

"That where within sixty days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under S. 19 . . . . the decree shall be executed as it stands notwithstanding anything contained in this Act to the contrary."

I have no doubt that this clause was enacted with reference to the ordinary case in which a stay is obtained and nothing is done by the decree-holder before execution is sought to be taken after the sixty days period has elapsed. The words "notwithstanding anything contained in this Act to the contrary" presumably have reference to the provisions of S. 7 which prohibit the execution of a decree against an agriculturist in so far as a decree is for an amount in excess of the sum as scaled down under Chap. 2. They are not in my opinion intended to refer to circumstances such as those with which we are now confronted where the decree has in fact been amended before execution has actually been taken. Assuming that the proviso of S. 20 did not contemplate the present facts, it remains to be seen what is the effect of applying to the undoubted facts the procedure laid down in S. 20. The lower Court has read the words "shall be executed as it stands" as having regard to the condition of the decree, not at the time of execution, but at the time of the stay proceedings; that is to say, the lower Court reads these words as if they were "the decree shall be executed as it stood when the stay was ordered." I doubt very much whether this is the correct grammatical construction of the words. In plain English, the words "shall be executed as it stands" would, in my opinion, mean, "shall be executed as it stands at the time of execution" and not as it stood at some anterior date. If the word "stands" were to relate back to some anterior date, the past tense ought to have been used. Moreover, the construction placed upon these words in the lower Court involves the difficulty that the executing Court would be required to ignore any amendment of the decree which might have taken place in the trial Court in the interval between the granting of the stay and the execution of the decree, even if that amendment were an amendment passed under the Civil Procedure Code. It seems to me that the view taken by the lower Court ignores the basic principle that the executing Court cannot go behind the decree as issued by the trial Court. If the trial Court amends the decree while the execution petition is pending, the executing Court cannot, when the amendment has been brought to its notice, proceed with the execution of the decree as it stood before the amendment. It is the trial Court and trial Court alone which can decide what is precisely the decree which the executing Court has to execute.

On these considerations I am constrained to hold that the words "the decree shall be executed as it stands" have reference to the frame of the decree at the time of the execution, having regard to any changes which it may have undergone in the trial Court, and not to the frame of the decree as it stood at the time of the stay order. I am fortified in this conclusion by reference to what happened in the present case. The decree-holder had notice of the application under S. 19 and he contested that application. On the strength of the decision in I. L. R. (1939) Mad. 886,[1] he could presumably have contended that the application was barred not having been filed within sixty days of the grant of the stay under S. 20. Whether he did raise such an objection or not, we do not know. There is also a possibility that some contention may have been taken based on S. 14, Limitation Act, with reference to the proceedings alleged to have taken place before the Debt Conciliation Board. That however is only a conjecture. We do know that the decree holder objected to the amendment of the decree under S. 19 and that his objection was overruled. In my opinion, it is no longer open to him to urge before the executing Court that the decree to be executed is the decree as it stood before the amendment. Even if the amendment was wrongly made, he is bound by it. In this view I allow the revision petition and direct execution to proceed on the basis of the decree as amended. The decree-holder will pay the costs of the revision petition.

C.R.K./G.N. *Petition allowed.*

1. ('39) 26 A. I. R. 1939 Mad. 613 : 186 I. C. 379 : I. L. R. (1939) Mad. 886 : (1939) 2 M. L. J. 308, Kumaraswami v. Thiruvengadatha Ayyangar.

A. I. R. (29) 1942 Madras 758

HAPPELL J.

Nanjunda Reddi and others — *Appellants*

v.

Venkatappa minor represented by V. S. Rangaswami Ayyangar and others — *Respondents.*

Second Appeal No. 649 of 1940, Decided on 27th February 1942, against decree of Sub-Judge, Salem, in A. S. No. 33 of 1939.

(a) Hindu law — Debt — Antecedent debt — Manager — Debt incurred by manager in purchase of lands held not antecedent debt.

The question whether a debt is antecedent or not is primarily a question of fact. [P 760*b*]

A mortgage was executed by the manager of a joint Hindu family on 18th March 1927. The money advanced under the security of the mortgage was Rs. 1000 and it was advanced to enable the mortgagor to pay the balance of Rs. 1000 due in respect of a sale deed dated 9th February 1927 which was registered on 6th April 1927.

Held that the debt incurred in the purchase of
a lands was not an antecedent debt. The fact that the mortgage deed was executed between the dates of the execution of the sale deed and the registration of it together with the payment of the balance under the sale deed, which was the consideration for the mortgage indicated very strongly that the two transactions were closely connected: ('38) 25 A. I. R. 1938 Mad. 465, *Expl.*; ('38) 25 A. I. R. 1938 Pat. 44 and ('38) 25 A. I. R. 1938 Pat. 437, *Ref.* [P 760*c*]

Hindu law —

('40) Mulla, Page 356 S. 395 (1),

('38) Mayne, Page 426 Para. 332.

(b) Hindu law—Debt — Father—Mortgage by father found not binding on sons—Decree should be against father's share in mortgaged property —It need not be against father's right, title and interest in mortgaged property at time of
b mortgage.

Where a mortgage executed by the father as manager of a joint Hindu family is found not to be binding on the sons the decree should be against the father's share in the mortgaged property. It need not be passed against the father's right, title and interest in the mortgage property at the date of the mortgage as well so as to enable the mortgagee in execution of the decree to obtain, if the facts and circumstances justify it, not only his one fourth share in partition of the mortgaged property, but the father's interest in the mortgaged property inasmuch as until the father's share in the mortgaged property has been sold no question of the mortgagee's right to any other part either of the mortgaged property or any other property of the family can arise. He can only proceed whether by sale or by an appli-
c cation for partition or both, against the share of the father in the other properties of the family, if any, if and when he has failed to realise the amount due under the mortgage by the sale of the mortgaged property. [P 760*e*, *f*]

Hindu law —

('40) Mulla, Page 363 Pt. (v).

('38) Mayne, Page 127 Pt. (x).

C. P. C. —

('40) Chitaley, O. 34 R. 4 N. 10 Pt. 3; O. 34 R. 5 N. 17 Pt. 4; O. 34 R. 9 N. 10 Pt. 6.

('41) Mulla, Page 1083 Pt. (w); Page 1086 Pt. (y).

(c) Hindu law — Alienation — Necessity — Father—Mortgage by—Property purchased with mortgage money — Suit to enforce mortgage — Fact that son was in enjoyment of property cannot preclude him from challenging mortgage — — Mortgage not found to bind son—Mortgagee
d cannot be given charge on property purchased to extent of son's share in family property.

In a suit to enforce a mortgage executed by the father of a joint Hindu family, the fact that the son was in enjoyment of the property purchased with the mortgage money cannot preclude him from challenging the mortgage on the ground that it was not for necessity or executed to pay antecedent debt: ('33) 20 A. I. R. 1933 All. 846, *Disting.* [P 760*f*]

The mortgagee in the aforesaid suit cannot be given a charge on the property purchased with the mortgage money to the extent of the son's share in the family property when the mortgage is not found to be binding on the son. [P 760*g*]

K. Narasimha Ayyangar and T. Thyagaraja Iyer — for Appellants.

V. S. Rangaswami Ayyangar — for Respondents.

JUDGMENT. — The suit out of which this appeal arises was brought by the appellant as plaintiff to enforce a mortgage executed in his favour by the deceased father of defendant 1 and the brother
e of defendant 2 as manager of a joint family. The mortgage deed, Ex. A, was executed on 18th March 1927. The money advanced under the security of the mortgage was Rs. 1000 and it was advanced to enable the mortgagor to pay the balance of Rs. 1000 due in respect of a sale deed, Ex. B, dated 9th February 1927 which was registered on 6th April 1927. Both the lower Courts held that the mortgage deed was not executed for necessity, and this means that the mortgage is not binding on the half share of defendant 2. Since this finding has not been challenged in appeal, the mortgage will not be binding on the share of defendant 1 also unless it is proved that the debt to pay which the mortgage money was advanced was an antecedent debt. The question of antecedence was not raised in the plaint but was argued at the trial of the suit and evidence was adduced in support of the contention that the
f debt incurred in respect of the sale deed was antecedent to the mortgage debt. Both lower Courts, however, held that the sale under Ex. B and the mortgage transaction evidenced by Ex. A were not independent transactions but were part of the same transaction. The learned District Munsif also held that there was no consideration for the mortgage and dismissed the suit. But the learned Subordinate Judge, holding that there was consideration, allowed the appeal in part and gave a preliminary decree for sale against the one-fourth share in the mortgaged property of defendant 1's father for the realisation of Rs. 1000 with costs and interest.

The first contention of the appellant is that the lower Court should have held that the money was borrowed on the mortgage to discharge an antece-
g dent debt and that the decree should consequently have been given against the half share in the mortgaged property of the mortgagor and defendant 1, his son. The facts regarding the connexion between the purchase of the property under the sale deed Ex. B by the respondent's father and the advance of the money under the mortgage Ex. A executed on 18th March 1927 are, as stated already, that the sale deed was executed on 9th February 1927 on which date a sum of Rs. 1000 was paid towards the purchase money while Rs. 1000 remained to be paid; that the mortgage was executed on 18th March 1927 with the recital that the money was advanced for the purchase of lands that the money under the mortgage was paid although it is not found when; and that finally on 6th April 1927 Rs. 1000 was paid towards the sale deed Ex. B which was regis-
h tered on that date. The learned District Munsif did not discuss the question of the antecedence of this debt covered by the sale deed but observed simply that an antecedent debt means antecedent in fact as well as in time, i. e., it must be truly independent of and not part of the transaction impeached. The learned Subordinate Judge also pointed out that "a debt that is claimed to be antecedent for the purpose of making a son liable must be antecedent not merely in point of time, but also in substance," and he found that the debt incurred in the purchase of lands was not an antecedent debt because the purchase of the lands under Ex. B was not concluded until the registration of the deed on 6th April 1927, i. e., after the execution of the mortgage deed. It is argued by learned counsel for the appellant that the learned Subordinate Judge should have held that the debt came into existence on 9th February 1927, and that as it was prior to the execution of the mortgage deed, it should have been found to be an antecedent debt. It is also argued that it is not the case that the liability on the part of the mortgagor

to pay the balance of the consideration under the sale deed came into existence only on 6th April 1927 since the evidence is that he was put into possession of the land purchased by him as soon as the sale deed was executed on 9th February 1927.

The mortgagor may have been liable to pay the balance of Rs. 1000, in the circumstances of the case, even before the registration of the deed. But it does not follow necessarily, even then, that the execution of the sale deed and the mortgage deed were separate transactions and distinct in time and substance. In support of his contention, learned counsel has referred me to a decision of Horwill J. reported in A. I. R. 1938 Mad. 465[1] and he contends that this decision should be followed in preference to cases cited on the other side, viz,, A. I. R. 1938 Pat. 44[2] and A.I.R. 1938 Pat, 437.[3] A. I. R. 1938 Mad. 465[1] was a case in which A mortgaged certain items of property which he had purchased, and also other items to B in order to find the purchase money for the items of property which he had bought. The mortgage was later in date than the sale. Horwill J. found that the sale and the mortgage were distinct transactions and that the purchase money constituted an antecedent debt in relation to the money advanced under the mortgage deed. No doubt there is some similarity between the facts of this case and the facts of the case now in question; but it was pointed out in A. I. R. 1938 Pat. 437[3] that the question whether a debt is antecedent or not is primarily a question of fact, and Horwill J., in the case decided by him observes :

"These two acts can however amount to one transaction only if the parties to the mortgage and the sale looked upon them as one transaction: but there seems to be no evidence in this case that the vendor had anything to do with the mortgage or, more important still, that the plaintiff had anything to do with the sale."

In the present case, the fact that the mortgage deed was executed between the dates of the execution of the sale deed and the registration of it together with the payment of the balance under the sale deed, which was the consideration for the mortgage, indicates very strongly that the two transactions were closely connected. The learned Subordinate Judge has held on a consideration of the facts and circumstances that the debt was not an antecedent debt, and, in the circumstances of the case, especially in the absence of the evidence which has not been printed, it does not seem to me to be possible to say that this finding is wrong. It does not follow, because it has been held on the facts in A. I. R. 1938 Mad. 465[1] and on the facts in another decision of a Bench of this Court to which I have been referred, 51 Mad. 711,[4] that the debts were antecedent debts, that therefore on the facts of this case it must be held that the debt in respect of the sale deed was a debt antecedent to the mortgage debt. On the facts the finding of the learned Subordinate Judge was justified and was not wrong in principle or on authority. It is next argued for the appellant that even if the decree must only be against the one-fourth share of the father in the mortgaged property, it should be amended to be not merely against his one-fourth share but against his "right, title and interest" in the mortgaged property at the time of the mortgage. The object of this contention is said to be to enable the appellant in execution of the decree to obtain, if the facts and circumstances justify it, not only his one-fourth share in partition of the mortgaged property, but the father's interest in the mortgaged property. It is plain that until the father's share in the mortgaged property has been sold no question of the appellant's right to any other part either of the mortgaged property or any other property of the family can arise. He can only proceed, whether by sale or by an application for partition or both, against the share of the father in the other properties of the family, if any, if and when he has failed to realise the amount due under the mortgage by the sale of the mortgaged property subject to sale.

It is finally argued that respondent-defendant 1 should not have been heard to say that the mortgage was not binding on his share of the mortgaged property in view of the fact that he was in enjoyment of the property purchased with the mortgage money. There is, in my opinion, no substance in this contention and the case to which I have been referred to in support of it, 56 All. 142,[5] relates to an entirely different kind of suit. That was a case in which a minor was sued for the recovery of money, borrowed by his guardian with which the guardian had purchased the property which the minor was enjoying on the date of suit. It was held in effect that the minor could not refuse to return either the money or the property. That, of course, is an entirely different case from the present which was brought to enforce a mortgage. Whether the appellant had other remedies open to him need not be considered here. It is clear that defendant 1 was entitled to resist the suit on the mortgage on the ground that the mortgage was not binding on him since it was not for necessity or executed to pay an antecedent debt. It is clear also that the appellant in a suit to enforce the mortgage cannot, as learned counsel contends on his behalf, be given a charge on the property purchased with the mortgage money to the extent of defendant 1's share in the family property. The decree of the lower appellate Court is therefore, confirmed and the appeal is dismissed, but without costs as the minors are represented by a Court guardian whose fees has already been paid by the appellant.

C.R.K./G.N. *Appeal dismissed.*

1. ('38) 25 A. I. R. 1938 Mad. 465 : 180 I. C. 908, Mariappa v. Ramanuja.
2. ('38) 25 A. I. R. 1938 Pat. 44 : 173 I. C. 292 : 17 Pat. 168, Ramakaran Thakur v. Baldeo Thakur.
3. ('38) 25 A. I. R. 1938 Pat. 437 : 177 I. C. 886 : 17 Pat. 236, Chitradhar Narain Das v. Khidar Thakur.
4. ('28) 15 A. I. R. 1928 Mad. 566 : 111 I. C. 297 : 51 Mad. 711 : 55 M. L. J. 471, Damodharam Chetti v. Bansilal Abirchand.
5. ('33) 20 A. I. R. 1933 All. 846 : 148 I. C. 229 : 56 All. 142 : 1933 A. L. J, 1584, Sohanlal v. Atal Nath.

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